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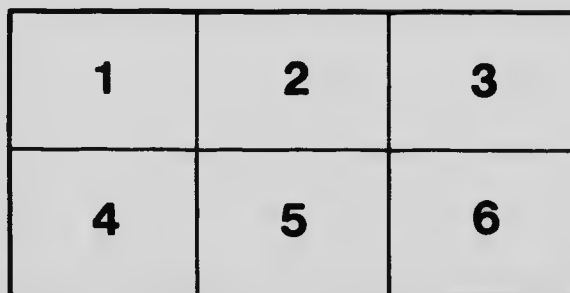
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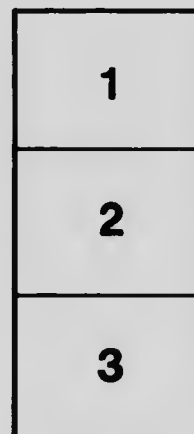
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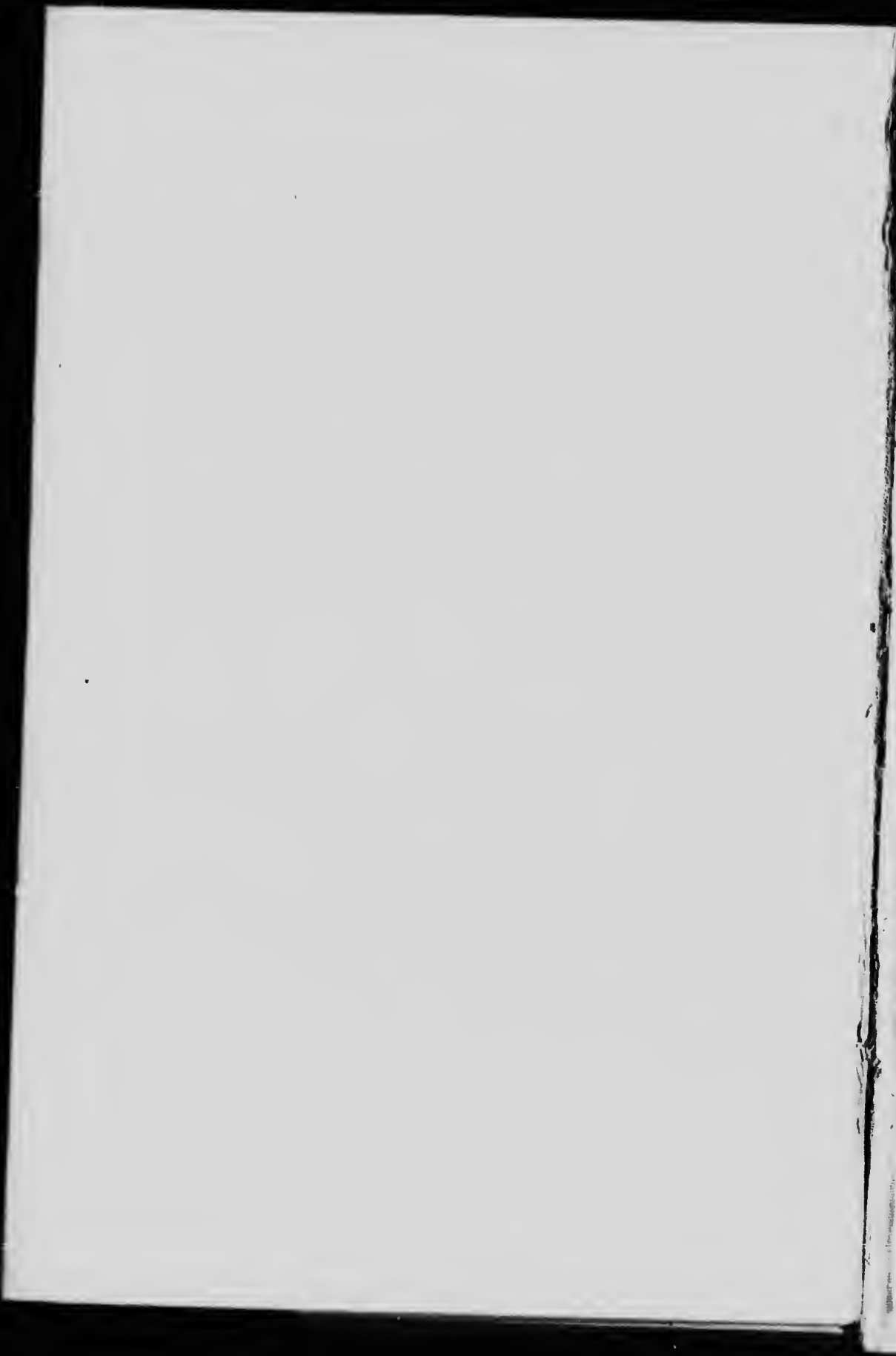
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A TREATISE
ON
THE SYSTEM OF EVIDENCE IN TRIALS
AT COMMON LAW

VOLUME II.



A
TREATISE
ON THE SYSTEM OF
EVIDENCE
IN
TRIALS AT COMMON LAW

INCLUDING
THE STATUTES AND JUDICIAL DECISIONS OF
ALL JURISDICTIONS OF THE
UNITED STATES,
ENGLAND, AND CANADA

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IN FOUR VOLUMES

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LIST OF STATUTORY COMPILATIONS AND LATEST REPORTS AND STATUTES CONSULTED.

I. STATUTES.

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

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

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

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

³ A note on the validity of the Commission's amendments of 1901 will be found in § 483.

LIST OF COMPILATIONS CONSULTED.

Jurisdiction.	Title and Date of Compilation Used.	Date of Latest Session Laws Examined.
UNITED STATES:		
Florida	Revised Statutes 1892	1903
Georgia	Code 1895; Van Epps' Supplement 1900	1903
Hawaii	Penal Laws 1897; Revised Civil Laws 1897	1901
Idaho	Revised Statutes 1887; Constitution 1890	1907
Illinois	Revised Statutes 1874, Hurd's edition of 1898	1903
Indiana	Thornton's Revised Statutes 1897	1903
Indian Territory, t		
Iowa	Eberole's Annotated Code 1897	1903
Kansas	Webb's General Statutes 1897	1903
Kentucky	Carroll's Statutes 1899, and Codes of Civil and Criminal Procedure 1895, edition of 1900	1903
Louisiana	Saunders' Revised Civil Code 1888; Garland's Revised Code of Practice 1894 and Supplement 1900; Wolff's Revised Laws 1897; Constitution 1898	1903
Maine	Public Statutes 1883, Supplement 1895	1903
Maryland	Poe's Public General Laws 1888; Supplement 1900	1903
Massachusetts	Public Statutes 1882; Revised Laws 1902	1903
Michigan	Miller's Compiled Laws 1897	1903
Minnesota	Wenzell, Lusk, and Tiffany's General Statutes 1894	1903
Mississippi	Thompson, Dillard, and Canpbell's Annotated Code 1892	1903
Missouri	Revised Statutes 1899	1903
Montana	Saunders' Codes and Statutes 1895	1903
Nebraska	Brown and Wheeler's Compiled Statutes 1899	1903
Nevada	Haly and Hammond's General Statutes 1885	1903
New Hampshire	Public Statutes 1891	1903
New Jersey	General Statutes 1898	1903
New Mexico	Compiled Laws 1897	1903
New York	Birdseye's Revised Statutes 1896	1903
North Carolina	Code 1883; Long and Lawrence's Amendments 1897	1903
North Dakota	Revised Codes 1895	1903
Ohio	Bates' Annotated Revised Statutes 1898	1903
Oklahoma	Statutes 1893	1903
Oregon	Hill's Codes and General Laws 1892	1903
Pennsylvania	Lepper and Lewis' Digest 1898	1903
Philippine Islands, ³		
Porto Rico, ²		
Rhode Island	General Laws 1898	1903
South Carolina	Revised Statutes 1893; Code 1902	1903
South Dakota	Grantham's Statutes 1899	1903
Tennessee	Shannon's Annotated Code 1898	1903
Texas	Revised Civil Statutes 1895; Penal Code 1895; Code of Criminal Procedure 1895	1903
United States	Revised Statutes 1878, Supplements 1891, 1895	1903
Utah	Revised Statutes 1898	1903
Vermont	Statutes 1894	1903
Virginia	Code 1897, Supplement 1898	1903
Washington	Ballinger's Annotated Codes and Statutes 1897	1903
West Virginia	Code 1891, third edition	1903
Wisconsin	Sanborn and Berryman's Statutes 1896	1903
Wyoming	Revised Statutes 1887	1903

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

LIST OF LATEST REPORTS CONSULTED.

II. REPORTS.

Most of the citations of decisions rendered since 1800 have been taken from the reports published in the National Reporter System, as they appeared in weekly numbers. For all decisions reported since the beginning of that System, the duplicate citation has been added, to include both the Official Report and the National Reporter,—most of these duplicate citations being furnished through the courtesy of the West Publishing Company, the remainder aided by the author from the Blue Books. As the printing progressed, the duplicate citations of the Official Reports appearing from time to time were obtained from the Third Labels and inserted in the proof. Thus it happens that in the earlier parts of the book most of the citations of decisions of 1903 are to the National Reporters only.

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

Atlantic Reporter, vol. 55.
Federal Reporter, vol. 125.
Northeastern Reporter, vol. 68.
Northwestern Reporter, vol. 96.
Pacific Reporter, vol. 73.

Southern Reporter, vol. 35.
Southeastern Reporter, vol. 45.
Southwestern Reporter, vol. 75.
Supreme Court Reporter, vol. 23.

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

District of Columbia Appeals, vol. 21.

Hawaii, vol. 13.

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

England, Law Reports 1903.
Canada (Dominion), vol. 32.
British Columbia, vol. 10, pt. 1.
Manitoba, vol. 12.
New Brunswick, vol. 34.

Newfoundland, vol. 3.
Northwest Territories, vol. 5, nos. 1, 2.
Nova Scotia, vol. 35.
Ontario, Law Reports, vol. 5.
Prince Edward Island, vol. 2.

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

III. CITATION OF THIS TREATISE.

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

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



EVIDENCE

IN

TRIALS AT COMMON LAW.

BOOK I: ADMISSIBILITY.—PART I: RELEVANCY.

TITLE II: TESTIMONIAL EVIDENCE.

SUB-TITLE II: TESTIMONIAL IMPEACHMENT.

CHAPTER XXIX.

INTRODUCTORY.

A. GENERAL THEORY OF IMPEACHMENT.

- § 875. Analysis of the Process of Impeachment.
- § 876. Distinction between proving Incorrectness of Testimony from Defective Qualifications and proving the Defective Qualifications by Conduct and other Circumstances.
- § 877. Distinction between Relevancy and Auxiliary Policy.
- § 878. Distinction between Cross-examination and Extrinsic Testimony.
- § 879. Distinction between Circumstances having Definite Relevancy and Circumstances having Indefinite Relevancy.
- § 880. Distinction between Impeaching Evidence and Rehabilitating or Supporting Evidence.
- § 881. Order of Topics.

B. PERSONS IMPEACHABLE.

1. Impeachment of Hearsay Testimony.

- § 884. General Principle.
- § 885. Dying Declarations.
- § 886. Attesting Will-Witness.
- § 887. Statements of Facts against Interest, and other Hearsay Statements.
- § 888. Absent Witness' Testimony, admitted to avoid Continuance.

2. Impeachment of Defendant as Witness.

- § 889. Distinction between Becoming a Witness and Waiving a Witness' Privilege.
- § 890. Defendant impeachable as an Ordinary Witness.
- § 891. Same: Application of the Rule.

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- § 892. Defendant not Testifying but making a "Statement."

3. Impeachment of an Impeaching Witness.

- § 894. Limitation in the Trial Court's Discretion.

4. Impeachment of One's Own Witness.

- § 896. History of the Rule.
- § 897. First Reason: The Party is Bound by his Witness' Statements.
- § 898. Second Reason: The Party Guarantees his Witness' General Credibility.
- § 899. Third Reason: The Party ought not to have the Means to Coerce his Witness.
- § 900. Bad Moral Character.
- § 901. Bias, Interest, or Corruption.
- § 902. Prior Self-Contradictions; (1) Theory.
- § 903. Same: (2) Practical Reasons *Pro* and *Con*.
- § 904. Same: (3) Various Forms of Rule adopted by different Courts.
- § 905. Same: (4) State of the Law in Various Jurisdictions.
- § 906. Same: (5) Rules for Prior Warning to the Witness, etc.; Rule for Party's Admission.
- § 907. Contradiction by other Witnesses, not forbidden.
- § 908. Same: Contradiction as involving Impeachment.
- § 909. Who is One's Own Witness; General Principle.
- § 910. Same: (1) A calls a Witness; may A impeach? Subpoena, Oath, and Interrogation.
- § 911. Same: (2) A calls a Witness, then B calls him; may B impeach? (a) *via voce* Testimony.
- § 912. Same: (b) Depositions.

§ 913. Same: (3) A calls a Witness, then B calls him; may A impeach? (a) *via voce* Testimony; (b) Depositions.

§ 914. Same: (4) Making a Witness One's Own by Cross-examination; (a) Impeachment.

§ 915. Same: (b) Leading Questions.

§ 916. Same: (5) Calling the Other Party as a Witness; Co-defendants.

§ 917. Same: (6) Necessary Witnesses; (a) Attesting Will-Witness.

§ 918. Same: (b) Prosecution's Witness in a Criminal Case; Witness called by the Judge.

A. GENERAL THEORY OF IMPEACHMENT.

§ 875. **Analysis of the Process of Impeachment.** The process of impeachment, or discrediting, is fundamentally one of Circumstantial Relevancy. The nature of the probative inference and the conditions of its use rest on principles of the same sort as those already observed for Circumstantial Relevancy (*ante*, §§ 38-464). What is the process? The inference is (for example) that, because the witness X is of an untrustworthy disposition, therefore he is probably not telling the truth on the stand; or, because he has hostile feelings towards the opponent, therefore he is probably not telling the truth; or, because he is a cousin of the plain^{iff}, therefore he probably has hostile feelings towards the defendant, and the^{fore} he is probably not telling the truth; and so on. This process is materially different from that by which is originally determined his competency as a witness (*ante*, §§ 475-867). There the argument was that because an assertion is made by a person having certain qualifications, therefore the subject of the assertion is probably true in fact; and the rules in that department of evidence deal with the conditions (*i. e.* testimonial qualifications) which must exist before the law will allow that inference to be offered. Thus the drawing of an inference from the making of any human assertion is the process there dealt with, the evidence being Testimonial Evidence; while here the object is to draw inferences from any other matter than the making of an assertion, *i. e.* from Circumstantial Evidence (the subject of Title I, *ante*). Here, as in the topics dealt with in Title I, the inferences are from character, from conduct, and from sundry similar circumstances. Theoretically, then, the probative place of the present material is with Title I; practically, it is more easily examined and understood in this place.

In the various topics of evidence here concerned, several distinctions occur, running through the material more or less steadily and clearly; and these it is worth while to note at the outset.

§ 876. **Distinction between proving Incorrectness of Testimony from Defective Qualifications, and proving the Defective Qualifications by other Circumstances.** (1) It has been seen, in dealing with Testimonial Evidence, that an assertion may be used as the basis of inference only when it is attended by certain minimum qualifications in the person making it, *i. e.* first, the Capacity to Observe, Recollect, and Narrate — either Organic, Experiential, or Emotional —, and, secondly, Actual Observation, Recollection, and Relation (*ante*, §§ 475-478). Now, although the witness whose assertion has been thus admitted may possess in the minimum requisite degree these qualifications, nevertheless above this minimum degree there is a count-

less variety in the possible extent and strength of these qualifications, and the greater or less extent of them may throw light on the probability of his assertion's correctness. Thus, he may possess the minimum degree of sanity required to make the assertion admissible, or the minimum degree of opportunity of observation; and yet he may fall so far short of possessing such sanity or such opportunity of observation as he might well have had, and this fact, if shown, will detract from the probability of his assertion's correctness. In the first place, then, wherever a quality or condition is so important that its possession in a minimum degree is essential to the use of his assertion at all, it is obvious that its possession in a degree somewhat greater, but still less than perfect, may be used to argue against the probable correctness of his assertion; and thus a defect in any of the above testimonial qualifications may be employed in discrediting. But, in the second place, there are a few other qualities which, though not required as essential prerequisites to the use of the assertion at all, nevertheless may be used to cast doubt on its correctness when admitted. These are two, Moral Character and Emotional Prejudice. These, at a former stage of the law, were indeed in some respects regarded as prerequisites; *i. e.* a person totally lacking in moral character (as indicated by Infamy, or conviction of a crime), and a person not in an emotional attitude of non-partisanship (as indicated by Interest in the cause), was excluded absolutely (*ante*, §§ 519, 576). To-day the lack of these qualities is not regarded of such consequence as to exclude the assertion; but they still are regarded as having probative force against the correctness of the assertion. Thus, in discrediting an assertion, we may appeal, in searching for a basis of inference, not only to defects in specified qualities whose minimum existence is required for admitting the assertion, but also to the qualities of moral character and of emotional prejudice.

(2) These, then, are the starting-points of inference. We may argue that the witness' assertion may not be correct because the assertor has some defect either in Capacity — Organic or Experiential — to observe, recollect, or narrate, or in Opportunity of Actual Observation, Recollection, or Narration; and, additionally, we may argue from his moral character — a species of Organic Incapacity — and from his Emotional Incapacity. Now if we could adequately present these defects, or defective qualities, to the tribunal directly and abstractly, nothing further would be done or needed; we should ask the tribunal to infer from these defective qualities the probability of the assertion's incorrectness, and the only questions that would arise would involve the conditions under which this single inference would be allowed in the case of each quality. But it is obvious that in most cases it will be either impossible, or difficult, or insufficient, to present this defective quality to the tribunal directly or abstractly. In other words, the defective quality may in its turn need to be evidenced by other circumstances; and, instead of a single inference — from the defective quality to the assertion's incorrectness —, we shall have to resort to two inferences, *i. e.* from some other circumstance to the existence of the defective quality, and from that to our original

objective, the assertion's incorrectness. For example, if it is desired to argue from the witness' emotional prejudice or hostility to the opponent, it will rarely be possible to present that quality abstractly and directly; we must resort to another inference in order to evidence that very hostility; for example, it will be shown that a pecuniary loss to the witness will attend the victory of the opponent, or that he has quarrelled with the opponent, or that he is nearly related to the party he testifies for. Again, while it is commonly possible to present his defective moral character to the tribunal directly and abstractly—*i. e.* by reputation of that character, or by personal knowledge—, yet this is not the only or the sufficient way of getting at the character; a resort to a circumstantial inference may be desirable,— for example, the inference from his specific misconduct to his bad character; and then a second inference is required from the character to the assertion's incorrectness.

Now the practical basis of these two classes of inferences is wholly distinct, as it has already been seen to be (*ante*, § 53) in dealing with Character as evidence of an Act done, and Conduct as evidence of the Character. The questions of relevancy—*i. e.* the propriety of the inference—being here different, the rules prescribing the admission of the two sorts of inference must be separately treated. This is one of the fundamental distinctions affecting the arrangement of the subject, and is observed in the separation of Topics II and III (§§ 945-994, *post*) from Topic I (§§ 920-942).

§ 877. **Distinction between Relevancy and Auxiliary Policy.** It has already been seen (*ante*, § 42), that the exclusion of circumstantial evidence may be expressed by a single rule of thumb, and yet the rule may rest, not merely on some principle of Relevancy (or Probative Value), but also or solely on some principle other than Relevancy, *i. e.* on Auxiliary Policy. Thus, the occurrence of a similar injury to another person may be excluded because it does not satisfy a principle of Relevancy, *i. e.* the conditions of the injury are not substantially similar; while, again, the same evidence, though satisfying this principle of Relevancy, may still be excluded on the ground of surprise and confusion of issues, *i. e.* Auxiliary Policy (*ante*, § 443). Again, a person's bad character is concededly admissible, so far as Relevancy is concerned, to indicate his probable doing of a bad act, and yet, where the person is a defendant in a criminal case, an auxiliary policy of avoiding undue prejudice prevents the prosecution from resorting to it except in rebuttal; while, where this policy does not apply—as in the case of the prosecutrix on a rape charge, or of a deceased person alleged to be the aggressor in an affray,—the evidence is admitted when it satisfies the requirements of Relevancy alone (*ante*, §§ 55-68). In short, while the principles of Relevancy form a homogeneous and independent body of doctrine, and the principles of Auxiliary Policy form a wholly separate body of doctrine (*post*, §§ 1845, 1863) they may still have to be applied to the same piece of evidence in such a way that a single rule of thumb is often created as the net resultant of both principles; in the exposition of the subject it is

practically impossible to separate the treatment of the double principle lying behind the concrete rule. But this practical necessity, arising from convenience of treatment, need not mislead us to forget the distinctness of the two sets of principles; for, without a full understanding of the principles, the rules themselves can never be understood.

In the present subject, then, there occurs this same doubleness of principle. Each bit of circumstantial evidence offered to discredit a witness must first pass the gauntlet of the Relevancy principles; but it may also be obnoxious to some principle of Auxiliary Policy which may after all exclude it. In dealing with a given sort of discrediting evidence, the principle of its Relevancy has always first to be considered; and then the bearing must be examined of any principle of Auxiliary Policy which may apply. The evidence may satisfy the test of the first, but not of the second; or it may satisfy both; or there may be none of the second sort that is applicable. A few instances will serve to illustrate concretely in advance the workings of the two sorts of doctrines. (1) The witness' Character, as indicating incorrectness of assertion, is relevant (on the general principle of § 59, *ante*), when it involves the trait connected with the sort of act to be proved; a question of Relevancy here, then, is whether character for truthfulness only, or general character, may be used. This being determined, the matter of Auxiliary Policy presents itself; and the judges are found pointing out that the reason of this sort that effects exclusion of character as against a defendant in a criminal case does not apply here at all, *i. e.* the reason of unfair prejudice, because the witness is not on trial and cannot be condemned; while on the other hand a new principle of Auxiliary Policy here comes into play, *i. e.* the principle that one cannot attack the character of his own witness. (2) Again, in attempting to evidence this character by circumstantial evidence, it has already been seen (*ante*, § 194), that evidence of specific acts of misconduct, while it is relevant enough, is excluded as against a defendant in a criminal case because of two reasons, — first, the undue prejudice which might condemn him for past acts though innocent of the one charged; secondly, the unfair surprise and the impossibility of being prepared to disprove the misconduct alleged. Now, for witnesses, the first of these has no application, because the witness is not on trial; the second does apply, yet it may be obviated if we merely forbid the use of extrinsic testimony and confine the opponent to proving it by evidence extracted from the witness himself, *i. e.* by cross-examination. This being settled, certain questions of Relevancy still remain open for evidence thus extracted; for example, whether the mere arrest of a witness on a specific charge is relevant to show bad character. Thus, the net result of the rules for showing bad character by particular acts of misconduct depends on the combined influence of certain principles of Relevancy and certain principles of Auxiliary Policy taken together. (3) Again, to show the witness' Capacity for Mistake we may offer as relevant a prior contradictory statement of his. If it is really contradictory it is relevant.

But it must also pass the tests of Auxiliary Policy; in the first place, to avoid multiplicity of issues, such evidence must be excluded if it deals with a collateral matter; in the next place, to avoid surprise and furnish a fair opportunity for explanation or denial, the witness must first be asked whether he made such a statement. These tests being satisfied, and the relevancy appearing, the evidence may be used. (4) Again, to show Bias, we offer the expressions of the witness indicating a hostile feeling; by the Relevancy principle of Counter-explanation (*ante*, § 34), he may offer facts which explain away his expression and destroy its force as indicating hostility; here a question of relevancy may arise, — for example, whether the justness of his cause of anger is in any sense an explanation, as of course it may not be; or a question of Auxiliary Policy may arise —, for example, whether it is profitable to take up much time by such explanations, or whether the details of the quarrel, though truly explanatory, may not cause unfair prejudice to the opposing side.

Thus, throughout the whole subject, here as well as for Circumstantial Evidence at large (Title I), the principles of Relevancy and the principles of Auxiliary Policy, while wholly distinct in their nature, are yet so inextricably united in the concrete rules of exclusion that they must be expounded together in connection with each sort of evidence.

§ 878. **Distinction between Cross-examination and Extrinsic Testimony.** The particular principles of Auxiliary Policy that most commonly find use in the present class of evidence are those which seek to avoid unfair surprise and confusion of issues (*post*, §§ 1845, 1863), and these purposes are usually attainable by the simple expedient of cutting off extrinsic testimony, *i. e.* the calling of additional witnesses. The effect, therefore, of the constant applicability of this expedient is to produce a sharp distinction, in the use of discrediting evidence, between the extraction of this evidence by cross-examination and the presentation of it by extrinsic testimony. The defective general qualities — such as Moral Character, Insanity, and the like — can usually not be got at through the witness himself, and here the above distinction plays little part; but, in evidencing these qualities by specific acts of conduct, the witness himself is often equally as satisfactory for the purpose as additional witnesses would be, and hence the restriction of the impeacher to the extraction of the evidence by cross-examination may be no real hardship to him, while it may satisfy the doctrines of Auxiliary Policy. Hence, in that field, we find much of the evidence subject constantly to such a restriction; and the concrete shape of the rule of thumb then becomes this, that such-and-such impeaching evidence may be offered through the medium of cross-examination, *i. e.* from the mouth of the witness himself, but not by the production of other witnesses. It is thus worth while practically to group some of the kinds of evidence according as they are ineligible, partly or wholly, to be offered through extrinsic testimony. Topics I and II (*post*, §§ 920-969) are thus separated from the ensuing Topics.

Two things must be kept in mind about such rules. (1) The question of

Relevancy is not touched by them. The restriction is based wholly on some doctrine of Auxiliary Policy. It prescribes that such-and-such evidence, if *relevant*, is to come only from a specific source. Its relevancy is still open to question. For example, in evidencing bad character, we may not call a new witness to impeach the former one by testifying to some misconduct of his; we are restricted to the questioning of the original witness; but, while conducting such questioning, we are still confined to facts which are relevant for the purpose, and we may at any moment be told that a given fact about which we are cross-examining — for example, former arrest on some heinous charge — is not relevant.

(2) Thus there is no virtue in the *cross-examination as such* with reference to the admissibility of the alleged fact. The notion is not that because we are cross-examining, therefore we may get admission for this or that fact; for the fact cannot go in if it is not relevant; but the notion is that because we are *not* using extrinsic testimony, the fact if relevant may go in. It is important to observe this, because the ordinary discussion of the rule of thumb leads often to a notion (for which the judges indeed are not responsible) that cross-examination has some mysterious virtue of its own which imparts merit to facts otherwise worthless. A loose belief doubtless obtains in some minds that almost anything may go in on cross-examination (saving the discretion of the Court). Conceptions of this sort should be radically abandoned. Cross-examination is no universal solvent for reducing everything to admissibility. The notion is not only unsound, but misleading; for several sorts of evidence — for example, facts evidencing Bias — are equally presentable through extrinsic testimony and through cross-examination, and a given fact may thus be in either way admissible. The real significance of the rules that involve a distinction between cross-examination and extrinsic testimony is seen if we note that the rules come about, not by enlarging the use of the former, but by cutting off the use of the latter. It is not that the law of impeachment loves cross-examination more; but that it loves extrinsic testimony less. Conceive the relevant facts as carried before the tribunal like chattels, in two kinds of vehicles, and understand the law to forbid the use of one of the kinds of vehicles for certain sorts of facts; the result being that the other kind of vehicle has thereby a far greater vogue, but simply because the use of the first kind is forbidden; and the tenor of the prohibition does not tell us what classes of facts may be carried at all, but merely what kinds of vehicles may not be used for carrying certain classes of facts.

It must be added that while these facts have usually to be carried to the tribunal (to continue the metaphor) in one or the other of these two kinds of vehicles, yet occasionally the facts do not have to be carried there in either, but are already (so to speak) found awaiting us there. That is to say, the *demeanor of the witness on the stand* is a third source of obtaining these facts. Incoherence of statement, hesitating manner, guilty appearance, evasive replies, and the like, contain within themselves many of the salient facts affecting the witness' credibility (*post*, § 947). These stand outside of

the broad distinction between cross-examination and extrinsic testimony, and are not affected by this principle of Auxiliary Policy.

§ 879. **Distinction between Circumstances having Definite Relevancy and Circumstances having Indefinite Relevancy.** The preceding distinction between the limited use of extrinsic testimony and the free use of cross-examination is intimately connected in application with another distinction involving the probative effect of circumstances offered in evidence. For instance, we find that circumstances of relationship, quarrels, or pecuniary interest, may be offered equally by extrinsic testimony as by cross-examination or a lie may be offered through extrinsic testimony on one condition only, namely, that the subject of the error or the lie be material to the case, and not "collateral" (*post*, §§ 1001-1003). That the principle of Auxiliary Policy excludes extrinsic testimony in the latter case and not in the former seems to depend partly on a difference in the probative nature of the evidence. In the former case, the probative force is definite and specific; in the latter case it is indefinite and ambiguous, although positive. In the former case, from the circumstance of (for example) relationship to a party, the inference is, definitely and solely, that a hostile feeling exists towards the opponent. In the latter case, the inference is that in some way or other the witness possesses a capacity or an inclination to an incorrect assertion. Yet, while the plain effect of the evidence is to indicate a defective testimonial quality of some sort, there is no definite indication of the specific quality that is defective. The mind recognizes and accepts the force of the inference that, because he was mistaken on one point, he may be mistaken on another; but it does not definitely infer a specific defective quality.

This being so, it is easy to see why the principle of Auxiliary Policy should be applied with greater readiness and more strictness to evidence of such indefinite and ambiguous effect and such prolific scope. We cut off relevant evidence, — evidence that is useful enough if we can get at it economically; but, comparing the quantity of it that might be offered, if there were no limit, with the indefiniteness of its objective point when received, we find that it would be obtained at a cost by no means economical, and that it is only worth receiving when it comes through the simple and limited source of cross-examination or when it deals with a fact which could have been shown in any case, *i. e.* is not collateral.

The result of this rough distinction between circumstances having a definite and strong probative meaning, and circumstances having an indefinite or a weak probative meaning, is that, when we are attempting to prove these defective qualities by circumstantial evidence, we find again the convenience of the grouping already noticed, namely, on the one hand, evidence that can be offered equally through extrinsic testimony and through cross-examination, and, on the other hand, evidence that cannot be offered at all through extrinsic testimony or can be offered only to a limited extent, according to the applicability of the above reasons. Such a grouping would be based on

the essential features of the evidence and the policy applicable to it, and is represented by the separation of Topics IV and V (*post*, §§ 1000-1046) from the preceding Topics I and II.

§ 880. **Distinction between Impeaching Evidence and Rehabilitating or Supporting Evidence.** It has already been seen (*ante*, § 34) that, in the very nature of the process of Inductive reasoning, while the proponent of evidence offers it as leading to a desired conclusion, it is always open to the opponent to show that the inference desired to be drawn is not the correct or more probable one, and that some other inference than the one desired is equally or more probable, *i. e.* to show that some other explanation exists and thus to explain away the force of the evidential circumstance. This counter-process of Explanation, inherent in the very nature of reasoning, is equally applicable, so far as Relevancy is concerned, in the use of circumstantial evidence to discredit a witness. Thus, in jurisdictions which allow general bad moral character to be used to indicate the probability of the witness' speaking untruthfully, the party offering the witness is usually allowed, on cross-examining the impeaching witness, to show that the other has kept his character for truth-telling, *i. e.* to explain away the desired inference. Again, in the single case in which by extrinsic testimony particular misconduct may be offered to show bad character, namely, conviction of a crime, the question arises whether it may be shown in explanation that the witness was really innocent; though here the resulting rule will be affected by the principle of Auxiliary Policy directed at preventing multiplicity of issues. Again, when a prior contradictory statement is offered to discredit, an explanation may be attempted by showing that the witness has at other times made statements precisely similar to that made on the stand, and the interesting question arises whether such evidence is relevant as affording any real explanation or destroying the force of the impeaching evidence; the generally accepted solution in modern times being that such similar statements do not accomplish any real explaining-away of a prior contradictory statement, but that they do on certain conditions help to explain away any evidence tending to show corruption, bias, or interest. Under each class of discrediting evidence, then, there may be available ways of explaining away by other evidence the force of the discrediting circumstance. But for convenience' sake these various classes of rehabilitating evidence must be considered together (*post*, §§ 1100-1144).

§ 881. **Order of Topics.** The foregoing considerations necessarily affect the order of topics; for the rules must be so treated as best to distinguish the principles behind them. Few of the rules are difficult to comprehend or obscure in their bearing; but much latitude of opinion is possible as to the most satisfactory order of treatment. The following order is most practicable:

First, as preliminary to the whole subject of impeachment, must be considered what Persons as witnesses are to be Impeachable. In the process of discrediting a witness, the first inference (*ante*, § 876) must always be from

some defective testimonial quality to the assertion's incorrectness. The different possible testimonial qualities are thus to be passed in review (Topic I), — Moral Character, Mental Capacity (Insanity, Intoxication), Emotional Capacity (Bias, Interest, Corruption), and Experiential Capacity. These discrediting deficiencies become in their turn the object of circumstantial proof, — first (Topic II), such sorts of evidence as are not forbidden to be offered by extrinsic testimony, — circumstances indicating Interest, Bias, and Corruption; following these, all such evidence as is more or less liable to the rule excluding extrinsic testimony, — (Topic III) Particular Instances of Conduct to show Character, — the principles here involved having an influence over the whole group; next, similar facts to show Experiential Defects and the like; (Topic IV) Specific Errors of assertion, used indefinitely to show some general capacity for mistake or misstatement; (Topic V) Prior Self-Contradictions, used indefinitely for a similar purpose; and, finally, (Topic VI) Admissions, *i. e.* prior self-contradictions of parties.

B. PERSONS IMPEACHABLE.

1. Impeachment of Hearsay Testimony.

§ 884. **General Principle.** When the statement of a person not in court is offered as evidence of the fact stated, the real ground of objection is that it has not been subjected to the test of trustworthiness which the law regards as desirable before listening to any testimonial evidence, namely, the test of cross-examination. This is the Hearsay rule (*post*, § 1362). Yet under certain conditions such statements may exceptionally be received. Now the statement, if thus received, stands testimonially as the equivalent of a statement made on the stand and subject to cross-examination; *i. e.* in both cases there is received the statement (for example) of A that B struck him with a knife, — in the one case, A being on the stand and untested when the statement is made, and in the other case, A being not on the stand and not tested when the statement is made. In both cases the statement is nothing more nor less than testimonial evidence, the two being precisely equivalent in respect to their nature as testimony.

This being so, the untested statement — *i. e.* the hearsay statement — must come from a person qualified to speak on the matter in question, precisely as ordinary testimony must; the rules of Testimonial Qualifications (as noted *post*, § 1424) have constant application to such testimonial statements admitted under the Hearsay exceptions. Now, in the same way, the statements being testimonial in their nature, it is right to subject them, when admitted, to impeachment in the appropriate ways, as it was to require the usual testimonial qualifications in advance; and that is what we find the law doing. For reasons of convenience in exposition, however, the rules of testimonial qualifications and of testimonial impeachment are better considered in connection with the various kinds of hearsay statements admitted under the exceptions to the Hearsay rule. It is enough here to note the general features of the process.

§ 885. **Dying Declarations.** Here the commonest methods of impeachment are those arising from the circumstances of the occasion, when the mental powers are not in a condition to promise the best results in the way of Testimonial Observation, Recollection, and Narration; these modes of impeachment are proper (*post*, § 1446). The use of Prior Self-Contradictions, however, depends so intimately on the general principle of that subject that it is here dealt with under that head (*post*, § 1033).

§ 886. **Attesting Will-Witness.** The proof of an attesting will-witness' signature involves virtually the use of his testimony according to the tenor of the attestation-clause (*post*, § 1505); and the modern tendency to ignore this truth has led sometimes to an ignoring of its corollary, namely, that a deceased attesting will-witness is open to impeachment like any other hearsay witness.¹

§ 887. **Statements of Facts against Interest, and other Hearsay Statements.** The other kinds of statements admissible under exceptions to the Hearsay rule are less commonly subjected to impeachment, but the principle is recognized as equally applicable. Accordingly, it is permissible to impeach statements of *facts against interest* (*post*, § 1471), statements of *facts of family history* (*post*, § 1496), *regular entries in the course of business* (*post*, § 1554), and other kinds of statements; though the attempt thus to apply the principle is rarely made.

§ 888. **Absent Witness' Testimony admitted to avoid Continuance.** By statute in almost every jurisdiction the authority is given to deny a motion for a continuance (or postponement of the trial), when requested on the ground of an expected witness' absence, provided the opposing party consents to admit the testimony as if the witness were present, or (as is more usual in criminal cases) to admit the truth of the facts that would be testified to by the witness. When a witness' testimony is admitted in this manner, may it be impeached? On principle, it may be, if the assent was of the first sort mentioned; but not if the assent was to the truth of the facts testified to. Since the testimony is received by virtue of a Judicial Admission, the application of the present principle can best be considered under that head (*post*, § 2595).

2. Impeachment of Defendant as Witness.

§ 889. **Distinction between Becoming a Witness and Waiving a Witness' Privilege.** When, under the modern statutes removing common-law disqualifications, a defendant in a criminal case takes the stand in his own behalf, two entirely distinct questions arise, to one of which the answer is clear and unanimous, to the other doubtful and inharmonious.

(1) Is his position as a witness so distinct from his position as defendant that that which would be usable to impeach him as a witness, but not usable against him as a defendant, may now be used? In particular, may his bad

¹ The application of the impeachment rules to this sort of testimony is dealt with under that exception (*post*, § 1514). Whether an attesting witness who is *one's own witness* may be impeached is dealt with *post*, § 908.

moral character be shown, — may this character be evidenced by particular acts, — may his testimony be tested by the sundry other methods applicable to witnesses? The argument for the negative is that a fact usable against him as a witness — for example, former conviction of felony — will not be restricted by the jury to its legitimate effect, *i. e.* the effect upon his credibility, but may also, mainly or subsidiarily, be applied by them for a forbidden purpose, *i. e.* to infer his bad character and thus his guilt as a defendant. The argument for the affirmative is that he is in fact a witness as much as he is in fact a defendant, that as a witness he may or may not be credible, and that the State has an overriding interest in ascertaining this; that, as the defendant has voluntarily chosen to offer his testimony, it is not unfair to require him to submit to the incidental tests of testimony ordinarily applied, and that any other rule would practically give immunity to defendants to offer false testimony to the jury. The question involved is thus the simple one whether the requirements of his position as a witness are to be maintained in their integrity, or whether their incidental infringement on his position as a defendant is to cause them to be sacrificed, and the appeal is to the general principle (*ante*, § 13) that evidence admissible for one purpose is not to be excluded because it would be inadmissible for another purpose.

(2) The second question does not care how the first is settled, *i. e.* does not care whether his position as a witness may or may not be treated as wholly distinct from his position as a defendant for the purpose of offering any evidence that would be admissible against him as a witness. The second question rests on a different matter of policy, namely, of Privilege. 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, is the principle determining the existence of a waiver the same for an ordinary witness and for a defendant-witness, or is there anything in the position of the latter which demands a different test for the existence of a waiver? It will be seen that the question here involved is wholly different from the preceding one, and is distinctly a question of the nature of Privilege and of its Waiver; while practically it covers a peculiar kind of evidence, *i. e.* facts tending to show guilt, and not facts affecting credibility.

There is, however, one circumstance, superficial only, which has tended to loose thinking on the subject, namely, the circumstance that much of the evidence of both sorts (*i. e.* to impeach credibility and to show guilt) is asked for on cross-examination; and thus we sometimes find the question "May a defendant on the witness-stand be cross-examined like any other witness?" put and discussed as though only one question, instead of two wholly distinct ones, were involved. No correct solution can ever be reached in that way. Whether facts impeaching credibility may be offered, either extrinsically or through cross-examination, is one question; whether a criminating fact, otherwise privileged, may be asked and compelled from the defendant himself, is the other and wholly distinct question. In the first case, the sole object is to impeach credibility, and the incidental effect on the defendant's

position as such is undesired and forbidden; in the second case, the sole object is usually to prove guilt, and to affect the defendant as such. The answer to either question might be in the affirmative or in the negative without affecting the answer to the other. The first question alone concerns us here. The second is dealt with under the subject of Privilege (*post*, § 2276).

§ 890. **Defendant impeachable as an Ordinary Witness.** Of the arguments on the first question, there is no hesitation in accepting those of the affirmative. The law is that a defendant taking the stand as a witness may as a witness be impeached precisely like any other witness. The rule is enunciated more or less broadly, and with more or less variation of phrasing, in the different jurisdictions; but the principle is universally conceded:

1867, *Com. v. Bonner*, 97 Mass. 587; the witness having been asked whether he had been in the House of Correction for any crime, Mr. Hulston argued, "that it is a subtlety beyond the capacity of jurors to discriminate between regarding evidence of a defendant's previous conviction of crime as affecting only his credibility as a witness, and regarding it as affecting his character generally, and that therefore such testimony should be excluded altogether"; but the Court held that in becoming a witness he must put up with such risks.

1874, *Buskirk*, C. J., in *Fletcher v. State*, 40 Ind. 130: "A defendant who elects to testify occupies the position of both defendant and witness, and thus he combines in his person the rights and privileges of both. But while this is true, we do not think it should result in any change in the law or rules of practice. In his capacity as a witness he is entitled to the same rights, and is subject to the same rules, as any other witness. In his character of defendant, he has the same rights, and is entitled to the same protection, as were possessed and enjoyed by defendants before the passage of the act in question [enabling defendants to testify]. When we are considering the rights of the appellant in his character of defendant, we lose sight of the fact that he has the right to testify as a witness; and when his privileges as a witness are called in question, they should be decided without reference to the fact that he is a defendant also."

1893, *Breaux*, J., in *State v. Murphy*, 45 La. An. 958, 959, 13 So. 229: "The defendant, in availing himself of the privilege of testifying in his own behalf, was subject to all the rules that apply to other witnesses. The accused was not compelled to testify; the statute declares that the failure to testify shall not create any presumption against a defendant. Having offered himself as a witness, and having testified, he was called upon to submit to the same tests which are legally applied to other witnesses. The witness can decline to answer any question which may tend to charge him as criminal; moreover, the Court has the power to protect him against unreasonable or oppressive cross-examination. These modes of guarding against the abuse possible under the statute are not in question. . . . The defendant appeared before the Court in the dual capacity of an accused and that of a witness. As an accused, his character was not subject to attack unless he opened the question. As a witness, his position was different; his credibility was subject to attack. . . . As a defendant, his character could not be impeached, that issue not having been opened by him. As a witness, it could be impeached, as the character of any witness may be subjected to that test. In other words, he may be unworthy of belief, but this unworthiness is not to be considered in determining whether or not he is guilty; while the attack upon the character of an accused is for the purpose of establishing that his plea is not supported by his attempt at proving character and that he is guilty."¹

¹ This doctrine is universally conceded. The authorities will be found in the places cited in the next section.

§ 891. **Same : Application of the Rule.** The general principle is not questioned. But it requires in certain situations to be discriminated, in its consequences, from other rules :

(1) The prosecution in a criminal case may not offer the accused's bad moral character except to rebut his offer of good character (*ante*, § 58), but it may impeach his witness-character without this restriction. The witness-character will involve in most jurisdictions the trait of veracity, while the accused-character will involve the trait appropriate to the crime charged. Hence (in most jurisdictions) a difference in the *kind of character* offerable by the prosecution.¹

(2) The *accused* may at any time offer his own *good moral character*, for the *trait in question*, as evidence that he did not commit the crime (*ante*, § 56). But he may not *as witness* offer his good character until it has been attempted to be impeached by the prosecution (*post*, § 1104). Hence (except in those jurisdictions where general bad character is allowed in impeachment) a difference as to the *time* when the accused may offer his character in his support as a witness.²

(3) In evidencing the accused's bad moral character as a witness, the usual kinds of evidence are equally available, — *conviction of crime, specific instances of misconduct* (on cross-examination), and the like. But when these involve a crime and are attempted to be proved on cross-examination, the question arises whether the accused is compellable to answer, *i. e.* whether he has *waired his privilege against self-crimination*.³ Furthermore, it may be noted, the doctrine has been advanced in New York that, while a defendant as a witness is in general impeachable as a witness, yet, in offering *through cross-examination* to impeach his credibility by specific acts of misconduct, the prosecution would have too wide a latitude in employing these discreditable facts unless some limits were set in order to prevent unfair prejudice to the defendant as such; and hence the scope of that particular sort of evidence should be narrower for a defendant-witness than for others. Such a doctrine, however, would involve no abandonment of the general principle that the defendant as a witness may be impeached as such in the other usual ways. Nevertheless, the limitation laid down by these New York rulings is not to be commended; it has been several times refused approval in other jurisdictions having these rulings before them, and is probably not law elsewhere, if indeed it is in New York to-day.⁴

§ 892. **Defendant not Testifying, but making a "Statement."** In the course of the transition from the unenlightened common-law disqualification of an accused person to his complete eligibility as a witness, several jurisdictions took a half-way step (*ante*, § 579) of allowing the accused person to make a

¹ The authorities are collected *post*, § 924. Since the defendant would never take the stand till after the prosecution had closed its case in chief, the prosecution would never be authorized to offer his character of either sort until rebuttal; it is therefore never a question of the

time of the prosecution's offer, but of the kind of character offered.

² The authorities are collected *post*, § 1104.

³ The authorities are collected *post*, §§ 2276, 2277.

⁴ The authorities are collected *post*, § 987.

"statement,"—a grudging concession to the demands of justice. Being in itself anomalous, it raised several anomalous questions. One of these was whether this "statement" rendered its maker open to impeachment like an ordinary witness. But this question is no longer of consequence.¹

3. Impeachment of an Impeaching Witness.

§ 894. **Limitation on the Trial Court's Discretion.** No question arises here except as to the use of character-evidence. When B is brought forward to impeach A, and C to impeach B, it is obvious that not only might there be no end to this process, but the real issues of the case might be wholly lost sight of in a mass of testimony amounting to not much more than mutual vilification. The general rule as to limiting the number of witnesses upon a given point (*post*, § 1907) does not in strictness apply. Three courses are open to pursue: first, to exclude absolutely the impeachment of the character of an impeaching witness;¹ secondly, to admit the impeachment of an impeaching witness, but no more;² thirdly, to admit it only to such an extent as the discretion of the trial Court deems best. The first two of these rules are represented in different jurisdictions. In such a case, however, any mere rule of thumb is undesirable; the preferable rule is the third.

4. Impeachment of One's Own Witness.

§ 896. **History of the Rule.** In the first and the second of the foregoing topics, the question presented was whether the person could properly be treated as a witness at all; for, if so, there was no objection to the process of impeachment in itself. But in the third and the present topics the person is clearly a witness, and the question is whether any principle of auxiliary policy should exclude the process of impeachment normally applicable.

¹ Except in Georgia; some authorities are cited *ante*, § 579.

² *Contra*: 1869, *State v. Cherry*, 63 N. C. 495 (Pearson, C. J.: "We are told that this supposed rule of law is acted upon in that circuit, and is based on the ground of avoiding the inconvenience of an endless process. If the impeaching witness can be impeached, the last witness may also be impeached, and so on *ad infinitum*. This inconvenience cannot occur very often or be very serious, for the general practice is to call only the most respectable men in the community as to character, and the instance of calling a witness of doubtful character to prove character is exceptional. Let it be understood that an impeaching witness cannot be impeached, and the exception will soon be the general rule. But be this as it may, truth should not be excluded to avoid inconvenience"); 1846, *Rector v. Rector*, 8 Ill. 105, 117 (generally not allowable, but here treated as proper).

³ 1851, Wayne, J. (the others not touching the point), in *Gaines v. Relf*, 12 How. 555. This was the rule of the civil and the canon law of the Continent: Corp. Jur. Canon., Decretal. II, 20, *de testibus*, c. 49; 1738, Oughton, *Ordo Ju-*

diciorum, tit. 102, § VI ("In testem testes, et in hos, sed non datur ultra"); and this was followed in Chancery: 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1484 (Sir W. Jones, for the prosecution: "If his new witnesses are only to the reputation of our witnesses, then perhaps one must have some other witnesses brought to discredit his; and we, not knowing who these new witnesses of his would be, may need perhaps another day to bring testimony against them; so that I know not when the matter can have an end"; L. H. S. Finch: "It is true, in the practice of Chancery we do examine to the credit of witnesses, and to their credit, but no more; but what my lords will do in this case I know not till they are withdrawn"; and the matter went off by consent). In the following jurisdictions the rule has been allowed to go this far, without saying that it shall go no farther: 1862, *State v. Brant*, 14 Ia. 182 (left undecided); 1868, *State v. Moore*, 25 id. 137 (not excluded here; but no general rule laid down); 1847, *Starks v. Penple*, 5 Den. 106, 109; 1903, *Brink v. Stratton*, — N. Y. —, 68 N. E. 148.

In the present topic, the rule has been long established, and is in its general validity never to-day questioned, that the party on whose behalf a witness appears cannot himself impeach that witness in certain ways. The history of it is singularly obscure, considering its practical frequency and importance. But the following stages of its development are fairly clear: (1) In the primitive modes of trial, persons who attended on behalf of the parties were not witnesses, in the modern sense of the word. They were "oath-helpers," by whose mere oath, taken by the prescribed number of persons and in the proper form, the issue of the cause was determined. They were chosen, naturally and usually, from among the relatives and adherents of either party. They went up to the court literally to "swear him off," and the two sets of oath-takers were marshalled in opposing bands. This traditional notion of a witness, that of a person *ex officio* a partisan pure and simple, persisted as a tradition long past the time when their function had ceased to be that of a mere oath-taker and had become that of a testifier to facts. So long as such a notion persisted, it was inconceivable that a party should gainsay his own witness; he had been told to bring a certain number of persons to swear for him; if one or more did not do so, that was merely his loss; he should have chosen better ones for his purpose. This notion that a party must stand or fall by what his partisan affirms was long in disrepair.¹ It was a natural consequence of this notion that the party should not be allowed to dispute what his own chosen witness says. Such (presumably) was the instinctive thought all through the earlier periods of our recorded trials, and long after the time when witnesses in the modern sense had taken the place of compurgators. But for a considerable period there is no trace of a positive rule upon the subject. There must have been the feeling; perhaps no opposition to it was attempted. (2) Meanwhile, in the civil and the canon law the rule was well known that one who used a witness for himself could not afterwards object to his incompetency (by interest or otherwise) when called by the opponent.² This rested on the general and natural notion of a waiver of the objection (*ante*, § 18), and was apparently a rule of equally unquestioned acceptance in our own law.³ (3) But the further conception, that a party calling a witness must not even discredit him, was not enforced as a rule of law until a comparatively late period. Its beginnings are seen at the end of the 1600s, in criminal trials. Until that time, the accused had no legal right to summon witnesses (*ante*, § 575), and apparently the prosecution was not before then hampered by any rule against impeachment. In that period a rule begins to be hinted at, as against the

¹ Compare the history of the rule about required numbers of witnesses (*post*, § 2032).

² Codex IV, 20, 17 ("Si quis testibus usus fuerit, iidemque testes adversus eum in alia lite producantur, non licebit ei personas eorum excipere, nisi ostenderit inimicitias inter se et illos *postea* emeruisse, ex quibus testes repelli leges præcipiunt; non adinenda scilicet ei licentia, ex ipsis depositionibus testimonium eorum arguere. Sed si liquidis probationibus datione

vel promissione pecuniarum eos corruptos esse ostenderit, etiam eam allegationem integram ei servari præcipimus"; A. D. 528); *ante* 1635, Hudson, *Treatise of the Court of Star Chamber*, 201 ("But this is a firm and constant rule, as well in this court as in all laws, that no man shall be received to except against a witness as incompetent, if he examine him also himself").

³ Some cases are cited *post*, §§ 911, 912.

accused's witnesses, though the prosecution is still exempt.⁴ (4) By the beginning of the 1700s a general rule makes a casual appearance, and is applied in civil cases equally.⁵ But it had not yet received common acceptance; for it is not mentioned in any of the early editions of the treatises on trial practice. (5) By the end of the 1700s, however, it is notorious and unquestioned. Its enforcement in the trial of Warren Hastings, in 1788,⁶ seems to have been the immediate cause of its general currency; for thereafter it receives mention in the treatises.⁷ Whatever its merits, then, its prestige is comparatively modern.

In considering its right to existence, the first question naturally is, By what reason of policy is this impeachment prohibited?; for upon the answer to this depends the next question, To what extent is such impeachment forbidden? To the first question we find in judicial annals more than one answer; and it is of prime importance to determine at the outset which of these is the correct one.

§ 897. **First Reason: The Party is Bound by his Witness' Statements.** The primitive notion, that a party is morally bound by the statements of his witnesses, no longer finds defenders, although its disappearance is by no means very far in the past. In the early 1800s the judges were still engaged in repudiating this false notion of the basis of the rule against impeaching one's own witness:

1811, *Ellenborough, L. C. J.*, in *Alexander v. Gibson*, 2 Camp. 555: "If a witness is called on the part of the plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed; but I know of no rule of law by which the truth is on such an occasion to be shut out and justice is to be perverted."

1831, *Tindal, C. J.*, in *Bradley v. Ricardo*, 8 Bing. 58: "The object of all the laws of evidence is to bring the whole truth of a case before the jury; . . . [but if this contradicting evidence were excluded] that would no longer be the just ground on which the

⁴ 1681, *Fitzharris' Trial*, 8 How. St. Tr. 223, 369, 373 (on the defendant's pressing an unwilling witness, called by him, with self-contradiction on cross-examination, *L. C. J. Pemberton*: "Mr. Fitzharris, do you design to detect Mrs. Wall of falsehood? She is your own witness; you consider not you can get nothing by that"; . . . Defendant, to another witness called by him: "You dare not speak the truth"; Mr. J. Dolben: "You disparage your own witnesses"); 1681, *Plunket's Trial*, ib. 447, 469 (a witness called for the prosecution exonerates the defendant; the Attorney-General then explains that he swore the contrary before the jury, and had said the same the night before, and ends by censuring him and having him committed); 1681, *Colledge's Trial*, ib. 549, 636 (defendant calls a witness to impeach another, and then, on his refusal, tries by a cross-examination to show him biased; *L. C. J. North*: "Look you, Mr. Colledge, I will tell you something for law and to set you right. Whatsoever witnesses you call, you call them as witnesses to testify the truth for you; and if you ask them any questions, you must take what they have

said as truth; . . . let him answer you if he will, but you must not afterwards go to disprove him"); 1691, *Lord Mohun's Trial*, 12 How. St. Tr. 1007 (self-contradiction of a witness, permitted to the prosecution).

⁵ 1700, *Adams v. Arnold*, 12 Mod. 375 ("And here Holt [*L. C. J.*] would not suffer the plaintiff to discredit a witness of his own calling, he swearing against him"); 1722, *Eyre, J.*, quoted in *Viner's Ahr. "Evidence," M. a. 6* ("The party who produceth a witness cannot examine to the discredit of such witness"); 1738, *Rice v. Oatfield*, 2 Stra. 1095 (cited *post*, § 907).

⁶ Cited *post*, § 905.

⁷ 1793, *Buller, Trials at Nisi Prius*, 297, 6th ed. (at the end of the "fourth general rule"); 1795, *Hawkins, Pleas of the Crown*, II, c. 46, § 208, 7th ed.; both of these citing only *Hastings' Trial*; 1796, *Crossfield's Trial*, 26 How. St. Tr. 1, 37 (*L. C. J. Eyre* referring apparently to *Hastings' Trial* as his authority). In 1803 the practice under the rule appears to be still uncertain: *Purcell v. M'Namara*, 8 Ves. Jr. 327, *L. C. Eldon*.

principles of evidence would proceed, but we should compel the plaintiff to take singly all the chances of the tables and to be bound by the statements of a witness whom he might call without knowing he was adverse, who might labor under a defect of memory, or be otherwise unable to make a statement on which complete reliance might be placed."

1826, 1834, *Putnam, J.*, in *Brown v. Bellows*, 4 Pick. 187, 194, and *Whitaker v. Salisbury*, 15 Id. 545: "A party is not obliged to receive as unimpeached truth everything which a witness called by him may swear to. If his witness has been false or mistaken in his testimony, he may prove the truth by others." . . . "It would evidently be a rule that would operate with great injustice, that a party calling a witness should be bound by the fact which was sworn to. No one would contend for a rule so inexpedient."

§ 898. **Second Reason: The Party Guarantees his Witness' General Credibility.** The modern rule as to impeaching the character of one's own witness is historically merely the last remnant of the broad primitive notion that a party must stand or fall by the utterances of his witness. This primitive notion, resting on no reason whatever, but upon mere tradition, and irrationally forbidding any attempt to question the utterances of one's own witness, was obliged to yield its ground before reason and common sense; and, as each encroachment upon its territory took place, it sought to justify by stating some plausible reason which would support the remainder of the rule. Such a reason was, and is still, frequently advanced in this form, that a party guarantees his witness' credibility. This has become the popular and canting reason:

1834, *Putnam, J.*, in *Whitaker v. Salisbury*, 15 Pick. 545: "When a party calls a witness whose general character for truth is bad, he is attempting to obtain his cause by testimony not worthy of credit; it is to some extent an imposition upon the court and jury. The law will not suppose that a party will do any such thing, but will rather hold the party calling the witness to have adopted and considered him as credible."

1877, *Folger, J.*, in *Pollock v. Pollock*, 71 N. Y. 152: "It is fair to judge a party by his own witness. If a party puts upon the stand a witness who is for any reason assailable, that party asserts or admits the credibility of that witness."

1866, Professor *Simon Greenleaf*, Evidence, § 442: "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; and having thus presented them to the court, the law will not permit the party afterwards to impeach their general reputation for truth."

One answer to this argument would be that the supposed guarantee ought not in fairness to be allowed to burden a party when he has discovered the witness' untrustworthiness after putting him on the stand. Another and more satisfactory answer would be that the ends of truth are not to be subverted by binding the parties with guarantees and vouchings, and that it is the business of a court of justice, in mere self-respect, to seek all sources of correct information, whatever foolish guarantees a party may or may not have chosen to make. But there are three other answers, not merely in the nature of counter-arguments, that effectually dispose of the above reason. (1) The first is that, in point of fact, looking at the actual conduct of trials, neither party does know, and much less does he guarantee, the character and trustworthiness of the witnesses called by him:

1870, *May, C. J.*, in "Some Rules of Evidence," 11 *American Law Review* 264: "But does common experience show that, from the given fact that a witness is brought into court by a party, it is to be inferred that he not only knows his character, but also that that character is such that 'in general' he is worthy of belief? . . . Witnesses are not made to order, — at least, not by honest people. The only witnesses who can properly be called are those who happen to have knowledge of relevant facts; and who these may be is predetermined by the history and course of the events which are to come under examination. . . . The witnesses to the material facts in dispute are such persons as happen to have been cognizant of the facts, and are not such as the parties have selected at their pleasure. In point of fact, it is substantially true that parties call particular persons as witnesses simply because they are obliged to and can call no others. If a lawsuit was a manufacture, and the party bringing it could select his materials — facts and witnesses —, there might be some propriety in holding him responsible for the character of these materials; but, as both are beyond his control, his responsibility for their character is out of the question. He comes into the court with the best materials he can get to make out his case."

(2) The second answer is that this theory of guaranteeing credibility is not true in law, *i. e.* is not practically enforced by any Court, and therefore is a mere empty phrase; for the permission to-day universally accorded (*post*, § 907) to discredit one's witness by showing the facts to be contrary to his assertion, is wholly inconsistent with any guarantee of credibility. If there were such a guarantee, the party could not fly in the face of it by proving that his witness is not to be believed on that point. A Court which allows the party to disprove what his witness has said, and at the same time speaks of a guarantee of credibility as the reason for some other part of the rule, refutes itself, and the phrase about a guarantee of credibility becomes a mere jargon devoid of reality.

(3) The further logical inconsistency of this reason was long ago pointed out in another respect:

1827, *Mr. Jeremy Bentham*, *Rationale of Judicial Evidence*, b. III, c. 1V (*Bowring's ed.*, vol. VI, p. 401): "Two arguments, in some measure distinct, may be collected from the books: . . . 1. By calling for his testimony, you have admitted him to be a person of credit, acknowledged his trustworthiness; to seek to discredit him would be an inconsistency; and the success of your endeavours would be fatal to your cause; for, if his testimony be not to be believed, and you have none but his, then is your side of the cause without evidence. . . . [This argument rests upon] a false axiom of psychology. . . . The false axiom is this: — 'All men belong to one or other of two classes — the trustworthy and the untrustworthy. The trustworthy never say anything but what is true; by them you never can be deceived. The untrustworthy never say anything but what is false: so sure as you believe them, so sure are you deceived.' . . . No man is so habitually mendacious as not to speak true a hundred times, for once that he speaks false; no man speaks falsehood for its own sake; no man departs from simple verity without a motive. . . . Exhibit in the strongest possible colours the untrustworthiness of your witness — his partiality to your adversary's side, and his improbity of character —, you discredit so much of his testimony as makes in favour of your adversary, but in the very same proportion you increase the trustworthiness of all that portion which makes in favour of yourself. . . . Among the means which the nature of things affords you for extracting the truth from this or any other unwilling bosom, is interrogation, — counter-interrogation, it may in one sense be called, in respect of its contrariety to the current of his wishes. 'No,' says one of the rules, 'this shall not be permitted to you.' 'Why?' says justice.

'Because,' adds the rule, 'this witness, this enemy of yours, is *your witness*.' . . . In the grammatical expression, '*your witness*,' howsoever applicable to him, what is there that should prevent your having permission to paint his disposition, any more than the disposition of any other person, in its real colours? . . . The tendency of this your counter-evidence is to place the value of your witness's testimony in its true light. 'No,' say the lawyers; 'we will not have it placed in its true light: the situation, the moral situation, in which the witness is placed — the sinister interests to the action of which he is exposed — shall not be presented to view.' 'Oh, but what you contend for is an inconsistency: you want the same man to be regarded as credible and incredible — as speaking true, and speaking false.' Not the smallest inconsistency: what we want to have thought true of this man, is no more than what is true of every man."

§ 899. **Third Reason: The Party ought not to have the means to Coerce his Witness.** The truth is that the Courts affecting the foregoing reasons have sought too much in the realm of objective arguments. They have thought of visiting punishment on the head of offending parties, or of leaving them to suffer the consequences of their mistakes. This is not a high-minded nor a practical attitude for a tribunal seeking truth, nor is it in harmony with the policy of other rules of Evidence. This whole attitude must be abandoned. What we are to ask is, Is there anything in the process of impeaching one's own witness which tends to restrict or impair the sources of evidence, to make competent evidence less plentiful or less trustworthy? We should ask, not what the conduct of the party is, but what the effect is upon the witness. Taking this subjective point of view, we find that there is something of a reason, — a reason easy to grasp, founded on reality, not on cant, legitimate in its policy, orthodox in its history, though narrow in its scope, — the reason that *the party ought not to have the means to coerce his witnesses*. It was laid down by Mr. Justice Buller, a century and a half ago, in terms which have been frequently quoted, — more often quoted than acknowledged (as Serjeant Evans once said of his own writings):

Ante 1767, Buller, J., *Trials at Nisi Prius*, 297: "A party never shall be permitted to produce general evidence to discredit his own witness, for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him."¹
1834, Putnam, J., in *Whitaker v. Salisbury*, 15 Pick. 545: "If this were not so, it would be in the power of any party merely by putting a witness upon the stand, to blacken and defame his general character for truth whenever the evidence should fall short of what was wanted."

The true foundation of policy (so far as there is any) is here manifest. If it were permissible, and therefore common, to impeach the character of one's witness whose testimony had been disappointing, no witness would care to risk the abuse of his character which might then be launched at him by the disappointed party. This fear of the possible consequences would operate subjectively to prevent a repentant witness from recanting a previously falsi-

¹ Approved in the following: 1834, Lord Denman, C. J., and Bolland, B., in *Wright v. Beckett*, 1 M. & Rob. 417, 432; 1801, Peake, Evidence, 89; 1814, Phillipps, Evidence, 308 (5th Amer. ed. : 1824, Starkie, Evidence, 216.

fied story, and would more or less affect every witness who knew that the party calling him expected him to tell a particular story. Of this sort of abuse from the opposite side the witness is even now sufficiently afraid; were he liable to it from either side indiscriminately, the terrors of the witness-box would be doubled. Speculative as this danger may be, it furnishes the only shred of reason on which the rule may be supported. Moreover, it is the only reason which allows the details of the rule to be worked out consistently. What is this fear which we desire to save the witness? It must be a fear that would operate upon the ordinary witness honestly inclined. The fear that his character will be abused, — this is certainly a tangible and sufficient consideration. On the other hand, the fear that he will be shown to be affected by bias or interest, — this involves nothing disgraceful or derogatory to character, and is hardly worth considering. Thus this reason tests efficiently the various details of the rule.

But, after all, it is a reason of trifling practical weight. It cannot appreciably affect an honest and reputable witness. The only person whom it could really concern is the disreputable and shifty witness; and what good reason is there why he should not be exposed? That he would adhere to false testimony solely for fear of exposure by the party calling him is unlikely; because his reputation would in that case equally be used against him by the opponent. It therefore becomes merely a question which of the two parties may properly expose him. Is there any reason of moral fairness which forbids this to the party calling him? The rational answer must be in the negative. There is no substantial reason for preserving this rule, — the remnant of a primitive notion:

1876, *May, C. J.*, in "Some Rules of Evidence," 11 *American Law Review* 267: "Courts are not established to give that party his case who behaves best in court. If they were, it seems to us that the plaintiff stands quite as well in such a case, on the score of fairness, as the defendant, who lies in wait for the profits of treachery. . . . [It is improper that] an untruthful or incredible or unreliable witness by reason of moral infirmity may not be unmasked by any party in interest. . . . What more absurd than to ask a jury to find the truth upon the testimony of a witness notorious for not speaking the truth, all the while concealing from them the fact that he is or may be a false witness? And how can it be of importance to the main purpose of the trial how or by whom the fact that the witness is not to be relied upon is made known? . . . If he betrays the party who calls him, and falsifies in every statement which he makes, the opposite party will of course accept the treason, say nothing of impeachment, and leave the jury no alternative but to find an unjust verdict upon evidence which both the parties know to be the rankest perjury. Certainly a rule which may produce such a result ought to be at once discarded, unless it can be shown to be of some special use in the general purposes of legal controversy. That a court of justice should permit such a miscarriage on the merits, because it sees, or fancies it sees, a shadow of unfairness in one of the parties in a matter collateral to the suit and in no way touching the justice of the case, is a reproach which ought to be done away. Nobody can profit by the rule but the witness and the antagonist of the party who calls him, and they only by the defeat of the ends of justice."²

² A similar argument is forcefully elaborated and by Chief Justice Appleton (*Evidence*, by Mr. Beutham (*Judicial Evidence, ubi supra*), c. XIV, p. 223).

Assuming the rule to rest upon the third reason above noted, it remains to ascertain the effect of this principle upon the various kinds of impeaching evidence.

§ 900. **Bad Character.** It has never been doubted that one effect of the rule is to exclude evidence of the witness' character; this much is clearly forbidden, whatever policy we accept as the support of the rule.¹ Upon the true policy of the rule, it ought to make no difference whether the party knew the character or not before offering the witness' testimony; but upon the conventional theory (*ante*, § 898), that the rule is intended to punish unfair conduct, it is difficult to avoid the conclusion that, if he did not know it, the prohibition does not apply.² Moreover, it ought not to apply to other qualities than moral character, — that is, not to insanity.³

§ 901. **Bias, Interest, or Corruption.** There is no reason whatever, upon correct policy, why this sort of evidence should be excluded; for neither interest nor bias are disgraces, the fear of which could be used to coerce a witness; and as for corruption by subornation or the like, it ought never to be kept unmasked. Courts have, however, usually treated all these matters as included within the prohibition against impeachment, and excluded such evidence.¹

¹ Apart from the following cases, this interpretation of the rule is repeated in almost every case upon the present topic, so that no other citations are necessary. *England*: St. 1854, c. 125, § 22 (quoted *post*, § 905); 1858, *Greenough v. Eccles*, 5 C. H. N. S. 786. 28 L. J. C. P. 160 (speaking of the law before 1854 as "clear"); *Canada*: *Crim. Code* 1892, § 699 (like *Eng. St.* 1854, c. 125, § 22); as also the following Provincial statutes: *Il. C. Rev. St.* 1897, c. 71, § 33; *Newf. Cons. St.* 1892, c. 57, § 17; *N. Br. Cons. St.* 1877, c. 46, § 19; *N. Sc. Rev. St.* 1900, c. 163, § 42; *Ont. Rev. St.* 1897, c. 73, § 20; 1853, *Mair v. Culy*, 10 U. C. Q. B. 321, 325, *per Burns, J.*; *P. E. I. St.* 1889, c. 9, § 15; *United States*: *Cal. C. C. P.* 1872, § 2049 ("by evidence of bad character"); 1897, *Wise v. Wakefield*, 118 *Cal.* 107, 50 *Pac.* 310; 1864, *Olmstead v. Winsted Bank*, 32 *Conn.* 278, 287; 1901, *Waterbury v. Waterbury T. Co.*, 74 *Conn.* 152, 50 *Atl.* 3; *Fla. Rev. St.* 1892, § 1101; *Haw. Civil Laws* 1897, § 1421 ("general evidence of bad character" forbidden); *Ida. Rev. St.* 1887, § 6080; *Ind. Rev. St.* 1897, § 520 (impeachment by "bad character," not allowable "unless it was indispensable that the party should produce him, or in case of manifest surprise"); *Mass. Pub. St.* 1882, c. 149, § 21; *Mont. C. C. P.* 1895, § 3377; 1826, *Skellinger v. Howell*, 3 *Halst.* N. J. 310; *N. M. Comp. L.* 1897, § 3026; 1830, *Lawrence v. Barker*, 5 *Wend.* 301, 305; 1874, *Jackson v. Leek*, 12 *id.* 105, 108; 1847, *People v. Safford*, 5 *Den.* 112, 117; 1860, *Sanchez v. People*, 22 *N. Y.* 147, 153; 1873, *Hullard v. Pearsall*, 53 *id.* 230; *Or. C. C. P.* 1892, § 838; *Tex. C. Cr. P.* 1895, § 795 ("The rule that a party introducing a witness shall not attack his testimony is so far modified that any party, when facts stated by a witness are injurious to his cause, may attack his testimony in any other

manner, except by proving the bad character of the witness"); *Va. St.* 1899-1900, c. 117, § 1 ("general evidence of bad character" forbidden); *Wyo. St.* 1895, c. 68 ("bad character" excluded).

² 1834, *Lord Denman, C. J.*, in *Wright v. Beckett*, 1 *M. & Rob.* 426 ("the rule cannot apply to a case where such facts are brought to your knowledge after you have placed him in the witness-box").

³ 1857, *State v. Knight*, 43 *Me.* 11, 134 (the counsel was allowed to argue against the accuracy of one of the statements of his witness by calling attention to her age and feebleness as affecting her memory; and the Court trying to treat it as a mere correction of fact). *Contes v. 1902, Southern Bell T. & T. Co. v. Mayo*, 134 *Ala.* 641, 33 *So.* 16 (impeachment of sanity, held improper).

¹ *Interest*: this has usually been excluded; 1802, *Fenton v. Hughes*, 7 *Ves. Jr.* 287, 290, *Lord Eldon, L. C.* (speaking of it as "settled upon by a conference by all the Judges"; excluded); 1829, *Winston v. Mosley*, 2 *Stew.* 138 (excluded); 1846, *Stewart v. Hood*, 10 *Ala.* 600, 607 (excluded); 1859, *Fairly v. Fairly*, 38 *Miss.* 280, 289 (excluded); 1827, *Jackson v. Varick*, 5 *Cow.* 239, 242 (in subscribing witness was allowed, after being called on one side, to be examined on the other, an objection on the score of interest not being available to the former; "they could not afterwards question either his competency or credibility"; affirmed in *Varick v. Jackson*, 2 *Wend.* 166, 200); 1829, *Fulton Bank v. Stafford*, 2 *Wend.* 483, 485 (same). *Corruption*: the practice has differed; 1838, *Dunn v. Aslett*, 2 *M. & Rob.* 122, *Lord Denman, C. J.* ("a party calling a witness may examine him as to any fact tending to show he has been induced to betray that party"; here, a recent intimacy with

§ 902. **Prior Self-Contradiction.** (1) **Theory.** The evidential nature of a contradictory statement made by the same person at another time is examined elsewhere (*post*, § 1018) in dealing with the various kinds of discrediting evidence. It is sufficient to note here that, in effect and primarily, it neutralizes the statement on the stand, by showing that the witness cannot be correct in both statements and is as likely to be wrong in the latter as in the former, and, furthermore, that his certain error in this one respect indicates a possibility of error upon other points. But what is not to be necessarily implied from this error is any reflection upon the witness' character, nor indeed upon any specific testimonial quality. The implication is merely that in some respect his testimonial capacity is capable of error, — perhaps in his observation, perhaps in his memory, perhaps through bias or corruption, perhaps through a dishonest disposition, but not definitely in any one of these qualities. Does, then, the principle of the rule forbidding the impeachment of one's own witness extend its prohibition to this sort of evidence?

Upon the second theory (*ante*, § 898), the cant theory, this evidence should logically be forbidden. If the party is to be taken as guaranteeing the witness' credibility, clearly he is prohibited from exposing, by any means whatever, an error of that witness, and especially an error which carries with it an implication of other errors, from whatever source. But the correct theory of the rule (*ante*, § 899) by no means prevents an exposure of error through the present means. The policy of protecting the witness, subjectively, against the fear of being abused and held up to disgrace, in case he should disappoint the expectations of the party calling him, obviously cannot regard the exposure of a self-contradiction as a legitimate reason for such apprehension on the part of the witness. There is no necessary implication of bad character, no smirching of reputation, no exposure of misdeeds on cross-examination, nothing that could fairly operate to coerce either an honest or a dishonest witness to persist in an incorrect story through fear of the party calling him. An honest witness could readily explain how he came to make the former statement; a dishonest one would not be deterred from returning to truth by such a trifling obstacle. On correct principles, then, the use of self-contradictory statements is not forbidden. But the case is even stronger; for the indirect effect of a self-contradiction, as reflecting on general credibility (*post*, § 1018), is not resorted to when such statements are used against one's own witness; for the effort is merely to nullify and remove the adverse and unexpected assertion, and the party neither expects nor wishes to discredit the remainder of the testimony, which satisfies him well enough. Thus, on the theory that the rule merely forbids an attack on general credibility, there is no breach of the rule in using evidence of self-contradictions. It may be

the opponent); 1874, *State v. Shonhansen*, 26 La. An. 421, 423 (excluding questions as to attempts to suborn witnesses). *Bias and Hostility*; this has been allowed to be shown: 1899, *Consol. Coal Co. v. Seuziger*, 179 Ill. 370, 53 N. E. 733

(cross-examination of a hostile witness to discredit memory, allowed); 1860, *Carr v. Moore*, 41 N. H. 131, 134 (allowed after cross-examination by the opponent).

sail, therefore, that even upon the common theory—at least, its looser form (*ante*, § 898)—the use of self-contradictions is in truth not improper.

§ 903. *Same*: (2) **Practical Reasons Pro and Con.** But such has been the difference of opinion over this sort of evidence that the question of general principle has not always been regarded as controlling, and the controversy has rested on such reasons of practical convenience, peculiar to this sort of evidence, as could be advanced on either side. These arguments are represented in the following passages:

1831, *Denman*, L. C. J., in *Wright v. Beckett*, 1 Moo. & Rob. 418, 425: "The word 'credit' appears to me manifestly to be employed in the sense of 'general character'; and, thus understood, the rule and the reason go well together, and are perfectly consonant to common sense; 'You shall not prove that man to be infamous whom you endeavored to pass off to the jury as respectable.' But how can this prevent me from showing that he states an untruth on a particular subject by producing the contrary statement previously made by him, which gave me just cause to expect the repetition of it now? If his character is injured, it is not directly but consequentially. But perhaps no injury may arise; there may be a defect of memory; there may be means of perfect explanation. If not, if the witness professing to be mine has been bribed by my adversary to deceive me, if, having taught me to expect the truth from him, he is induced by malice or corruption to turn round upon me with a newly invented falsehood, which defeats my just right and throws discredit on all my other witnesses, must I be prevented [from] showing the jury facts like these? . . . Can any reason, then, be assigned why, when equally deceived by his denying to-day what he asserted yesterday, you should be excluded from showing the contradiction into which (from whatever motive) he had fallen? It is clear that in civil cases the exclusion might produce great injustice, and in criminal cases improper acquittals and fraudulent convictions. . . . Indeed, the case of *Ewer v. Ambrose* presents a *reductio ad absurdum* which can hardly be surpassed; for if the answer could not have been received at all, the same man might defeat on the same day a suit in Chancery and an action at law by swearing in the former to the affirmative and in the latter to the negative of the same proposition. . . . The inconvenience of precluding the proof tendered strikes my mind as infinitely greater than that of admitting it. For it is impossible to conceive a more frightful iniquity than the triumph of falsehood and treachery in a witness who pledges himself to depose the truth when brought into Court, and in the meantime is persuaded to swear, when he appears, to a completely inconsistent story. The dangers on the other hand, though doubtless very fit subjects of precaution in the progress of a trial, exist at present in equal degree with reference to modes of proceeding which have never yet been questioned. The most obvious and striking danger is that of collusion. An attorney may induce a man to make a false statement without oath for the mere purpose of contradicting by that statement the truth, which when sworn as a witness he must reveal. The two parties concerned in this imagined collusion must be utterly lost to every sense of shame as well as honesty; but there is another mode by which their wicked conspiracy could be just as easily effected. The statement might be made and then the witness might tender himself to the opposite party, for whom he might be set up, and afterwards prostrated by his former statement; this far more effectual stratagem could be prevented by no rule of law. The other danger is that the statement, which is admissible only to contradict the witness, may be taken as substantive proof in the cause. But this danger arises equally from the contradiction of an adverse witness: it is met by the Judge pointing out the distinction to the jury and warning them not to be misled; it is not so abstruse but that Judges may explain it and juries perceive its reasonableness; and it is probable that they most commonly discard entirely the evidence of him who has stated falsehoods, whether sworn or unsworn."

1824, *Mr. Thomas Starkie*, Evidence, 217: "The resolution of this doubt depends, as it

seems, on the considerations [1] whether in the abstract such evidence is essential to justice; and if so, then whether the party is to be excluded from such evidence either by reason of [2] any objection in the nature of an estoppel, or [3] of any collateral inconvenience which might result. [1] As a general proposition, it is essential to justice that in a case where the testimony of two witnesses upon a question of fact is contradictory, every aid should be afforded to enable the jury to decide which of them is better entitled to credit. . . . [2] If, as an abstract position, it be essential to the end of truth that such evidence should be submitted to a jury, it remains to consider in the first place whether the party having called the witness is, as it were, to be estopped from afterwards so impeaching his credit. It is difficult to come to this conclusion. A party who is prepared with general evidence to show that a witness whom he calls is wholly incompetent acts unfairly and inconsistently; for, knowing his witness to be undeserving of credit, he offers him to the jury as the witness of truth, and attempts to take an unfair advantage by concealing or disclosing the real character of his witness as best suits his purpose; but a party may impeach his own witness in the mode in question without incurring any such blame; he may have been purposely deceived by the witness, or, though not under a legal necessity to call him, may be constrained by paucity of evidence under the particular circumstances. . . . [3] Considering the admission of such evidence in its tendency to occasion collateral inconvenience, the argument that a party ought not to be allowed to discredit his own witness by general evidence seems to have little weight; the contradiction proposed being plainly distinguishable. . . . A party may with perfect propriety and consistency insist on the general competency of his witness, although he alleges that his testimony as to one particular fact is erroneous."

1853, *Common Law Practice Commissioners*, Second Report, 16; *Jervis* (later C. J.), *Martin* (later B.), *Walton*, *Bramwell* (later B. and L. J.), *Willes* (later J.), and *Cockburn* (later L. C. J.) (after declaring that "the weight of reason and argument appears to us to be decidedly in favor of the affirmative" for admission, they proceed): "For the admissibility of the proposed evidence, it is said that this course is necessary as a security against the contrivance of an artful witness who otherwise might recommend himself to the party by the promise of favorable evidence (being really in the interest of the opposite party), and afterwards by hostile evidence ruin his cause; . . . that such a power is necessary for the purpose of placing the witness fairly and completely before the Court, and for enabling the jury to ascertain how far he deserves to be believed; that the ends of justice are best attained by allowing the fullest power for scrutinizing and correcting evidence, and that the exclusion of the proof of contrary statements might be attended with the worst consequences. The chief objection to the proposed evidence appears to be that a party, after calling a witness as a witness of credit, ought not to be allowed to discredit him. The objection proceeds upon the supposition that the party first acts on one principle, and afterwards, being disappointed by the witness, turns around and acts upon another, thus imputing to the party something of double dealing or dishonest practice. But it is evident that this does not apply to the case where a party, having given credit to a witness, is deceived by him and first discovers the deceit at the trial of the cause. To reject the proposed evidence in such a case, and repress the truth, would be to allow the witness to deceive both jury and party."

1870, *Mr. J. H. Benton, Jr.*, *arguendo*, in *Hurlburt v. Bellows*, 50 N. H. 112: "We submit that a party does not, by calling a witness, upon one point, vouch for him as entitled to credit upon every point to which he may be called in the case by anybody. He may know very little of the witness. He may even believe his character to be doubtful, and still properly believe that his statements upon the point to which he calls him are true. In such a case there is no reason for saying that the party or his attorney are practising a fraud upon the Court, or asking the jury to give the witness any more credit than he is entitled to. The party calls the witness in good faith, relying upon his previous statements, believing that he will state the truth, and asking for his testimony the exact credit to which it is entitled. Now if the witness has deceived him, and testifies contrary to

those statements, ought not the party to be allowed to show the deception, that the contradiction may be made manifest and the testimony weighed in the scales of truth? Suppose the contradiction does discredit the witness; if his testimony is unworthy of belief, ought not the jury to know it? . . . [By the opposite rule] a party who has been entrapped and deceived by a dishonest and lying witness is compelled to practise an unwilling, but none the less dangerous fraud upon the Court; and thus, not only his interests, but what is of infinitely more importance than the interests of any party, the cause of justice itself, is sacrificed to an unreasonable construction of the law."

There ought to be no hesitation upon the propriety of this evidence. It is receivable on three distinct considerations: 1. The principle of the rule is directed against Character evidence, and fails entirely to touch the present point; 2. The dangers supposed to accompany its use are too speculative and trifling to merit consideration; 3. The exclusion of the evidence would be unjust (1) in depriving the party of the opportunity of exhibiting the truth and (2) in leaving him the prey of a hostile witness. The only real danger that is to be apprehended is that the contradictory statement may be taken by the jury as substantive testimony in the place of the statement on the stand; but this, though a violation of the Hearsay Rule (*post*, § 1018), is not a serious enough disadvantage to outweigh the above considerations, and can always be guarded against by proper instructions.

§ 904. *Same*: (3) **Various Forms of Rule adopted by Different Courts.** The rulings, however, exhibit more than two attitudes taken towards the use of this evidence. There are, of course, (1) Courts which admit the evidence freely in any shape,¹ and (2) Courts which reject the evidence absolutely in every shape.² But there are also several attitudes of compromise and modification, the theories of which need to be examined before noting the rulings.

3. There is the view which admits the evidence after a showing that the party has been *surprised* (or "entrapped," "misled") by his witness, or, as it is sometimes put, that the witness unexpectedly proves adverse.³ This condition does not practically often exclude, since the party is in most cases the victim of such a surprise. But there are two objections to this limitation: (a) Even if the party does know beforehand (by a letter from the witness, for example), that the witness will not adhere to his original story, there is no harm done by allowing him, if he sees fit to call a witness against himself, to show the contradiction; for that is exactly what he could have done if he had left it to the other party to call the witness; he has in fact on the whole profited less than if the latter course had been pursued. (b) In most cases, the contradiction will deal with only one item in the whole story of the witness; and there is no reason why the party should not get

¹ *E. g.* in most of the statutes, *post*. In England by statute the discretion of the trial judge controls; in Kansas the Court has followed this form.

² In many of the earlier rulings, before the distinction as to refreshing recollection was taken.

³ *E. g.* in Missouri, *Dunn v. Dunnaker* (if "entrapped"); in New Hampshire, *Huriburt v.*

Bellevue (in case of surprise by an adverse witness, provided the party acts in good faith); in Mississippi, *Dunlap v. Richardson* ("deceived or misled," etc.); and in probably the majority of jurisdictions. Some Courts carelessly speak of the evidence as admissible "to show surprise." But the surprise is not the thing to be shown by the evidence; it is the surprise that allows the evidence to be received.

the benefit of the witness' testimony on the remaining points and yet show him mistaken in this one item; such a course is in no way dishonest, and to forbid it is to impose a captious and purposeless restriction and to suppress a portion of the truth.

4. Another typical attitude is to exclude the self-contradiction if offered by *extrinsic testimony*, but to allow it if brought out by a question to the witness himself.⁴ This compromise course, too, has nothing in its favor. If a contradiction may be shown, there is no good reason why the party should be restricted to a particular method of showing it. The doctrine of confusion of issues by outside testimony (*post*, § 1019) cannot apply, for it excludes only contradictions on collateral points; these could not be used even against an opponent's witness, and it may be conceded that the offered contradiction must deal with a material point.

(5) Another type of rule is to exclude all use of self-contradictory statements as such, *i. e.* as discrediting the witness' statement on the stand, whether offered by extrinsic testimony or brought out by questions to the witness; but to allow the witness himself to be questioned about the former statement purely for the purpose of *stimulating his recollection* and inducing him to make a correction. This form is second in popularity:

1850, *Coleridge, J.*, in *Melhuish v. Collier*, 10 L. J. Q. B. 493: "A witness from flurry or forgetfulness may omit facts, and on being reminded may carry his recollection back so as to be able to give his evidence fully and correctly, and a question for that purpose may properly be put. . . . It is objected that the object of the question put here was to contradict and not to remind the witness, and that therefore it could not be put. It is certainly very difficult to draw the line in practice, and I am not now disposed to do it."

1889, *Elliot, J.*, in *Babeock v. People*, 13 Colo. 519, 22 Pac. 817: "The tendency of recent legislation, as well of modern decisions, has been to relax somewhat the rules of evidence, so as to afford better opportunity for the development of truth. Modern experience has also shown that a party may sometimes be deceived in the character and animus of a witness whom he has called, as well as in the testimony he is expected to give; and he learns, after the witness begins to testify — a very inopportune time — that he has to encounter bitter and unscrupulous opposition where he had expected to receive only fair and honorable treatment. This may be evinced by reluctance or evasion on the part of the witness in answering questions, or by too great readiness in making or volunteering damaging statements contrary to his previous version of the matter. Under such circumstances, . . . in extreme cases, where it is apparent that a witness is giving testimony contrary to the reasonable expectation of the party calling him, such party should be allowed to cross-examine such witness, for the purpose of refreshing his recollection, with the view of modifying his testimony or of revealing his animus in the case, . . . and to ask him if he has not theretofore made other or different statements from those he has just given in evidence."

This form of the rule has the merit of being consistent with itself, and of recognizing that, however improper it may be thought to be to impeach by self-contradictions, nevertheless this doctrine should in no way prevent the

⁴ *E. g.* in Alabama, *Campbell v. State*; but these rulings usually simply reserve for the future the question of admitting outside testimony, and do not definitely reject it.

A sub-variety occurs in North Dakota (*George v. Triplett*), where there must be surprise by a hostile witness.

always legitimate effort of the party to stimulate his witness' memory and obviate the effect of temporary forgetfulness.⁵ Some Courts allow the question only on condition that the witness is hostile,—a limitation without precedent or justification.⁶ One or two Courts refuse to allow at all this method of refreshing recollection; but this involves the question what methods of refreshing recollection are legitimate, and has already been dealt with (*ante*, § 751).

(6) Another attitude is a kind of compromise between the last two; excluding outside evidence, it allows only the question to be put, primarily to stimulate recollection, but does not object to the incidental discrediting which may ensue:

1873, *Rapallo, J.*, in *Bullard v. Pearsall*, 53 N. Y. 231: "Such questions may be asked of the witness for the purpose of probing his recollection, recalling to his mind the statements he has previously made, and drawing out an explanation of the apparent inconsistency. This course of examination may result in satisfying the witness that he has fallen into error and that his original statements were correct; and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answers of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry; . . . inquiries calculated to elicit the facts, or to show to the witness that he is mistaken, and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility."

1895, *Corliss, J.*, in *George v. Triplett*, 5 N. D. 50, 61 N. W. 891: "This may be done . . . for the purpose of refreshing the recollections of the witness. . . . If the witness is in fact testifying falsely, it may bring him to the truth to probe his conscience, or to call to his mind the danger of punishment for perjury, in view of the fact that he has, by statements out of court inconsistent with his testimony, furnished evidence for his conviction. Moreover, a lawyer of strong personality, burning with indignation at the witness' deceit, may cow and break down a corrupt witness who has told him or his client a different story."⁷

(7) Still another hybrid form of the rule allows the question to be put to the witness, primarily to refresh recollection (as in one preceding form) or frankly to discredit (as in another); but it allows outside testimony to be offered in case the witness proves hostile.⁸

(8) Besides these various forms of the rule, there is found, among many of the Courts that freely admit the self-contradictory statements, a doctrine which excludes a certain class of such statements because they are not in any true sense contradictory, and merely serve to introduce flagrant hearsay. Thus, if A testifies that he knows nothing of the affray in question, this doctrine would forbid the admission of his former statement describing the affair in detail. Now the theory that this is not a self-contradiction⁹ seems un-

⁵ Examples of this may be seen in Iowa, *Hall v. R. Co.*; in Louisiana, *State v. Vickers*; in Michigan, *Dillon v. Pinch*; in South Carolina, *State v. Johnson*.

⁶ *E.g.* in Minnesota, *State v. Tall*; in Ohio, *Harley v. State*, with a flavor also of the next form.

⁷ Other examples may be found in Alabama,

Hemingway v. Garth; in Wyoming, *Arnold v. State*, with a peculiar limitation.

⁸ *E.g.* in the Federal Supreme Court, *Hickory v. U. S.*

⁹ 1883, *Hull v. State*, 98 Ind. 132 ("No fact having been stated, none could be disproved"), and cases cited *post*, § 1043.

sound; for he is clearly false in one or the other of his statements, since one of them in effect asserts that he knows about the affair and the other asserts that he does not. But the additional argument¹⁰ that the admission of such statements would practically allow a party to re-enforce by pure hearsay statements the gaps in his witness' statement seems a satisfactory reason for the prohibition; for it appeals to the well-established principle (*post*, §§ 1013, 1043) that a prior self-contradictory statement is not to be used as original testimony, and here the latter and illegitimate effect of the statement would practically usurp entirely its function as a mere contradiction. It may be noted that the Courts enforcing this doctrine differ as to details. Some seem to exclude such statements in whatever form offered;¹¹ others allow them to be brought out by question to the witness.¹² Moreover, some Courts, instead of holding that the defect of the evidence consists in a lack of self-contradiction, phrase it that the witness is not "adverse," meaning that he has merely failed to help the party offering him.¹³

§ 905. *Same: (4) State of the Law in the Various Jurisdictions.* The foregoing forms of the rule have not always been consistently enforced even within the same jurisdiction. In *England*, in particular, the rule has had a checkered course. Up to the middle of the 1800s the admissibility of this sort of evidence had not been generally conceded, and there were rulings looking in various directions.¹ At this time, as a result of the recommenda-

¹⁰ 1890, Thayer, C. J., in *Langford v. Jones*, 18 Or. 307, 327, 22 Pac. 1064 ("If it were proper [to offer such evidence], a case could be made out many times by proof of what third persons had said; it would only be necessary to call the persons as witnesses and attempt to show by them the substance of the matter embraced in the statements, and, having failed in that, then to prove what such persons had said at another time and place, when they were not under oath, and obtain the benefit of that as direct evidence of the fact. Such a construction would enable parties to employ as a sword what was intended as a shield").

¹¹ *E. g.* in *Indiana*, *Hull v. State*.

¹² *E. g.* in *California*, *People v. Jacobs*; in *Oregon*, *Langford v. Jones*.

¹³ *E. g.* in *Indiana*, *Conway v. State*, — the true explanation being better put in *Hull v. State*; in *Mississippi*, *Chism v. State*, — better put in *Moore v. State*.

¹ 1788, *Warren Hastings' Trial*, *Lords' Journal*, Feb. 9, April 10, 31 *Parl. Hist.* 369 (a question being asked as to former contradictory testimony, it was disallowed by the Judges, apparently on the principle of § 1043, *post*, and not as generally incompetent; such questions seem often to have been allowed elsewhere on this trial, *e. g.* 1788, May 7 and 28; part of the ruling is quoted in *Starkie, Evidence*, 220, and in *Phillips, Evidence*, 3th Amer. ed., 310); 1803, *R. v. Oldroyd*, R. & R. 88 (the judge ordered a person named as witness for the prosecution to be examined, though the prosecutor strongly suspected her to be an accomplice and did not wish to examine her; her testimony favored the accused; and the judge ordered her deposition

before the coroner to be read to show material discrepancies; held proper by all the Judges, as having been ordered by the judge; and *Ellenborough, L. C. J.*, and *Mansfield, C. J.*, also thought that the prosecutor could do the same); 1823, *R. v. Hoyle*, cited in 1 *Moo. & Rob.* 422, *Bayley, J.* (admitted); 1825, *Ewer v. Ambrose*, 3 B. & C. 746 (a contradictory statement was held improperly used as evidence of the fact alleged in it; but as to its use merely to discredit by inconsistency, *Bayley, J.*, inclined to forbid it; *Holroyd, J.*, and *Littledale, J.*, thought it unnecessary to decide the question); 1831, *Bernasconi v. Fairbrother*, cited in 1 *Moo. & Rob.* 427, *Denman, L. C. J.* (admitted); 1834, *Wright v. Heckett*, 1 *Moo. & Rob.* 428 (*Denman, L. C. J.*: "The only proper way of conducting it [the cross-examination] is by proving the witness' former statement in the most distinct and authentic manner"; 1834, *Bolland, B.* ("I think great weight is due to the argument founded on the danger of collusion; it is, indeed, in my mind, the main objection to the reception of the evidence"); 1838, *Dunn v. Aslett*, 2 *Moo. & Rob.* 122, *Denman, L. C. J.* (admitted); 1838, *Holds-worth v. Mayor*, ib. 153, *Parke, B.* (excluded, even though the hostile testimony came out on cross-examination; "it goes to his general credit to show that he has given a different account of the matter before"); 1839, *R. v. Ball*, 8 C. & P. 745, *Erskine, J.* (excluding extrinsic testimony, but apparently allowing the question on cross-examination); *R. v. Farr*, ib. 768, *Patteson, J.* (excluding it from both sources); 1841, *Winter v. Hunt*, 2 *Moo. & Rob.* 357, *Erskine, J.* (excluded; citing another ruling by himself and *Patteson, J.*, and the approval of

tion of the Commission on Procedure (quoted *ante*, § 903), a statute was enacted:

1854, St. 17 & 18 Vict. c. 125, § 22: "[1] A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; [2] but he may, in case the witness shall in the opinion of the judge prove adverse, [3] contradict him by other evidence, [4] or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony."

It is easy to imagine the confusion caused by this bungling paragraph; for the showing of an error by ordinary contradiction, provided for in clause [3], was already freely permissible without interference by the judge and whether or not the witness was adverse; the proviso contained in clause [2] was probably intended for clause [4] as an alternative suggestion, and when the Commission chose the phrase "by leave of the judge" and rejected the other, it was by some draughtsman's mistake transposed to clause [2] instead of being struck out. As the statute stands, the present class of evidence, self-contradictions, is admissible only by leave of the judge and in case of a witness deemed adverse by the judge.²

'several of the other Judges"); *Allay v. Hutchings*, ib., *Wightman, J.* (excluded); 1850, *Melhuish v. Collier*, 19 L. J. Q. B. 493 (admissible, by question to witness, per *Patteson and Erle, JJ.*; *Coleridge, J.*, allowing it for refreshing recollection, and refusing to distinguish the two purposes in practice; outside testimony excluded, per *Patteson and Coleridge, JJ.*, but *semble, contra*, per *Erle, J.*, who said: "It is not necessary to decide the point whether the attorney could be called to contradict [the witness who denied having told him the same story she told on the stand] The majority of the Judges are of opinion that such a course ought not to be allowed; but some judges have continued until the end of their career to think that justice required that such evidence should be admitted"); 1850, *The Lochibo*, 14 Jur. 792, *Dr. Lushington* (not deciding, but expressing a preference for the opinion of *Bolland, B.*; treating prior self-contradictions as a means "absolutely to discredit the witness," and indirectly equivalent to discrediting him by "general evidence"; also making the argument of policy, that "I have yet to learn that a witness is to be tied and pruned down by his signature before; I think it is for the interests of justice, and the only way to get at the truth, that a witness should go before the examiner to give his evidence not tied down or coerced by any statement previously made to any solicitor or proctor in the cause"; the learned Judge was probably moved by Scotch traditions); 1853, *R. v. Williams*, 8 Cox Cr. 343, *Williams, J.* (allowing a witness who has given an unexpected answer to be shown his deposition and then asked once more, and afterwards to be questioned in leading form from the deposition).

² The principal question of interpretation in the ensuing rubrics is as to the meaning of "adverse": *England*: 1858, *Greenough v. Eccles*, 5 C. B. n. s. 786, 28 L. J. C. P. 160 ("adverse" is interpreted as "hostile," in distinction from merely "unfavorable"; so that the conditions for

are (1) that the judge shall consider him hostile, and (2) that the judge shall also give leave, which he need not do even though the witness is hostile; *Cockburn, C. J.*, not "altogether assenting"); 1858, *Reed v. King*, 30 L. T. R. 290 (a prior conversation with the offering party's attorney; excluded on obscure grounds); 1858, *Faulkner v. Brine*, 1 F. & F. 254, *Lord Campbell, C. J.* (permitting the question, but not clearly specifying the conditions); 1859, *Dear v. Knight*, ib. 433, *Erle, J.* (same); *Martin v. Ins. Co.*, ib. 505, *Wightman, J.* (same); but the practice in all three cases seems to be to treat any unfavorable statement on a material point as "adverse," thus negating the interpretation of "hostile" accepted in *Greenough v. Eccles*; 1861, *Jackson v. Thomson*, 1 B. & S. 745 (allowing the use of a series of letters; *Cockburn, C. J.*, intimating that a compulsory witness may still be attacked as at common law); 1867, *Ryberg v. Smith*, 32 L. J. P. M. & A. 112 (a useless precedent, since the Judge Ordinary excluded the evidence in entire forgetfulness of § 22); 1864, *Cresswell v. Jackson*, 4 F. & F. 3, *Cockburn, C. J.*; 1865, *Pound v. Wilson*, ib. 301, *Erle, C. J.* (both apparently construing "adverse" as merely "different and unfavorable"); 1866, *Coles v. Brown*, L. R. 1 P. & D. 70, *Sir J. P. Wilde, seimble* (adopting the distinction of *Greenough v. Eccles*); 1867, *Amstell v. Alexander*, 16 L. T. R. n. s. 840, *Branwell, B.* (referring to the interpretation in *Greenough v. Eccles*, but apparently disapproving it and treating "adverse" as meaning "unfavorable"); 1887, *R. v. Little*, 15 Cox Cr. 319, *Day, J.* (the witness for the prosecution in rape appearing adverse; here the Stat. 28 & 29 Vict. c. 18, § 3, extending the preceding one to criminal cases, was applied); 1886, *Rice v. Howard*, L. R. 16 Q. B. D. 681, *Grove and Stephen, JJ.* (treating "adverse" as equivalent to "hostile," and leaving the determination of the fact wholly with the trial Judge); 1888, *Parnell Commission's Proceedings*, 11th, 21st, 27th days, *Times*

In the *United States*,² fortunately, only a few jurisdictions have adopted the English statute. But the variety of attitude in the different jurisdic-

Rep. pt. 3, pp. 140, 146, pt. 6, p. 94, pt. 7, pp. 181 ff., 212 (the statute does not seem to have been referred to at all; here extrinsic testimony was received to show surprise, but not to discredit); *Canada*: Dom. Crim. Code 1892, § 699 (like Eng. St. 1854, c. 125, § 22); B. C. Rev. St. 1897, c. 71, § 33 (like Eng. St. 1854, c. 125, § 22); N. Br. Cons. St. 1877, c. 46, § 19 (like Eng. St. 1854, c. 125, § 22); 1862, *Davidson v. Arsenau*, 5 All. N. Br. 239, *semble* (*Meluish v. Collier* approved); Newf. Cons. St. 1892, c. 57, § 17 (like Eng. St. 1854, c. 125, § 22); N. Sc. Rev. St. 1900, c. 163, § 43 (like Eng. St. 1854, c. 125, § 22); Ont. Rev. St. 1897, c. 73, § 20 (like Eng. St. 1854, c. 125, § 22); 1881, *Dunbar v. Meek*, 32 U. C. Q. B. 195, 213 (statute applied); P. E. I. St. 1889, c. 9, § 15 ("he may contradict him by other evidence, or, by leave of the judge in case the witness shall in the opinion of the judge prove adverse, prove that he has made at other times," etc., as in Eng. St. 1854, c. 125, § 22; this corrects the anomalous wording of the English statute).

² The citations *ante*, § 761 (refreshing recollection by asking about prior testimony), should be compared with the following: *Alabama*: 1829, *Winston v. Moseley*, 2 Stew. 137, *semble* (excluded); 1853, *Campbell v. State*, 23 Ala. 44, 76 (after examining the authorities, admits the question to the witness, to discredit; but leaves undecided the admissibility of outside evidence); 1874, *Hemingway v. Garth*, 51 id. 530 ("It is not an objection to such evidence that it has a tendency to impeach the witness"; admitting a question to the witness); 1892, *Thompson v. State*, 99 id. 173, 175, 13 So. 753 (refreshing memory by calling attention to report of former testimony, allowed); 1892, *Louisville & N. R. Co. v. Hurt*, 101 id. 34, 43, 13 So. 130 (questions as to former testimony, allowed to refresh memory); 1896, *Feibelman v. Assn. Co.*, 108 id. 180, 19 So. 540 (admitting the question to stimulate recollection, after unfavorable testimony); 1898, *Thomas v. State*, 117 id. 178, 23 So. 665 (allowed on cross examination "to show surprise," in spite of incidental discrediting; *Coleman, J., diss.*); 1900, *Schieffelin v. Schieffelin*, 127 id. 14, 28 So. 687 (allowable in case of surprise or to refresh memory); *Alaska*: C. C. P. 1900, § 667 (like Or. Annot. C. 1892, § 838); *Arkansas*: Stats. 1894, § 2958 (may show "that he has made statements different from his present testimony"); 1884, *Ward v. Young*, 42 Ark. 543, 553 (statute applied); *California*: C. C. P. 1872, § 2049 ("The party producing a witness . . . may also show that he has made at other times statements inconsistent with his present testimony"); 1874, *People v. Jacobs*, 49 Cal. 384 (the testimony not being hostile, but merely falling short of what was expected, questions as to former statements were allowed, but outside evidence was excluded; intimating that for a witness unexpectedly hostile the evidence would be received"); 1889, *People v. Bushon*, 80 id. 161, 22 Pac. 127, 549 (former testimony at a coroner's inquest read over to the witness, and then, on his denial, allowed to be proved; no cases cited); 1891, *People v. Wallace*, 89 id. 158, 163, 26 Pac. 650 (same as *People v. Jacobs* in facts; outside evidence of prior declarations excluded, since they would "enable the party to get the naked declarations of the witness before the jury as independent evidence"); 1892, *People v. Mitchell*, 94 id. 550, 556, 29 Pac. 1106 (same as *People v. Jacobs*, in facts; but even the question was not allowed, by a misunderstanding of the *Jacobs* ruling); 1893, *People v. Kruger*, 100 id. 523, 35 Pac. 88 (rule of surprise applied); 1894, *Re Kennedy*, 104 id. 429, 431, 38 Pac. 93 (like *People v. Wallace*); 1895, *Hyde v. Buckner*, 108 id. 522, 41 Pac. 416 (admitting outside testimony in case of surprise); 1896, *People v. Crespi*, 115 id. 50, 46 Pac. 863 (excluded, because offered as a substitute for testimony and not merely to show surprise); 1897, *People v. Durrant*, 116 id. 179, 48 Pac. 75 (reading from former testimony, allowed); 1897, *Thiele v. Newman*, ib. 371, 48 Pac. 713 (outside testimony, allowed, in case of surprise); *Colorado*: 1889, *Babcock v. People*, 13 Colo. 519, 22 Pac. 813 (excluding outside testimony, but admitting the question to stimulate recollection; see quotation *ante*, § 904). *Columbia* (District): Code 1901, § 1073 a, as contained in U. S. St. 1902, c. 1329 (when a party producing a witness has been "taken by surprise by the testimony of such witness," the Court may in discretion allow the party to prove "for the purpose only of affecting the credibility of the witness, that the witness has made to such party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause," upon due warning as to the "circumstances of the supposed statement" and an opportunity to explain); 1894, *Weaver v. B. & O. R. Co.*, 3 D. C. App. 436, 448 (prior testimony, not allowed to be asked for on cross-examination; partly on the ground of the trial Court's discretion, partly on other mixed grounds; general principle of surprise conceded, at least so as to permit cross-examination to such matters); 1895, *Stearman v. R. Co.*, 6 id. 46, 51 (refreshing his recollection by reading aloud to him, in the jury's presence, his former affidavit, held properly refused); *Connecticut*: 1896, *Wheeler v. Thomas*, 67 Conn. 577, 35 Atl. 499 (excluded); 1902, *Carputer's Appeal*, 74 id. 431, 51 Atl. 126 (allowable in the discretion of the trial Court, where the party is surprised); *Delaware*: 1899, *State v. Wright*, 2 Pen. 228, 45 Atl. 395 (may "contradict his own witness when taken by surprise"); 1899, *State v. Quinn*, ib. 339, 45 Atl. 544 (admissible where surprise is suggested); *Florida*: Rev. St. 1892, § 1101 (a party "may, in case the witness prove adverse, contradict him by other evidence, or prove that he has made at other times a statement inconsistent with his present testimony"); 1899, *Mercer v. State*, 41 Fla. 279, 26 So. 317 (witness to immaterial matter cannot be "adverse"); 1903, *Bryan v. State*, — id. —, 34 So. 243 (statute applied; whether a witness is "adverse," is much in

tions and the indiscriminate citation of rulings from other Courts, together with the indecision of the earlier English precedents, has tended to produce

the trial Court's discretion); 1903, *Sylvester v. State*, — id. —, 35 So. 142 (prior statements of a witness not appearing hostile, not admitted to impeach; *semble*, admissible to refresh memory); *Georgia*: Code 1893, § 5290, Cr. C. § 1024 (impeachment, in general, allowable "where he can show to the Court that he has been entrapped by the witness by a previous contradictory statement"); statute applied in the following rulings: 1874, *McDaniel v. State*, 51 Ga. 253; 1878, *Garrett v. Sparks*, 60 Id. 582, 586; 1881, *Cox v. Prater*, 67 Id. 588, 593; 1891, *Dixon v. State*, 86 Id. 754, 13 S. E. 87; *Hawaii*: Civil Laws 1897, § 1421 ("in case the witness shall in the opinion of the Court . . . prove adverse," the party producing him "may by leave of such Court or other person prove that he has made at other times a statement inconsistent with his present testimony"); 1898, *Kwong Lee Wai v. Ching Sai*, 11 Haw. 444, 448 (in case of surprise, the witness may be asked about a prior inconsistent statement, and extrinsic proof of it may be made); *Idaho*: Rev. St. 1887, § 6080 (like Cal. C. C. P. § 2049); 1900, *State v. Corcoran*, 7 Ida. 220, 61 Pac. 1014 (statute applied); *Indiana*: Rev. St. 1897, § 520 (party may "in all cases contradict him . . . by showing that he has made statements different from his present testimony"); the original Civil Code section contained a similar provision: 1861, *Judy v. Johnson*, 16 Ind. 371; 1862, *Hill v. Goode*, 18 Id. 207, 209; but the Criminal Code at that time lacked such a provision: 1860, *Quinn v. State*, 14 Ind. 589 (applying the rule of exclusion to criminal cases); 1870, *Howard v. State*, 32 Id. 478 (cross-examination only, allowed, to "refresh the memory of the witness and give him the opportunity to set the matter right"); this lack, in criminal cases, was supplied by Rev. St. 1881, § 1796; and the statutory rule has since been applied as follows: 1883, *Hull v. State*, 93 Ind. 128, 132 (excluded, where the witness simply fails to make the desired assertion); 1888, *Conway v. State*, 118 Id. 482, 488, 21 N. E. 285 ("the only limitation is that . . . he has given testimony prejudicial to the party"); 1890, *Miller v. Cook*, 124 Id. 101, 104, 24 N. E. 577 (like *Hull v. State*); 1889, *Crocker v. Agnew*, 122 Id. 585, 24 N. E. 169; 1895, *Blough v. Parry*, 144 Id. 463, 40 N. E. 70 (like *Hull v. State*); 1901, *Adams v. State*, 156 Id. 596, 59 N. E. 24; (statute applied); *Iowa*: 1886, *Humble v. Shoemaker*, 70 Ia. 223, 226, 30 N. W. 492 (question allowed, to refresh recollection and induce correction); 1888, *State v. Cummins*, 76 Id. 133, 135, 40 N. W. 124 (question allowed, to refresh recollection); 1892, *Hall v. R. Co.*, 84 Id. 311, 315, 51 N. W. 150 (question allowed, to refresh his recollection, to allow him to make a correction, and "to show that it has surprised the party who called him"; but no outside testimony allowable); 1896, *Spaulding v. R. Co.*, 98 Id. 205, 67 N. W. 227 (question as to testimony at a former trial, admitted "to test and quicken his recollection, and give him an opportunity to correct his testimony"); 1896, *Hall v. Manson*, 99 Id. 698, 68 N. W. 922 (apparently allowing the witness to be questioned, but rejecting outside testimony); 1894, *Smith v. Dawley*, 92 Id. 312, 60 N. W. 625 (excluding outside testimony); *Kansas*: 1882, *Johnson v. Leggett*, 28 Kan. 590, 605 (the trial Court "may, when it thinks the interests of justice require, permit a party to show that he is unexpectedly mistaken in the testimony of any witness, and what such other testimony would be"); 1886, *St. Louis & S. F. R. Co. v. Weaver*, 35 Id. 412, 431 (admitted, in discretion, by outside testimony); 1892, *State v. Sorter*, 52 Id. 531, 34 Pac. 1036 (admitted); *Kentucky*: C. C. P. 1895, § 596 (allowed unconditionally); applied in the following cases: 1859, *Champ v. Com.*, 2 Metc. 17, 23 (here the statement was excluded, because the witness had simply failed to allude to the matter on the stand); 1876, *Blackburn v. Com.*, 12 Bush 181, 184; 1892, *Wynn v. R. Co.*, — Ky. —, 20 S. W. 215 (admitted); 1896, *Pittsburg C. C. & St. L. R. Co. v. Lewis*, — id. —, 38 S. W. 482, *semble* (admitted, to refresh recollection); 1901, *Feltner v. Com.*, — id. —, 64 S. W. 959 (prior statements excluded; opinion obscure); 1903, *Mosley v. Com.*, — id. —, 72 S. W. 344 (prior statements held admissible, under C. C. P. § 596, but not as substantive evidence); *Louisiana*: 1876, *State v. Thomas*, 28 La. An. 827 (excluded); 1885, *State v. Simon*, 37 Id. 569 (admitted, where it was incidental and the party was taken by surprise); 1886, *State v. Boyd*, 38 Id. 105 (admissible, where the witness is unwilling, *semble*; none of the three cases consider the rule carefully); 1895, *State v. Johnson*, 47 Id. 1225, 17 So. 789 (admissible, in case of surprise); 1895, *State v. Vickers*, ib. 1574, 18 So. 639 (cross-question only admissible, in case of surprise and to stimulate recollection); 1900, *State v. Robinson*, 52 Id. 616, 27 So. 124 (question as to former testimony, excluded on the facts; principle obscure); *Maine*: 1840, *Dennett v. Dow*, 17 Me. 73, 22 (excluded); 1847, *Chamberlain v. Sauds*, 27 Id. 458, 466 (same); *Maryland*: 1807, *De Sobry v. De Laistre*, 2 H. & J. 219 (a deposition abroad *de bene* taken by defendant, allowed to be contradicted by defendant by letters to him from the opponent); 1821, *Queen v. State*, 5 H. & J. 232 (admitted); 1839, *Franklin Bank v. Navig. Co.*, 11 G. & J. 36 (excluded); 1877, *Sewell v. Gardner*, 48 Md. 178, 183 (where the party was misled, he may "contradict the witness' statement by his own or other testimony"; here he was not misled); *Massachusetts*: The common-law rulings were here inclined to a radical exclusion: 1852, *Com. v. Starkweather*, 10 Cush. 59 (exclusion of both question and outside evidence); 1855, *Com. v. Welsh*, 4 Gray 535, *semble* (same); 1858, *Com. v. Hudson*, 11 Id. 64 (same, even where the question was asked on cross-examination after the opponent had made the witness his own); 1867, *Adams v. Wheeler*, 13 Id. 67 (excluding statements which "can have no effect but to impair the credit of the witness

confusion in our law, even within the rulings of the same jurisdiction. The sound and simple remedy would be by statute to abolish all limitation

with the jury"; reversing the question of admissibility to refresh recollection or in case of surprise by a hostile witness). Int. r. 1869, by statute (c. 423; Pub. St. 1882, c. 169, § 22, Rev. L. 1902, c. 173, § 24; like Cal. C. C. P. § 2049, using "prove" instead of "show"), the use of the evidence was freely permitted; applied in the following rulings: 1869, *Ryerson v. Abington*, 102 Mass. 531; 1873, *Bramon v. Hursell*, 112 id. 63, 70; 1875, *Day v. Cooley*, 118 id. 524, 526; 1877, *Force v. Martin*, 122 id. 5; 1877, *Brooks v. Weeks*, 121 id. 433 (politling out that the party need not show surprise); 1882, *Com. v. Donahoe*, 133 id. 407; 1899, *Knigh v. Rothschild*, 172 id. 546, 52 N. E. 1062; *Michigan*: 1895, *People v. Case*, 103 Mich. 92, 62 N. W. 1017 (opinion obscure; cross examination to contrary statements in a deposition read to the witness, allowed); 1895, *People v. O'Neill*, 107 id. 556, 65 N. W. 540 (calling the attention of hostile witnesses to their testimony before the grand jury to refresh their memories, allowed); 1896, *Dillon v. Puch*, 110 id. 149, 67 N. W. 1113 (the question may be put, in the trial Court's discretion); 1897, *People v. Gillespie*, 111 id. 241, 69 N. W. 490 (question as to a former contradictory affidavit allowed, to induce the witness to state what she knew"); 1898, *Gilbert v. R. Co.*, 116 id. 610, 74 N. W. 1010 (in discretion, the question may be put to refresh recollection); 1899, *McGee v. Banm-gartner*, 121 id. 287, 80 N. W. 21 (inconsistent affidavit admitted, and witness' explanation that it was obtained by threats contradicted by the testimony of the drawer of the affidavit); 1902, *People v. Payne*, — id. —, 91 N. W. 739 (cross-examination to contrary statement, allowed, "not as substantive proof, but as explaining why he had called him"); 1903, *Westphal v. R. Co.*, — id. —, 8 N. W. 19 ("a party will not be permitted to impeach his own witness by showing contradictory statements"; none of the foregoing cases cited); *Minnesota*: 1867, *State v. Johnson*, 12 Minn. 476, 486 (question allowable "either to lead the witness to correct her testimony, or to save the party calling her from being sacrificed by the witness"); 1890, *State v. Tall*, 43 id. 273, 275, 45 N. W. 449 (question admissible "not for the purpose of discrediting the witness, but as a proper means of inducing him to tell the truth," provided he is hostile); 1893, *Selover v. Bryant*, 54 id. 434, 56 N. W. 58 (prior self-contradiction, admissible, in case of surprise, in the trial Court's discretion; *Gillilan, C. J.*, diss.); *Mississippi*: 1881, *Moore v. R. Co.*, 59 Miss. 243, 248 (admissible, where it appears that the party was surprised; here the record indicated the contrary, and nothing was shown to remove this indication); 1886, *Dudlap v. Richardson*, 63 id. 447, 449 (admissible where "deceived or misled by fraud or artifice practised on him by the witness"); 1893, *Chism v. State*, 70 id. 742, 12 So. 852 (approving the preceding two); 1898, *Hacot v. Lumber Co.*, — id. —, 23 So. 481 (allowed, where there was hostility on cross-examination and also surprise); nevertheless, under the doctrine of (8), § 904, ante, these statements may be excluded: 1881, *Moore v. R. Co.*, 59 Miss. 243, 248 (failure to testify to certain injuries; former assertions of the injuries excluded, as there was nothing to impeach; whether such assertions could be referred to to refresh the memory, undecided); 1893, *Chism v. State*, 70 id. 742, 12 So. 852 (the witness professed to know nothing of the killing; former assertions about it excluded, because "the first and essential thing is that the testimony of the witness must be adverse"); *Missouri*: 1885, *Dunn v. Dunnaker*, 87 Mo. 597, 600 (admissible only where "the party is entrapped" into offering a witness who disappoints him); 1896, *State v. Burks*, 132 id. 363, 34 S. W. 48 (not admissible "unless the party is entrapped into offering" a witness who proves faithless; shortly termed, "a surprise"); 1899, *Feary v. O'Neill*, 149 id. 467, 50 S. W. 918 (not allowed where there was no surprise or misleading); 1903, *State v. Coats*, 174 id. 396, 74 S. W. 864 (defendant's witness' memory allowed to be refreshed by reading her prior contradictory testimony); *Montana*: *C. C. P.* 1895, § 3377 (like Cal. C. C. P. § 2049); 1898, *State v. Floor*, 20 Mont. 574, 52 Pac. 611 (statute applied; the suggestion of the defendant's counsel that the statute violated the constitutional guarantee of due process of law was of course repudiated; *New Hampshire*: 1870, *Hurlburt v. Bellows*, 30 N. H. 105, 116 (admissible in case of surprise and absence of collusion or bad faith, if the witness is adverse); 1885, *Whitman v. Morey*, 63 id. 448, 456, 2 Atl. 899 (same); *New Jersey*: 1840, *Brewer v. Porch*, 17 N. J. L. 377, 379 (excluded); 1897, *Kohl v. State*, 59 id. 445, 36 Atl. 931, 37 Atl. 73 (excluded); *New Mexico*: *Comp. L.* 1897, § 3026 ("In case the witness, in the opinion of the judge, proves adverse, such party may prove that the witness made at other times a statement inconsistent with his present testimony"); *New York*: 1830, *Lawrence v. Barker*, 5 Wend. 301, 305 (Savage, C. J., allowing "great latitude of examination" in certain cases, but not specifying the use of self-contradictory statements); 1847, *People v. Safford*, 5 Den. 112, 116 (excluded, on the theory that to contradict by showing error "does by no means involve the witness in the crime of perjury, but may be reconcilable with the most perfect integrity and good faith," while a prior self-contradiction necessarily involves an "impeachment"); 1850, *Thompson v. Blanchard*, 4 N. Y. 303, 311 (excluded); 1873, *Bullard v. Pearsall*, 53 id. 230 (excluded, "when the sole object of such proof is to discredit the witness"; thus extrinsic proof is absolutely excluded, while cross-examination is possible for the purpose of refreshing recollection and obtaining explanation or correction; allowable, therefore, on cross-examination only; but the ruling on the facts is confused; the form of question intended to be sanctioned being apparently, "whether he had not made a prior state-

on this kind of evidence; and this step has in some States already been taken.

ment to such-and-such an effect"); 1874, *Conter v. Express Co.*, 56 *Id.* 585, 566 (excluded, "when it is only material as it bears upon credibility"; but conceding an exception "on the ground of surprise, as contrary to" just expectations, or of deceit of the opponent; citing *Melnhish v. Collier*, but misunderstanding it); 1887, *Becker v. Koch*, 104 *Id.* 394, 402, 10 *N. E.* 701 (prior self-contradictory statements absolutely inadmissible to impeach; as matter of law, "not open to discussion"; though, as a policy, apparently questioned; yet, in this very case, curiously enough, the witness' self-contradictory statements on the direct examination were allowed to be employed, and the right conceded "to show that a portion of the evidence of your own witness is untrue, by comparing it with another portion of the evidence of the same witness and with the other facts in the case"); 1888, *Cross v. Cross*, 108 *Id.* 628, 15 *N. E.* 333 (following *Becker v. Koch*, and allowing a husband, called by the wife in a suit for divorce based on abandonment, to be discredited, as to his denials of intent to abandon, by "the facts and circumstances of his conduct, his letters and declarations," i. e. allowing freely the use of prior self-contradictions, but putting it on the ground of the witness being really hostile and interested; erroneously fathering this view upon the case of *Becker v. Koch*); 1889, *People v. Kolly*, 113 *Id.* 647, 651, 21 *N. E.* 122 (former testimony; *Billard v. Pearsall* approved; yet here the former statement was not contradictory, but merely supplied an omission); 1890, *De Meli v. De Meli*, 120 *Id.* 483, 490, 24 *N. E.* 996 (approving *Becker v. Koch*); 1897, *People v. Burgess*, 153 *Id.* 561, 47 *N. E.* 889, *semble* (excluded); *North Carolina*: 1796, *State v. Norris*, 1 *Hayw.* 429, 437 (excluding the evidence in civil cases, but admitting it in criminal cases, because of the possibility of imposing on the State's attorney); 1805, *Sawrey v. Murrell*, 2 *Id.* 397, *semble* (same); 1849, *Neil v. Childs*, 10 *Ireal.* 195, 197, *semble, contra* (left undecided); 1851, *Hice v. Cox*, 12 *Id.* 315, *semble* (same); 1833, *State v. Taylor*, 88 *N. C.* 696 (outside testimony excluded); *North Dakota*: 1895, *George v. Triplett*, 5 *N. D.* 50, 63 *N. W.* 891 (question allowable, where surprised by a hostile witness; as to outside testimony, point reserved); *Ohio*: 1889, *Hurley v. State*, 46 *Oh.* 320, 322, 21 *N. E.* 645 (admissible only on cross-examination; not "merely to impeach the witness," but "for the purpose of refreshing his recollection and inducing him to correct his testimony or explain his apparent inconsistency," provided the party is surprised by "unexpected adverse testimony"; and the precedents are carefully examined); *Oklahoma*: 1900, *Drury v. Terr.*, 9 *Okl.* 398, 60 *Pac.* 101, *semble* (inadmissible); *Oregon*: *C. C. P.* 1892, § 838 (like *Cal. C. C. P.* § 2049); 1890, *Langford v. Jones*, 18 *Or.* 307, 325, 22 *Pac.* 1064 (the witness professed ignorance of the subject; former assertions excluded, when offered by outside evidence, because there was no testimony to contradict; but the witness may be asked about such statements, to refresh his memory); 1896, *State v. Steeves*, 29 *Id.* 85, 43 *Pac.* 947, *semble* (here the witness merely failed to prove what was expected; opinion obscure); 1898, *State v. Bartmess*, 33 *Id.* 110, 54 *Pac.* 167 (witness hostile; self-contradictions allowed to be shown by others; in any case, refreshment of memory by cross-examination after unexpected testimony is allowed); 1901, *State v. McDaniel*, 39 *Id.* 161, 65 *Pac.* 520 (admissible under *C. § 838*); *Pennsylvania*: 1781, *Rapp v. Le Blanc*, 1 *Dall.* 63, *semble* (excluded); 1825, *Cowden v. Reynolds*, 12 *S. & R.* 281, 283 (admitted); 1835, *Craig v. Craig*, 5 *Rawle* 91, 95, *semble* (same); 1838, *Stockton v. Demuth*, 7 *Watts* 39, 41 (excluded, not citing this case); 1838, *Smith v. Price*, 8 *Id.* 447 (same); 1843, *Bank of N. Liberties v. Davis*, 6 *W. & S.* 283, 288 (admitted, citing the first case only); 1848, *Harden v. Hays*, 9 *Pa. St.* 151, 159 (admitted); 1868, *Stearns v. Bank*, 53 *Id.* 490 (excluded, two judges dissenting); 1892, *Fisher v. Hart*, 149 *Id.* 232, 24 *Atl.* 225 (cross-examination to prior contradictory statements, excluded, apparently because the witness had shown no hostile bias); 1892, *McNerney v. Reading*, 150 *Id.* 611, 615, 25 *Atl.* 57 (the witness being unwilling and his testimony a surprise, cross-examination to contradictory statements was held allowable in discretion); 1898, *Morris v. Guffey*, 188 *Id.* 534, 41 *Atl.* 731 (allowed, on the facts); *South Carolina*: 1884, *Bauskett v. Keith*, 22 *S. C.* 187, 199 (excluded); 1895, *State v. Johnson*, 43 *Id.* 123, 20 *S. E.* 988 (adhering to the precedent, but allowing the witness to be asked to induce correction); *Tennessee*: 1848, *Story v. Saunders*, 8 *Humph.* 663, 666 (excluded); *Texas*: *C. Cr. P.* 1895, § 795 (allowed; see quotation *ante*, § 900); 1894, *Erwin v. State*, 32 *Tex. Cr.* 519, 24 *S. W.* 904 (excluded, where on the stand the witness failed to affirm a decided fact); 1898, *Ross v. State*, — *Id.* —, 45 *S. W.* 808 (prior self-contradiction apparently allowable in case of surprise); 1900, *Spangler v. State*, 41 *Id.* 424, 55 *S. W.* 326 (former testimony containing a prior self-contradictory statement, held inadmissible, where it merely affirms what the witness has failed to testify to on the stand; but the witness may be shown the prior testimony so as to recall the fact to his mind, if possible); 1900, *Brown v. State*, 42 *Id.* 176, 58 *S. W.* 131 (former testimony held to be improperly used on the facts; *Spangler's Case* approved); 1903, *Barnard v. State*, — *Id.* —, 73 *S. W.* 957 (statute applied; surprise is not required); *United States*: 1884, *The Charles Morgan*, 115 *U. S.* 69, 77, 5 *Sup.* 1172; 1893, *Hickory v. U. S.*, 151 *Id.* 303, 309, 14 *Sup.* 334 (questioning allowed to refresh recollection and induce a correction; outside evidence intimated to be allowable in the discretion of the trial Court where the witness unexpectedly proves hostile; for other Federal decisions see *ante*, § 761); 1893, *St. Clair v. U. S.*, 154 *Id.* 134, 150, 14 *Sup.* 1002 ("The rule is correctly intimated by Greenleaf, when he says [§ 444]. . . [The party may] show that the evidence has taken him by surprise and is contrary to the examination of the witness preparatory to the trial"); 1899, *Swift v. Short*, 34 *C. C. A.* 545, 92 *Fed.* 567 ("under some circum-

§ 906. **Same: (5) Rules for Prior Warning to the Witness, etc.; Rule for Party's Admission.** (1) So far as impeachment by prior self-contradiction is permitted, under any of the foregoing doctrines, the ordinary rules for that mode of impeachment become applicable (*post*, §§ 1017-1046). In particular, the witness must be asked, before extrinsic testimony is adduced, whether he made the statement;¹ and the statement, if however proved, has only an impeaching effect and is not *independent testimony*.²

(2) So far as impeachment by prior self-contradiction is under any of the foregoing doctrines *prohibited*, the prohibition does not apply to a *party's admission*, which is receivable as such, even though it be also a self-contradiction of himself as witness.³

§ 907. **Contradiction by Other Witnesses, not forbidden.** The process of contradiction by other witnesses (*post*, § 1000) has for its object (1) to demonstrate an error of the first witness, and (2) to argue that the commission of this error shows him capable of making other errors. The second step of the argument is one that would not usually be resorted to against one's own witness, though such occasions may arise; but in both aspects the permission to employ such opposing evidence is now fully accorded, and this permission, even to the extent of only the first step in the argument, signifies the overthrow of the earlier notion that a party is bound by his witness' statement or guarantees his credibility. This notion, as already observed (*ante*, § 896), is

stances . . . the party so deceived may impeach the witness to the extent of showing "prior contradictory statements": 1900, *Clary v. Hardeeville Brick Co.*, 100 Fed. 915 (allowed, where the opponent's witness has not been allowed in chief to be cross-examined to self-contradictory statements under the rule of § 1885, *post*, and therefore is allowed to be recalled by the cross-examiner during his own case for that purpose); 1906, *Hays v. Tacoma R. & P. Co.*, 106 Fed. 48 (allowed, in case of surprise); 1901, *Tacoma R. & P. Co. v. Hays*, 49 C. C. A. 115, 110 Fed. 496 (trial Court's discretion conceded; following *Hickory v. U. S.*); *Vermont*: 1862, *Fairchild v. Bascomb*, 35 Vt. 398, 405, 417 (excluded); 1883, *Cox v. Eayres*, 55 id. 24, 27, 35 (excluded; there being no discretion for the trial Court); rule changed by St. 1886, c. 49, now St. 1894, § 1247 (allowable "by leave of Court," "when in the opinion of the Court a witness produced by a party is adverse"); applied in the following cases: 1890, *Hurlburt v. Hurlburt's Estate*, 63 id. 667, 670, 22 Atl. 850; 1891, *Good v. Knox*, 64 id. 97, 99, 23 Atl. 520; 1897, *State v. Slack*, 69 id. 486, 38 Atl. 311; 1901, *Davis v. Buchanan*, 73 id. 67, 50 Atl. 545; (*State v. Slack* followed); 1901, *McGovern v. Smith*, ib. 52, 50 Atl. 549 (similar); *Virginia*: St. 1899-1900, c. 117, § 1 (a party may "in case the witness shall in the opinion of the Court prove adverse, contradict him by other evidence, or by leave of the Court prove that he has made in other times a statement inconsistent with his present testimony. . . . In every such case the Court, if requested by the other party, shall instruct the jury not to consider the evidence of such inconsistent statements, except for the

purpose of contradicting the witness"); 1902, *Gordon v. Funkhouser*, 100 Va. 675, 42 S. E. 677 (statute applied); *West Virginia*: 1900, *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626 (admitted to show the good faith of the party offering); *Wisconsin*: 1892, *Richards v. Stato*, 82 Wis. 172, 180, 51 N. W. 652 (excluded; "this rule is elementary"); 1898, *Suttan v. R. Co.*, 98 id. 157, 73 N. W. 993, *semble* (allowable in discretion, for an adverse witness); 1898, *Collins v. Hoehle*, 99 id. 639, 75 N. W. 416 (self-contradictions excluded, both on cross-examination and by others); *Wyoming*: 1895, *Arnold v. Stato*, 5 Wyo. 439, 40 Pac. 967 (question admissible, for a hostile witness, to stimulate recollection, even if discredit incidentally follows); St. 1895, c. 68 (a party may, as to his own witness, show "that he has made at other times statements inconsistent with his present testimony, and this rule should apply to both civil and criminal cases"); 1903, *Horn v. Stato*, — Wyo. —, 73 Pac. 705 (statute applied).

¹ *Post*, § 1028. The statutes cited *ante*, § 905, provide usually (but superfluously) for this.

² 1825, *Ewer v. Ambrose*, 3 B. & C. 746 (where a prior deposition was offered, and the trial judge left it to the jury whether they would "give credit to S. B.'s answer in Chancery or to his testimony given in Court"; *Holroyd, J.*, pointed out that the contradictory statement could not be used "to prove substantively" its allegation); 1877, *Brooks v. Weeks*, 121 Mass. 433; 1847, *People v. Safford*, 5 Den. 112, 117; and cases cited *post*, § 1018.

³ *Post*, § 1051.

found as late as the 1700s;¹ but by the end of that century the doctrine was clearly laid down that one's own witness could always be contradicted by others and his error shown;² and this became established law (though not without an occasional trace of the older notion³) by the first half of the 1800s.⁴ In 1854, however, came the statute (quoted *ante*, § 905) in which the anomalous condition was inserted that the witness should be deemed adverse by the judge. The limitation thus blunderingly put upon the right to contradict has however been practically read out of the statute.⁵

In the United States, except for an occasional earlier ruling,⁶ the same result has been reached at common law, though statutes have occasionally confirmed it.⁷

¹ The earlier cases usually speak in general terms of a prohibition against discrediting one's own witness; but it seems likely that this included a prohibition even against proving his error by other witnesses: 1700, *Adams v. Arnold*, 12 Mod. 375 ("And here Holt [C. J.] would not suffer the plaintiff to discredit a witness of his own calling, he swearing against him"); 1722, *Eyre, J.*, cited in *Vin. Abr.* XII, 48, tit. Evidence ("The party who produceth a witness cannot examine to the discredit of such witness"); the turning point seems to be the following case: 1738, *Rice v. Outfield*, 2 Stra. 1095 ("It was argued on behalf of the defendant that the plaintiff could not be allowed to contradict his former evidence," but it was answered that "if there was any contradiction, it is no objection"; citing *Pike v. Badmering*, in *L. C. J. Pratt's* time, unreported; and the Court unanimously received the evidence).

² *Id.* 1767, *Buller*, *Trials at Nisi Prins*, 297 ("But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that those facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only;") 1762, *Lowe v. Jolliffe*, 1 W. Bl. 365 (*Mansfield, L. C. J.*, and others; error shown against a testimonial witness to sanity; no discussion and no ruling).

³ 1818, *Richardson v. Allan*, 2 Stark. 334, *Ellenborough, L. C. J.* (witness to the genuineness of an indorsement; a second witness not allowed, except the alleged indorser himself).

⁴ 1825, *Ewer v. Ambrose*, 3 B. & C. 746 ("the party is at liberty afterwards to make out his own case by other witnesses"); 1831, *Bradley v. Ricardo*, 8 Bing. 57; 1832, *Friedlander v. Assur Co.*, 4 B. & Ad. 193; 1834, *Denman, L. C. J.*, in *Wright v. Beckett*, 1 Moo. & Rob. 420 ("The case of *Lowe v. Jolliffe* would have seemed to make an end of the antiquated notion that a party cannot contradict his own witness"); 1839, *R. v. Ball*, 8 C. & P. 745; 1850, *Mellish v. Collier*, 19 L. J. Q. B. 493 (per *Cole-ridge and Erle, JJ.*); 1850, *The Lochlibo*, 14 Jur. 792, *Dr. Lushington* (referring to the common-law practice as "beyond all dispute, beyond all doubt"); 1854, *Greenough v. Eccles*, 5

C. B. N. s. 786, 28 L. J. C. P. 160 (speaking of the law before 1854 as "clear").

⁵ 1858, *Greenough v. Eccles*, 5 C. B. N. s. 786; *Cockburn, C. J.*, says: "Perhaps the better way is to consider the second branch of the section as altogether superfluous"; while the majority of the Court, *Williams and Willes, JJ.*, seem to reach the same result by defining "adverse" as "hostile," in distinction from "unfavorable," and then treating it as not implicitly forbidding the greater by permitting the less, and thus allowing contradiction on relevant matters as something "he may still do, if the witness is unfavorable." The statute, however, seems later to have been not so clearly construed; 1866, *Coles v. Brown*, L. R. 1 P. & D. 70, *Sir J. P. Wilde* (an attesting witness was allowed to be contradicted merely on the theory that he was a compulsory witness); 1890, *R. v. Dyche*, 17 Cox Cr. 39, *Hawkins, J.* (four persons were convicted for felonious wounding; it was afterwards believed that these were innocent; on the present trial, the assaulted person having testified, on cross examination, that the first four and not the present defendants were the persons attacking him, the prosecution was allowed to call those four to show their *alibi*). In *Canada*, the English statute has been adopted literally (except in *Prince Edward Island*), but has been construed as in England: *Dom. Crim. Code* 1892, § 699; *B. C. Rev. St.* 1897, c. 71, § 33; *N. Br. Cons. St.* 1877, c. 46, § 19; *Newf. Cons. St.* 1892, c. 57, § 17; *N. Sc. Rev. St.* 1900, c. 163, § 42; 1894, *Almon v. Law*, 26 N. Sc. 340, 348 (contradiction allowed; the confusion of the statute being noted; *Greenough v. Eccles* approved); *Ont. Rev. St.* 1897, c. 73, § 20; 1864, *Robinson v. Reynolds*, 23 U. C. Q. B. 560, 563 (applying the Ontario statute according to the opinion of *Williams, J.*, in *Greenough v. Eccles*); 1900, *Stanley P. Co. v. Thomson*, 32 Ont. 341 (the witness may be contradicted by others, called not to discredit but to contradict, without leave of the judge; *Greenough v. Eccles* followed); *P. E. I. St.* 1889, c. 9, § 15 (quoted *ante*, § 905).

⁶ 1829, *Winston v. Mosley*, 2 Stew. 137 (excluded, except in case of surprise or of a compulsory witness); 1840, *Hallett v. Wulker*, 1 Ala. 585, 588 ("may perhaps" be done); 1782, *Rupp v. LeBlanc*, 1 Dall. 63, *semble* (excluded).

⁷ The following cases would undoubtedly be followed in all jurisdictions where there are no

§ 908. **Same: Contradiction as involving Impeachment.** It has been noted (*ante*, § 897) that a chief reason for the victory of the newer notion was the perception that without it one could not prove the facts of his case if the first witness called were to testify untruly. From this point of view the discrediting of the witness is regarded as incidental only (because inevitable) to this other and necessary right. Nevertheless, the discrediting of the witness is also a legitimate use to be made of the evidence, if desired. A demonstrated error on one point may be used to infer error by the same witness upon other points.¹ It follows, too, from the permission to discredit

express utterances; some of the more recent opinions, uselessly repeating, for the benefit of careless brief-makers, the rule of prior decisions, have not been here inserted: *Ala.*: 1897, *Jones v. State*, 115 Ala. 67, 22 So. 566; 1897, *Phanix Assur. Co. v. McArthur*, 116 Id. 659, 22 So. 903; 1898, *Wadsworth v. Dunnam*, 117 Id. 661, 23 So. 699; *Alaska*: C. C. P. 1900, § 667; *Ark.*: *State*, 1894, § 2958; *Cal.*: C. C. P. 1872, § 2049; *Colo.*: 1889, *Babcock v. People*, 13 Colo. 521, 22 Pac. 817; 1892, *Moffatt v. Tenney*, 17 Id. 189, 195, 30 Pac. 348; 1897, *Brown v. Tourtelotte*, 24 Id. 204, 50 Pac. 195; *Conn.*: 1864, *Olmstead v. Winsted Bank*, 32 Conn. 278, 287; *Gu.*: 1849, *Merchants' Bank v. Rawls*, 7 Ga. 191, 198; 1855, *Burkhalter v. Edwards*, 16 Id. 593, 596; 1877, *Skipper v. State*, 59 Id. 63, 66; 1878, *Garrett v. Sparks*, 60 Id. 582, 585; 1887, *Hollingsworth v. State*, 79 Id. 607, 4 S. E. 560; *Haw.*: *Civ. L.* 1897, § 1421; *Illa.*: *Rev. St.* 1887, § 6080; *Ill.*: 1865, *Rockwood v. Poundstone*, 38 Ill. 199; 1900, *Highley v. Bank*, 185 Id. 565, 57 N. E. 436; 1903, *U. S. Brewing Co. v. Raddy*, 203 Id. 306, 67 N. E. 799 (contradicting the defendant's attorney, who on the call of the plaintiff had testified that he had not attempted to subpoena witnesses); *Ind.*: *Rev. St.* 1897, § 520; 1889, *Crocker v. Agenbroad*, 122 Ind. 585, 24 N. E. 169; 1900, *Hanes v. State*, 155 Id. 112, 37 N. E. 704; *Ind. Terr.*: 1901, *Bradburn v. U. S.*, 5 Ind. T. 604, 64 S. W. 550; *Ia.*: 1866, *Thorn v. Moore*, 21 Ia. 285, 290; 1880, *Clapp v. Peck*, 55 Id. 270, 272, 7 N. W. 587; 1888, *Gardner v. Connelly*, 75 Id. 205, 39 N. W. 650; 1892, *Smith v. Utesch*, 85 Id. 381, 386, 52 N. W. 343; *Kan.*: 1901, *Deering v. Crenningham*, 63 Kan. 174, 65 Pac. 263; *Ay.*: C. C. P., 1895, § 596; 1859, *Champ v. Com.*, 2 Mete. 17, 23; 1876, *Blackburn v. Com.*, 12 Bush 181, 184; 1850, *Young v. Wood*, 11 B. Monr. 123, 134; *Me.*: 1887, *State v. Knight*, 43 Me. 11, 134; 1854, *Hall v. Houghton*, 37 Me. 411, 415; *Md.*: 1839, *Franklin Bank v. Navig. Co.*, 11 G. & J. 36; 1843, *Wolfe v. Hanver*, 1 Gill 91; *Mass.*: 1826, *Brown v. Bellows*, 4 Pick. 187, 194 (where a part of the case was to prove the witness' interest with the opponent, and his declarations to that effect were admitted); 1834, *Whitaker v. Salisbury*, 15 Pick. 534, 544; 1852, *Com. v. Starkweather*, 10 Cush. 59; 1859, *Brolley v. Lapham*, 15 Gray 292, 297; *St.* 1869, *Pub. St.* 1882, c. 169, § 22, *Rev. L.* 1902, c. 175, § 24; *Mich.*: 1877, *Snell v. Gregory*, 37 Mich. 500; 1892, *Pickard v. Bryant*, 92 Id. 430, 434, 52 N. W. 788; 1896, *Darling v. Thompson*, 108 Id. 275, 65 N. W. 754; *Minn.*: 1892, *Schmidt v. Dunham*,

50 Minn. 96, 52 N. W. 277; *Miss.*: 1859, *Fairly v. Fairly*, 38 Miss. 280, 288; 1887, *Madden v. State*, 65 Id. 176, 3 So. 328 (that no promises had been made to a State's witness, as he had testified, allowed); *Mo.*: 1854, *Brown v. Wood*, 19 Mo. 475; 1899, *State v. Branch*, 151 Id. 622, 52 S. W. 390; *Mont.*: C. C. P. 1895, § 5377; *N. H.*: 1849, *Seavy v. Dearborn*, 19 N. H. 355; *N. J.*: 1826, *Skellinger v. Howell*, 3 Halk. 310; 1897, *Thorp v. Leibrecht*, 56 N. J. Eq. 499, 39 Atl. 361 ("either by his own examination and the improbability of his own story" or by other evidence); 1901, *Ingersoll v. English*, 66 N. J. L. 463, 49 Atl. 737; *N. Y.*: 1804, *Steinbach v. Ins. Co.*, 2 Chines. 129, 131; 1830, *Lawrence v. Barker*, 5 Wend. 301, 305 ("he may nevertheless prove the fact by another witness or may show that the account given by the first witness is incorrect"); 1834, *Jackson v. Leek*, 12 Id. 105, 108; 1839, *McArthur v. Sears*, 21 Id. 189, 192 (deposition); 1847, *People v. Safford*, 5 Den. 112, 117; 1850, *Thompson v. Blanchard*, 4 N. Y. 303, 311; 1873, *Hullard v. Pearsall*, 53 Id. 230; 1874, *Conter v. Express Co.*, 56 Id. 585, 588; 1877, *Pollock v. Pollock*, 71 Id. 137, 152; 1887, *Becker v. Koch*, 104 Id. 394, 402, 10 N. E. 701 (*see post*, § 1003); 1890, *DeMeli v. DeMeli*, 120 Id. 485, 490, 24 N. E. 996; *N. C.*: 1840, *Spencer v. White*, 1 Ired. 236, 239; 1845, *Shelton v. Hampton*, 6 Id. 215; 1851, *Ilice v. Cox*, 12 Id. 315; 1873, *Wilson v. Derr*, 69 N. C. 137, 139; 1880, *Strudwick v. Brodnax*, 83 Id. 401, 403; 1884, *Gadsby v. Dyer*, 91 Id. 311, 314; 1886, *McDonald v. Carson*, 94 Id. 497, 503; 1892, *Chester v. Wilhelm*, 111 Id. 314, 316, 16 S. E. 229; 1895, *Kendrick v. Dellinger*, 117 Id. 491, 23 S. E. 438; 1896, *State v. Mace*, 118 Id. 1244, 24 S. E. 798; *Or.*: 1889, *Hurley v. State*, 46 Oh. 320, 322, 21 N. E. 645; *Or.*: C. C. P., § 838; 1900, *State v. Mims*, 36 Or. 315, 61 Pac. 888; *Pa.*: 1838, *Stockton v. Demuth*, 7 Watts 39, 41; 1843, *Bank of N. Liberties v. Davis*, 6 W. & S. 285, 287; 1866, *Stearns v. Bank*, 53 Pa. 490; *S. C.*: 1887, *Wagener v. Mars*, 27 S. C. 97, 98, 102, 2 S. E. 844; *U. S.*: 1893, *Hickory v. U. S.*, 151 U. S. 303, 309, 14 Sop. 334; 1899, *Swift v. Short*, 54 C. C. A. 545, 92 Fed. 567; 1899, *Peters v. U. S.*, 36 C. C. A. 105, 94 Fed. 127; *Wis.*: 1877, *Smith v. Ehaner*, 43 Wis. 181; 1879, *Wisconsin River L. Co. v. Walker*, 43 Id. 617, 4 N. W. 803; *Wyo.*: *St.* 1895, c. 68.
¹ 1831, *Bradley v. Ricardo*, 8 Bing 57 (*Bosquet, J.*: "The discrepancy may afford a fair topic for counsel as to the degree of credit to which the witness is entitled"). *Contra*: 1897, *Nathan v. Sands*, 52 Nebr. 660, 72 N. W. 1030

a witness by other witnesses, that counsel, with or without offering other witnesses, may argue that his own witness is in error.² It is occasionally said that he may not;³ but it is obvious that such a doctrine would simply bring us back to the exploded notion that one is bound by the statements of his own witness.

§ 909. *Who is One's Own Witness; General Principle.* Since the rule forbids certain modes of impeaching one's own witness, the question constantly arises whether a given witness falls within that category.

It is to be noticed, first, that the test for this purpose has nothing necessarily in common with the test for the *prohibition of leading questions*. Occasionally a tendency is found to confuse the two tests. But the latter rests purely on the presumed mental condition of the witness. The object of the rule is to prevent the supplying of suggestions of false testimony to a witness who is disposed to take advantage of them (*ante*, § 769). He is assumed to be friendly to the party putting him on the stand; but this is only a provisional assumption; and, accordingly, if he turns out to be hostile to that party, the prohibition ceases (*ante*, § 774), and, conversely, if on cross-examination by the other party, to whom he has been assumed to be hostile, he turns out to be a friendly partisan, the prohibition applies equally on cross-examination (*ante*, § 773). Thus the test for the prohibition of leading questions is ultimately and essentially independent of the superficial circumstance whether originally one party or the other put him on the stand.

The present rule, on the other hand, must depend, to some extent at least, upon that circumstance. The controlling consideration is not the temper of the witness as being friendly or hostile, but the *conduct of the party as having dealt with the witness* so as to make the witness his own. How to determine what dealings have this effect is by no means easy. The general rule itself (against impeaching one's own witness) is so fraught with irrationality that to apply it with rational deduction is almost impossible. A rule which rests upon a fiction is apt to lead to mere quibbles when a detailed and consistent development is attempted. The quiddities and meaningless distinctions which occur in the present application serve more than anything else to exhibit the arbitrary absurdity of the rule at large. In attempting to apply it in the present connection, the test may be sought either in the superficial features of the rule or in the supposed underlying reason of it:

(a) Superficially, the rule applies to a witness who has been put forward by the party and used to supply testimony. By this test, if A calls the witness and obtains testimony, and B afterwards calls him, the rule applies alike

(contradiction forbidden where the sole purpose was to discredit the witness); but this is anomalous, and may better be explained by the general rule against contradictions on collateral matters (*post*, § 1001).

² 1886, *Mitchell v. Sawyer*, 115 Ill. 650, 657. 5 N. E. 109; 1864, *Roberts v. Miles*, 12 Mich. 296, 305; 1890, *Webber v. Jackson*, 79 id. 175, 179, 44 N. W. 591; 1892, *Gilfillan, C. J.*, in *Schmidt v. Dunham*, 50 Minn. 96, 52 N. W. 277

("He may question the truth of his statements of fact either by independent opposing evidence or by inference or arguments drawn from the testimony"); 1897, *McLean v. Clark*, 31 Fed. 501, 504.

³ 1892, *Clafin v. Dodson*, 111 Mo. 195, 201, 19 S. W. 711; 1899, *Dravo v. Fabel*, 132 U. S. 487, 490, 10 Sup. 170; 1880, *Tarsney v. Turner*, 48 Fed. 318; 1892, *Graves v. Davenport*, 50 id. 881, 884.

to both, and both are therefore prevented from impeaching him in the forbidden ways.

(b) The conventional reason for the rule is that the calling party guarantees the witness' credibility (*ante*, § 898). Taking this as a test, it is clear that if A calls the witness, A cannot thereafter impeach him, even when B has subsequently called him. As to B, it would seem that from the outset he must be assumed as disputing A's whole case and therefore, by implication, of denying the credibility of A's witnesses; hence, when he afterwards calls a witness of A, this denial can hardly be said to be abandoned, for B is still denying the facts testified to for A; thus, when B puts A's witness on the stand, he is merely availing himself hypothetically of A's guarantee, and says in effect, "A has guaranteed this man's credibility, and has thus claimed that what he will say is true; taking that claim for what it purports to be worth, A has thus virtually admitted in advance that what the witness is now about to say in my favor is true, and I put forward the witness merely by virtue of A's admission; I claim nothing myself in that respect." This may be artificial reasoning, but the whole reason of the rule begins as artificial, and a just deduction from its fictitious premises seems to lead to the above conclusion. It is true that A's original guarantee may be said (as some Courts prefer to say) to extend merely to the testimony which A will obtain in his own favor, and not to the testimony which B may later obtain, so that thus A would be prevented from impeaching as to the former statements (and those only), while B could not impeach as to the latter statements (and those only); the result thus coinciding in part with that of (a) *supra*. But this is fundamentally fallacious. The guarantee of credibility (if there is one at all) must relate to the witness' general personal trustworthiness of disposition and emotion, not to the correctness of specific statements of fact; since the latter, as is universally conceded (*ante*, § 907), may always be shown to be untrue. The guarantee is of the continuing, single quality of trustworthiness, and is therefore inseparable; it either is made or is not made, and it cannot be construed as existing for some statements and not for others. Hence, upon this theory, it should follow that the party first calling the witness cannot thereafter impeach him, while the other party, though afterwards calling him, may still impeach him. Besides, by any other solution, the practically absurd result is reached of allowing B, in his case in reply, first to impeach A's witness as a confirmed liar, and then to call the same witness under a supposed guarantee of credibility without withdrawing his impeachment. Finally, it may be said¹ that, under the orthodox

¹ As in the following passage: 1824, Starkie, Evidence, 3d ed., 187: "It has been said that, where a witness has been examined by one party, he may afterwards be cross examined as an adverse witness [by the adversary] when he is called by the adversary as one of his own witnesses. Yet, if a party omit from prudential motives to examine his adversary's witness, [when first called,] as to any branch of his own

case, there seems to be no reason why, when he afterwards adopts him as his own witness, he should not be so considered to all purposes. . . . The same witness may know distinct parts of the transaction, one branch of which makes for the plaintiff and the other for the defendant; and if each party call him as his own witness, there seems to be no reason why each should not be in turn bound by the same principle."

rule for the order of evidence (*post*, § 1885), B might have obtained all the witness' knowledge as to his own case on cross-examination, so that by not doing so and by calling him later, he has waived his option to treat him throughout as A's witness, and thus has made him his own. It is true that there was such an option as to putting in his own case on cross-examination. But it does not follow that there was an option between treating him as A's witness throughout and treating him as his own by calling him later; for this begs the question by assuming it already determined that to call the witness later would be to make him his own; that, indeed, is the very question sought to be determined. Under the Federal rule, forbidding putting in one's own case on cross-examination (*post*, § 1885), even this argument disappears, for under that rule there is no semblance of such an option.

(c) The only tenable reason for maintaining the general rule at all is the danger that a party calling a witness might coerce him into falsities by threatening to blacken his character if he fails to testify favorably (*ante*, § 899). This reason might seem to apply equally to both parties where both call the witness. Yet if A first calls him, B is then entitled to impeach his character in reply, and thus it is practically vain to forbid him to do so after calling the witness on his own side, if he has taken the precaution to do so before calling him. So far, then, as this reason amounts to anything (*ante*, § 899), it leads to the same conclusion as the theory (b) *supra*, namely, that the prohibition extends throughout to A, the party originally calling, but not to B, the party subsequently calling. Moreover, if it be said that this reason would not prohibit A from impeaching character after B's call, the answer is that the same supposed abuse is possible, in that A might threaten to blacken the witness' character in rebuttal if when called later by B he testified favorably to B.

Such seem to be the general considerations that may be invoked in solving the specific situations now to be dealt with. No doubt it may all seem to be a matter of fine distinctions, of petty quibblings, and of artificial imaginings. But if we are building a rule upon fiction there is nothing else to be done but to carry out the assumed requirements of the fiction. It is all a ridiculous structure in the air of legal fancy; but so long as the rule exists, it is to be applied with at least a pretence of rationality. Concede the falsity of the foundation, and then the entire structure may be abandoned. Until then, it remains to apply the rule to concrete situations as best we can.

§ 910. Same: (1) A calls a Witness; may A impeach? **Subpœna, Oath, and Interrogation.** At the outset it is necessary to determine at what point of time, in the simplest case, the witness becomes one own. Where A makes a witness his own, and B later does the same, complicated questions arise as to the incidence of the rule. But in these it is always assumed that A had originally done something to make the witness his own, *i. e.* that there is some act — such as summoning by subpœna, administering the oath, or the like — by which A had originally set the rule in operation. The question thus arises, What is this original act by which the rule is at least *prima*

facie act in operation against the party doing it? Or, in other words, what constitutes "calling" a witness, for the purposes of this rule? Is it the mere summoning into court by subpoena? Or is it the administration of an oath? Or is it nothing short of asking questions and obtaining answers?

1. For a witness summoned under the *ordinary subpoena*, it is clear that neither the summons, nor the oath, nor the questioning are sufficient; there *must be an answer furnishing relevant evidence*; for until that point is reached, the party has not obtained any testimony from that witness and it would thus be erroneous to suppose that he had guaranteed the credit of a non-existent and merely potential testimony. The principle is the same as that which determines whether the opponent has the right to cross-examine to his own case.¹

2. For a witness summoned under a *subpoena duces tecum to produce a document*, the line is crossed when the witness, being questioned, has given a relevant answer respecting the identity or execution of the document. The reason is not essentially different from that just mentioned.²

3. For a *deposition taken but not used*, it would seem that the taker has not made the witness his own. But since a Court holding the contrary view is always obliged further to consider whether the subsequent use of the deposition by the opponent relieves the taking party from the rule, and since it is seldom possible to discern upon which ground the decision is reached, the state of the law may better be examined under the other head (*post*, § 913 (b)).

4. Where the witness is *called by the judge*, and not by a party, either party may impeach him.³

§ 911. Same: (2) A calls a Witness, then B calls him; may B impeach? (a) *viva voce* Testimony. Where A first calls the witness, and then B calls him, it seems to follow (for the reasons noted in § 909, *ante*) that B may nevertheless impeach him, whether by questions in the nature of cross-examination or otherwise.¹ Some Courts, however, take the contrary view and forbid impeachment by B;² and this occasionally goes to the extent of forbidding even proof by contradiction,³ — an extreme error, because the rule itself

¹ *Post*, § 1893, where the authorities are collected.

² *Post*, § 1894, where the authorities are collected.

³ 1886, *Nelph v. State*, 22 Fla. 537, 545; 1892, *Hill v. Com.*, 88 Va. 633, 639, 14 S. E. 340; 1893, *Clark v. Com.*, 90 id. 360, 368, 18 S. E. 440. *Contra*: 1894, *Conlson v. Dishborough*, 2 Q. B. 316 (neither may cross-examine, except in judge's discretion). Compare the rule for compulsory witnesses, *post*, § 917.

¹ 1801, *Dickinson v. Shee*, 4 Esp. 67 (Kenyon, L. C. J.): "The witness having been originally called by the plaintiff and examined as his witness, the privilege of the defendant to cross-examine remained in every stage of the cause and for every purpose"; 1887, *Travers v. McMurray*, 19 N. C. 509; 1806, *Sawrey v. Murrell*, 2 Bayw. N. C. 397 ("The question . . .

is to be considered as an interrogatory as to a distinct fact upon the cross-examination of the witness, although it was put to her after her first examination was desisted from for some time").

² 1871, *Barker v. Bell*, 46 Ala. 216, 223 (recalled by the opponent against objection; rule applicable to the opponent); 1876, *Artz v. R. Co.*, 44 Ia. 284, 286 (witness dismissed by one party after preliminary questions, and then used by the opponent; rule applicable to the latter); 1892, *Richards v. State*, 82 Wis. 172, 180, 51 N. W. 652. *Undecided*: 1877, *State v. Jones*, 64 Mo. 391, 397.

³ 1894, *Smith v. Assnr. Co.*, 13 C. C. A. 284, 65 Fed. 765; compare § 914, note 1, *infra*. This fallacy is also noted in *Jones v. State*, 115 Ala. 67, 22 So. 566 (1896).

(as universally conceded) does not prohibit this mode of impeachment (*ante*, § 907). But, even in such Courts, the case should be distinguished of impeachment on a recall by B for further cross-examination (allowable in the trial Court's discretion; *post*, § 1897), for this is merely a continuation of cross-examination and not a calling of the witness as B's own;⁴ and the same distinction applies to a *viva voce* cross-examination (substituted for the cross-interrogatories in writing) of a witness whose direct examination has been taken and used by deposition for the first party.⁵

§ 912. *Same*: (b) *Deposition*. It is generally conceded that where a deposition is taken at A's instance, B having notice and opportunity to cross-examine, A's failure to read the deposition as evidence leaves B nevertheless entitled to use it (*post*, § 1389), on condition that he put in the whole, both the direct and the cross examination (*post*, § 1893, and § 2103). If A had read the deposition, in whole or in part, he would clearly have made the witness his own, and B's subsequent use of it would (on the principle of the preceding section) not prevent B from impeaching the deponent.¹ But the difficulty is, where A, the taker, has made no use of the depositions, that he can hardly be said to have made the witness his own (*ante*, § 910, (3)); indeed, his failure to use them is generally due to the discovery that the witness' testimony is unfavorable, and is practically a revoyage of discovery, and the first and only person to utilize the deposition as testimony is B; the witness therefore is B's; and this must be so, whether the evidence he especially desires occurs in the answers to the direct or to the cross examination; accordingly, B may not impeach him.²

§ 913. *Same*: (3) *A calls a Witness, then B calls him; may A impeach?* (a) *viva voce Testimony*; (b) *Deposition*. (a) Where A has first called the witness, and then B has called him, does the rule cease to operate as to A, so as to allow him to impeach the witness? For the reasons already noted (*ante*, § 909), it would seem that the rule still prohibits impeachment by A; and this result is accepted by the majority of Courts dealing with the question.³

⁴ 1851, *Ross v. Haynes*, 3 Greene Ia. 211, 213.

⁵ Miss. Annot. Code 1892, § 1756 (opponent may procure deponent and put him on the stand "as the witness of the party procuring the deposition, and may cross-examine him as the witness of such party"). See a ruling to the same effect under § 1893, *post*.

¹ 1846, *Carville v. Stout*, 10 Ala. 796, 802, *semble* (A takes successive depositions of the same witness, and uses the last only; B may use the prior ones to discredit the witness). *Contra*: 1848, *Story v. Saumlers*, 8 Humph. 663, 666 (deposition used by both parties; neither may impeach); compare the cases cited *post*, § 1892.

² 1854, *Jewell v. Center*, 25 Ala. 498, 504 ("What are we to understand, in legal parlance, by testimony belonging to a suitor?

Clearly, that it pertains to him who introduces it"); 1882, *Herring v. Skaggs*, 73 id. 446, 453 (deposition taken originally by co-opponent); Cal. C. C. P. 1872, § 2034 (deposition may be read by either party, "and is then deemed the evidence of the party reading it"); 1861, *Masick v. Ray*, 3 Mete. Ky. 427, 431; 1861, *Gen. St.* 1885, § 3432 (deposition shall "be deemed the evidence of the party reading it"); N. D. Rev. C. 1895, § 5682 (same); Utah Rev. St. 1898, § 3459 (like Cal. C. C. P. § 2034); 1903, *Von Tobel v. Stetson & P. M. Co.*, — Wash. —, 73 Pac. 788. *Contra*: 1804, *Steinbach v. Ins Co.*, 2 Caines 129, 131, *semble* (deposition used by the cross-examiner only; witness not made his own).

³ 1903, *Young v. Montgomery*, — Ind. —, 67 N. E. 684, *semble*; 1838, *Com. v. Hudson*, 11 Gray 64, 66 (Shaw, C. J.: "[The opponent

(b) In the case of a *deposition*, the same rule would apply where A, the taker, has used it, and then B, the opponent, also uses it.³ But where A has not read it, and B first puts it in as testimony, it would seem that the deponent has never been made A's witness (for the reasons already noted in § 912), and therefore that the rule has never come into force against him and that he is at liberty to impeach the deponent.³ This result is further corroborated by a group of early rulings (no longer of force since the abolition of disqualification by interest), in which it was held that A, the taker of a deposition not using it, could, as against B, the opponent desiring to use it, enforce the objection that the deponent was by interest disqualified as a witness for B.⁴

§ 914. Same: (4) Making a Witness One's Own by Cross-examination; (a) *Impeachment*. In many jurisdictions there obtains a rule (*post*, §§ 1885 ff.; called there the Federal rule) that the opponent, upon cross-examination, may not apply his questions to the material of his own case-in-reply, but must confine the subject of his questions to the matter of the first party's case as presented through his witnesses; thus the opponent, in order to obtain from the witness such facts as he can contribute to the opponent's own case, must wait his turn and then call the witness on his own behalf. That rule concerns merely the order of evidence, and is supposed (though erroneously) to prevent confusion and obscurity. But it is sometimes wrested from its original purpose, and joined with the rule against impeaching one's own witness, so as to produce a singular effect. This effect is produced by

makes the witness his own] to some purposes; it would be very difficult to determine what. But the party who first called him cannot be allowed to say or to show that he was unworthy of credit"; 1827, *Jackson v. Varick*, 7 Cow. 238, 242, *semble* ("He was introduced and sworn generally by the defendants; . . . they could not afterwards question either his competency or credibility"); affirmed in 2 Wend. 166, 205; 1829, *Fulton Bank v. Stafford*, 2 Wend. 483; 1834, *Bogert v. Bogert*, 2 Edw. Ch. 399, 403; 1843, *Floyd v. Bovard*, 16 W. & S. 75 (obscure). *Contra*: 1864, *Stafford v. Fargo*, 35 Ill. 481, 486, *semble*; 1896, *Hall v. Manson*, 99 Ia. 698, 68 N. W. 922; 1898, *Morris v. Guffey*, 188 Pa. 534, 41 Atl. 731.

Distinguish the following: 1811, *Watson v. Ins. Co.*, 2 Wash. C. C. 480 (certificate of a survey used as showing the fact of a survey; the survey itself then read by the opponent; rule not applicable to the former party).

³ 1848, *Story v. Saunders*, 8 Himpl. 663, 666 (deposition taken and used by both parties; rule applicable to both).

⁴ 1834, *Crary v. Sprague*, 12 Wend. 41, 45 (holding the rule not applicable as against A where B used the testimony of a deceased witness called at the former trial by A); 1849, *Neil v. Childs*, 10 Fred. 195; 1880, *Strudwick v. Brodnax*, 83 N. C. 401, 404 (approving preceding case); 1837, *Richmond v. Richmond*, 10 Yerg. 343, 345 (forbidding impeachment by general character); add the statutes cited *ante*, § 912,

and the cases cited *post*, § 1892. *Contra*: 1850, *Young v. Wood*, 11 B. Monr. 123, 134 (taker may probably not impeach general character, but may disprove facts testified to); 1826, *Phettipiece v. Sayles*, 4 Mason 312, 320.

⁵ The following list is a partial one only; note also that the rule might be different for an attempt to disqualify entirely, for the reason given below: 1858, *House v. Camp*, 32 Ala. 541, 579 (deposition offered by defendant at trial below but suppressed; defendant allowed to object to deponent's incompetency for plaintiff); 1849, *Elliot v. Shultz*, 10 Himpl. 234 (objection on ground of hearsay, allowed). *Contra*: 1846, *Stewart v. Hood*, 10 Ala. 600, 607 (deposition taken by defendants, allowed to be used by plaintiff, because defendant taking it could not object to deponent's interest in favor of cross-examiner; "there is certainly no good to result from a practice which will permit a party first to ascertain by actual examination what a witness will swear and then admit or exclude him, at pleasure"); 1869, *Weil v. Silverstone*, 6 Bush 698, 700; 1871, *Sullivan v. Norris*, 8 Id. 319 (but here the rule is held not to forbid an objection to inadmissible evidence). It may be noted that these rulings often deal at the same time with the question of § 1892, *post*, namely, whether B could cross-examine on his own case; because B, in order to avoid the objection now involved, which would arise if he called the witness for himself, was thus driven to cross-examine upon his own case if allowable.

declaring that if the cross-examining party does ask about his own case (in violation of the first rule), he *thereby makes the witness his own*, and is thus prohibited from impeaching the witness on the subject of such questions. This consequence is enforced in a few of the Courts adopting the above Federal rule;¹ and even occasionally (but without the slightest justification) in Courts following the orthodox rule (*post*, § 1885) which does not prohibit asking about one's own case on cross-examination.² A further logical consequence of the doctrine is that the original party may impeach on the matters thus brought out on cross-examination.³

But this doctrine rests merely on a confusion of ideas, and has no legitimate foundation. The two rules, one concerning the order of evidence (*post*, § 1885), the other concerning the scope of impeachment (*ante*, § 896), have nothing to do with each other in policy or in principle. It is true that, as a mere accident, the application of one results in the other going into force, and the exemption from one would remit the other; so that, where the latter is burdensome, the opponent struggles to evade the former as a means of escaping the latter. For example, one might desire to sue a corporation in the Federal Court, and to this end might join the corporation and its negligent employee as joint tortfeasors of different jurisdictions, and thus the defendant would strive to oppose the application of the doctrine of joint tortfeasors; and yet the constitutional rule as to Federal jurisdiction and the common-law doctrine as to joint tortfeasors have nothing whatever in common as to origin or policy. In the present situation, then, if the opponent had called the witness as his own, the prohibition as to impeachment would have come into force; yet, for not doing so, the Court imposes a penalty (namely, the prohibition of impeachment) which has no connection with the rule violated (namely, as to order of evidence). The fact that such would have been a consequence, if he had called the witness, is a mere accident, and is not a necessary and appropriate penalty for failure to follow the rule about the order of evidence; as is easily apparent from the fact that under the orthodox rule (which allows cross-examining to one's own case) there is no prohibition against impeachment; in other words, the prohibition against impeachment turns upon the *act of calling and thus indorsing the witness* (*ante*, § 909), and *not upon the topics of the questions* put to the witness. The

¹ Ark. Stats 1894, § 2957 (in cross-examining "on new matters, such examination is subject to the same rules as to the direct examination"); Cal. C. C. P. 1872, § 2048 (if the opposite party "examine him as to other matters [than those connected with the direct examination], such examination is to be subject to the same rules as a direct examination"); 1900, *Hanes v. State*, 153 Ind. 112, 57 N. E. 704; 1878, *Clough v. State*, 7 Nebr. 320, 341; 1897, *Kohl v. State*, 59 N. J. L. 445, 36 Atl. 931, 37 Atl. 73; Or. C. C. P. 1892, § 837 (like Cal. C. C. P. § 2048); 1903, *Bailey v. Seattle & R. R. Co.*, — Wash. —, 73 Pac. 679; and the cases cited in the next note.

² 1804, *Jackson v. Son*, 2 Caines 178 (opponent not allowed to cross-examine to a will,

without notice to produce, because, the will being a new issue, "he made the witness as much his own as if he had himself called him"; a correct enough ruling on the facts); 1836, *People v. Moore*, 15 Wend. 419, 423 (preceding case approved on the present principle); 1860, *Mattice v. Allen*, 33 Barb. 545, 546 (present principle repudiated, except to limit leading questions by the Court's discretion; ["if the witness] had given material testimony against him, although he had attempted to prove his own case or some part of it by him, still he did not thereby forfeit the right to impeach him by particular or general testimony"); 1875, *Bassham v. State*, 58 Tex. 622, 625.

³ 1876, *Arts v. R. Co.*, 44 Ia. 384, 286.

result is, by the singular rule now under consideration, that the opponent is in effect told by the Court: "If you had called the witness as your own, we should have punished you by prohibiting his impeachment; but, though you have *not* done so, we shall nevertheless punish you for not doing it, in the same way as if you had done it." The particular injustice of this vagary lies in the further circumstance that it is usually applied by a Court to an opponent who has cross-examined to his own case without objection, and is later prohibited from impeachment; the only impropriety in his examination consisted in anticipating the usual order of his evidence, and if it was desired to correct this impropriety, the appropriate method was to stop the cross-examination on that subject, after objection made; but, if no objection is made, and no ruling had, the consequence should be that the first party has waived the impropriety of introducing the evidence too soon, and the whole incident is closed; there remains no evidential crime to be atoned for later by the inappropriate punishment of prohibiting impeachment; to impose any penalty at all is to revive a fault already annulled by waiver.

This form of error has as yet not gone far, but it threatens to spread. The notion of a connection in principle between the two rules about the order of evidence and the limits of impeachment is a specious and simple one, and its fallacy deserves to be exposed and checked. Both of the rules in question are impolitic and unjust (*ante*, §§ 896-899; *post*, §§ 1887-1888), and their combination in the present form results in quibbles of particular absurdity. Its worst tendency is to convert the rules of evidence into mere conjuring wands,—to aid unscrupulous counsel in entrapping opponents into an immaterial error which provides a weapon for the assassination of a true and just verdict.

§ 915. *Same*: (b) *Leading Questions*. The peculiar rule dealt with in the preceding section—*i. e.* that cross-examining on one's own case makes the witness one's own—is also by some Courts applied for still another purpose, namely, to forbid leading questions as to such topics. The process of argument is that since the cross-examination to such topics makes the witness one's own, and since leading questions to one's own witness are forbidden, they are therefore on such topics improper on cross-examination:

1881, *Finch, J.*, in *People v. Court of Oyer & Terminer*, 83 N. Y. 436, 450 (forbidding leading questions on cross-examination "while seeking to elicit new matter constituting an element of the intended defence"): "A different rule would enable a party to develop his defence untrammelled by the rules which govern a direct examination, and give him an advantage for which we can see no just reason. As to the new matter the witness becomes his own, and in substance and effect the cross-examination ceases. That is properly such only while it is directed to the evidence given in behalf of the adversary; when it passes beyond that, it becomes the direct and affirmative evidence of the party, and should be subjected to appropriate restraints. There is no reason in the nature of the case why a direct examination should be guarded against the evil and danger resulting from leading questions, which does not apply to an effort upon cross-examination to introduce a new and affirmative defence."

1874, *Dunne, C. J.*, in *Rush v. French*, 1 Ariz. 99, 130, 25 Pac. 816: "There is a general impression that the right to cross-examine implies the right to put leading questions;

but the very point of *Harrison v. Rowan* [cited *infra*] is that the judge there was of opinion that such is not always the case; that you may cross-examine and lead while you keep within the limits of the plaintiff's [opponent's] case; but that when you strike new matter, though you may still cross-examine, you must not in that part of the cross-examination put leading questions; and though this seems a fine distinction, it may often be broad enough to secure valuable results."¹

That such reasoning could be advanced in support of such a result seems incredible; for it rests on a misconception of one of the simplest and most established doctrines of evidence. (1) That doctrine is (*ante*, § 767) that the prohibition of leading questions rests upon the supposed partisan bias of the witness, rendering him willing to accept suggestions, that therefore (*ante*, § 774) a leading question is allowable even on a direct examination where the witness appears to be biased against the examiner, and that (*ante*, § 773) it is always allowable on a cross-examination unless the witness appears biased in favor of the cross-examiner. In other words, the policy of the prohibition turns solely upon the emotional attitude of the witness to the party in general, *i. e.* to one side or the other, regarded as antagonists, and has nothing to do with the subject of the specific questions. If a witness is biased for A, the bias applies to all questions which B may ask on cross-examinations. To suppose the witness to be dominated in A's favor by partisan rancor and stubbornness when one question is asked, so as to justify B's leading question, but the next moment to be possessed of equal fervor against A and in favor of B, so as to forbid B's next question to be in leading form, and to fancy the strong tide of partisan emotion thus swinging back and forth in the witness' mind from question to question, is merely to contrive a fantastic fiction. (2) Furthermore, the doctrine of the present chapter — the rule against impeaching one's own witness — has no concern with the rule against leading questions. Leading questions do not impeach. The subject-matter may impeach; but the form of the question cannot convert a non-impeaching fact into an impeaching fact. Conceding, then, that a cross-examination to one's own case makes the witness one's own and forbids impeachment (as in the cases of the preceding section), still this does not forbid leading questions; for the fact asked in the leading questions may not impeach the witness at all, and indeed their subject is by hypothesis merely a substantive fact bearing on the cross-examiner's own case. So that the propriety of leading questions still remains to be determined by the principle appropriate to them, namely (as above explained) by the witness' partisan attitude towards the parties in general. It is well settled that leading questions (for the reasons above stated) may

¹ *Accord*: 1881, *People v. Court of Oyer & Terminer*, 83 N. Y. 436, 459 (leading questions not allowed, in asking to one's own case on cross-examination; quoted *supra*); 1827, *Ellmaker v. Buckley*, 16 S. & R. 72, 77 ("no bias is to be presumed after the witness has been called by both parties"); 1843, *Floyd v. Boyard*, 16 W. & S. 75, *semble*; 1820, *Harrison v. Rowan*,

3 Wash. C. C. 580, 582 ("If the cross-examination respects new matter, leading questions cannot be asked"); 1877, *State v. Hopkins*, 50 Vt. 316, 331. It would follow that the original calling party may ask leading questions on the same topics: 1877, *State v. Hopkins*, *supra* (subject to the trial Court's discretion).

be asked on cross-examination unless the witness appears biased for the cross-examiner (*ante*, § 773), and it may be supposed that the few Courts adopting the present rule have sometimes done so in momentary forgetfulness of the doctrine on that subject, and that the effort to establish an exception of the present sort was due merely to the confusing and unfortunate influence of the Federal rule (*post*, § 1885) against putting in one's own case on cross-examination, — a rule which only arose long after the principles affecting leading questions had been firmly established:

1835, *Shaw, C. J.*, in *Moody v. Rowell*, 17 Pick. 490, 499: "The general rule admitted on all hands is that on a cross-examination leading questions may be put, and the Court are of opinion that it would not be useful to engraft upon it a distinction not in general necessary to attain the purposes of justice in the investigation of the truth of facts, that it would be often difficult of application, and that all the practical good expected from it may be as effectually attained by the exercise of the discretionary power of the Court."¹

§ 916. *Same*: (5) **Calling the Other Party as a Witness; Co-defendants.**

(1) If there is any situation in which any semblance of reason disappears for the application of the rule against impeaching one's own witness, it is when the *opposing party is himself called by the first party*, and is sought to be compelled to disclose under oath that truth which he knows but is naturally unwilling to make known. To say that the first party guarantees the opponent's credibility (*ante*, § 898) is to mock him with a false formula; he *hopes* that the opponent will speak truly, but he equally perceives the possibilities of the contrary, and he no more guarantees the other's credibility than he guarantees the truth of the other's case and the falsity of his own. To say, furthermore, that the first party, if he could impeach at will, holds the means of improperly coercing the other (*ante*, § 899) is to proceed upon a singular interpretation of human nature and experience, and to attribute a power which the former may perhaps wish that he had but certainly cannot be clothed with by this or any other rule. There is therefore no reason why the rule should apply at all.¹

The state of the law is confused. In some jurisdictions by judicial decision the rule is held to be inapplicable; in others, to be applicable. In many jurisdictions the statutes making the opponent compellable to testify have attempted to declare something on the present point, but usually with the sole result of increasing the uncertainty and introducing arbitrary suggestions. Of these statutes the most that can be said (apart from express

¹ *Accord*: 1801, *Dickinson v. Shee*, 4 Esp. 67; 1835, *Moody v. Rowell*, 17 Pick. 490, 499 (see quotation *supra*); 1854, *Beal v. Nichols*, 2 Gray 262 (similar, here also refusing to allow the original calling party to put leading questions as a matter of right); 1853, *Legg v. Drake*, 1 Oh. St. 286, 291 (in discretion).

¹ One peculiar practical absurdity of the opposite result may be noted. Since impeachment by prior self-contradiction would be excluded, the opponent could tell his story as favorably

for himself as he pleased, and no prior inconsistent statements could be used in impeachment; so that unless one took the risk of abiding by what the opponent should choose to say, it would be preferable not to call him at all; thus the main purpose of the enabling statute making him compellable is defeated or encumbered. The prior statements, to be sure, could sometimes be used as admissions, but even this was ignored in *Stradwick v. Brodnax*, *infra*.

judicial interpretations) is, first, that a statute authorizing the opponent's examination subject to the "ordinary rules of cross-examination" must be supposed to imply a general exemption from the present rule of impeachment; secondly, that a statute making the opponent examinable "like any other witness" may be supposed to refer to all such rules as benefit the calling party and not necessarily to include, as binding him, the rule against impeaching one's own witness; and, thirdly, that statutes which declare the calling party "not concluded" by the testimony and allow him to rebut it "by adverse testimony" were apparently contrived in a singular legislative ignorance or forgetfulness of the common law, which for more than a century has clearly conceded that exception to the general rule (*ante*, § 907), so that the effect of these statutes (as ordinarily worded) on the general rule for other kinds of impeachment remains indeterminate.³

³ For the right to *cross-examine on one's own case*, dealt with in some of the statutes *infra*, see further §§ 1891, 1892, *post*; and for the right to *cross-examine* to character on interrogatories of *discovery before trial*, see *post*, § 1856. The phrase "rule applicable" in the following notes means the rule against impeaching one's own witness: *Eng.*: 1873, *Allinson v. Labouchere*, L. R. 3 Q. B. D. 634, 661 (on interrogatories of discovery, examination to character is not allowable); *Can.*: 1862, *Atkinson v. Atkinson*, 5 All. 271 (whether the opponent is a hostile witness depends on his conduct on the stand, not on his position in the record); *Newf. Cons. St.* 1892, c. 57, § 1 (quoted *ante*, § 4891); 1853, *Mair v. Culy*, 10 E. C. Q. B. 321, 325. *Burns, J.* (holding that the rule did not apply; but here the result was merely to admit a contradiction, which could have been admitted even against an ordinary witness); 1881, *Dunbar v. Meek*, 32 E. C. C. P. 195, 213 ("A party calling the opposite party as a witness makes him his witness to all intents and purposes"); *Ala.*: Code 1897, § 1857 (use of interrogatories of opponent does not preclude "from contradicting it"); 1874, *Warren v. Gabriel*, 51 Ala. 235 (examination of the opponent on interrogatories; rule applicable); *Ariz.*: *Rev. St.* 1887, §§ 1831, 1855 (examination of opponent to be conducted "under the same rules applicable to other witnesses"); § 1856 (leading interrogatories in deposition, allowable); § 1858 (taker "may contradict the answers [to interrogatories] by any competent testimony, in the same manner as he might contradict the testimony of any other witness"); *Ark.*: 1854, *Drennen v. Lindsey*, 15 Ark. 359, 361 (rule applicable); *Colo.*: *St.* 1899, Mar. 1, c. 95 (opposing party may be examined at the trial "as if under cross-examination"); *Conn.*: *Gen. St.* 1887, § 1099 (opponent may be compelled to testify "in the same manner and subject to the same rules as other witnesses"); *Del.*: L. 1851 (vol. 11), c. 598, § 1 (a party "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"); *Ga.*: Code 1895, § 5290 (may cross-examine and impeach opponent "as though the witness had testified in his own behalf"); 1878, *Garrett v. Sparks*, 60 Ga. 582, 586 (rule applicable); *Ill.*: *Rev. St.* 1874, c. 51, § 6 (a party may be examined "in like manner and subject to the same rules as other witnesses"); *Ind.*: *Rev. St.* 1897, § 525 ("may be rebutted by adverse testimony"); 1889, *Croker v. Agenbroad*, 122 Ind. 585, 24 N. E. 169 (using the opposite party's deposition; left undecided); *Ia.*: 1863, *Hunt v. Coe*, 15 Ia. 197 (rule applicable); 1893, *Thomas v. McDanel*, 88 id. 380, 55 N. W. 499 (rule not applicable); *Md.*: *Pub. G. L.* 1888, Art. 35, § 4 (opponent's testimony may be rebutted by adverse testimony and by admissions); *Mass.*: *Pub. St.* 1882, c. 169, § 20 ("the same liberty . . . as is allowed upon cross-examination"); *Mich.*: 1900, *Smith v. Smith*, 125 Mich. 234, 84 N. W. 144 (director of an opponent corporation may not be impeached except as other witnesses are); *Minn.*: *Gen. St.* 1894, § 5659 (like *Del. supra*, but ending with "counter-testimony" instead of "other evidence"); 1896, *Suter v. Page*, 64 Minn. 444, 67 N. W. 67 (opponent is not the first party's witness); 1896, *Pfefferkorn v. See-field*, 66 id. 223, 68 N. W. 1072 (examiner is not restricted to the case of the opponent, but may cover the whole field as in the case of one of his own witnesses); 1900, *Pipstone Co. Bank v. Ward*, 81 id. 263, 83 N. W. 991 (statute applied); 1901, *Kellogg Co. v. Holm*, 82 id. 416, 85 N. W. 159 (statute applied); *Mo.*: *Rev. St.* 1889, § 8920 (a party may compel an adverse party "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"); 1872, *Chandler v. Freeman*, 50 Mo. 239 (rule applicable); 1898, *Imhoff v. McArthur*, 145 id. 371, 48 S. W. 456 (same); *N. H.*: *Pub. St.* 1891, c. 224, § 15 (party may cross-examine, contradict, or impeach the testimony, offered by him, of a nominal or real adverse party); *N. J.*: *Gen. St.* 1896, § 2 ("When any party is called as a wit-

(2) Where a *co-party* is called against his *co-party*, for the opponent, it seems clear that the *co-party* against whom he testifies may impeach him.³

(3) Where a *co-defendant* in a *criminal prosecution* testifies for himself, the other *co-defendant* may impeach him, because their interests, as between each other, are distinct, and because the witness has been called by himself

ness by the opposite party, he shall be subject to the same rules as to examination and cross-examination as other witnesses"); *ib.*, Practice, § 163 (examination of opposing party by deposition may be "rebutted by adverse testimony"); *N. Y.*: C. C. P. 1877, § 838 (opponent's testimony "may be rebutted by other evidence"); *Laws* 1847, c. 430, § 2 (plaintiff in action where jury is pleaded may examine defendant as any other witness); 1804, *Jackson v. Son*, 2 *Caines* 178 (opponent on cross-examination is one's own witness for the purpose of proving a document's contents); *N. C.*: Code 1881, § 583 (opponent's testimony may be "rebutted by adverse testimony"); 1880, *Strudwick v. Brodnax*, 83 *N. C.* 401, 403 (opponent's deposition not impeachable by prior inconsistent statements; clearly erroneous, because they were also admissions); 1885, *Coates v. Wilkes*, 92 *id.* 376, 385 (obscure, applying Code § 583); 1890, *Helm v. Green*, 105 *id.* 251, 262, 11 *S. E.* 470 (rule applicable); *N. D.*: *Rev. C.* 1895, § 5649 (examination of opponent "may be rebutted by adverse testimony"); § 5651 (one examined as an opponent "may be examined on his own behalf, subject to the same rules of examination as other witnesses"); *St.* 1903, c. 98 (a party, or beneficiary, or officers of a corporate party, may be examined "as if under cross-examination at the instance of the adverse party"; and the adverse party may "rebut it by counter-testimony"; this act not to apply to trials under Civ. C. § 5630, unless the party invoking it is "at the time exercising the right of rebuttal"); *Oh.*: *Rev. St.* § 5243 (opponent may be examined "as if under cross-examination," and examiner "shall not be concluded thereby, but may rebut it by counter-evidence"); *Pa.*: *P. & L. Dig.* 1896, "Witnesses," § 21 (a party "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 witness 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 where a *co-party* is thus cross-examined, "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 cross-examination"); 1874, *Brubaker v. Taylor*, 76 *Pa.* 83, 87, *same* (rule not applicable); 1898, *Callery v. Traush Co.*, 185 *id.* 176, 39 *Atl.* 813 (injury by street-car; plaintiff cannot treat motorman as an opposing party); 1901, *Gantt v. Cox*, 199 *id.* 208, 48 *Atl.* 992 (officers of opponent cor-

poration become one's own witnesses on calling; but a liberal discretion may make exceptions); *S. D.*: *Stats.* 1899, §§ 6487, 6489 (like *N. D.* *Rev. C.* §§ 5649, 5651); *Tex.*: *Rev. Civ. Stats.* 1895, § 2293 (opponent's examination on interrogatories is to be conducted "in the same manner and according to the same rules which apply in the case of any other witness"); § 2296 (party taking may "contradict the answers by any other competent testimony in the same manner as he might contradict the testimony of any other witness"); *U. S.*: 1889, *Dravo v. Fabel*, 132 *U. S.* 487, 489, 10 *Sup.* 170 (taking the opposing party's deposition; rule applicable); *Vt.*: *Stats.* 1894, § 1246 (a party may compel an adverse party "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"); 1891, *Good v. Knox*, 64 *Vt.* 97, 99, 23 *All.* 520 (opponent called to testify against a *co-defendant*; rule applicable); *Va.*: *Code* 1887, § 3351 (opponent examinable "according to the rules applicable to cross-examination"); *Wash.*: *C. & Stats.* 1897, §§ 6008, 6745 (opponent compellable to testify "subject to the same rules of examination as any other witness"); §§ 6012, 6746 (opponent's testimony "may be rebutted by adverse testimony"); 1900, *Reed v. Loney*, 22 *Wash.* 433, 61 *Pac.* 41 (respondent's use of appellant's testimony at former proceedings, to impeach appellant's answer, held not to make him respondent's witness); *Wis.*: *Stats.* 1898, § 4068 (a party "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"; remainder as in *Delaware*, the last clause being "and may rebut the evidence given therein by counter or impeaching testimony"); § 4096 (examination by deposition "shall be subject to the same rules as that of any other witness"); § 4098 (the testimony "may be rebutted by other testimony as if taken in his own behalf"); 1901, *Kreider v. Wisconsin R. P. & P. Co.*, 110 *Wis.* 645, 86 *N. W.* 662 (manager of a mill, held not a corporate officer to be examinable adversely, under § 4096, *Rev. St.* 1898, as amended by *Laws* 1899, c. 29). Whichever rule be adopted, it is at least clear that the opponent thus called could not be allowed to impeach himself; 1853, *Legg v. Drake*, 1 *Oh. St.* 286, 289 (it "would be incompatible with his situation as both party and witness; for the reason that he could not allege his own want of credibility").

³ *Mo. Pub. St.* 1883, c. 82, § 97 (*co-party* may "contradict or discredit" a *co-party* called by the opponent).

and not by the impeacher; and the same consequence follows for witnesses called by one co-defendant.⁴

(4) Where a co-party in a civil case testifies for himself at his own instance, the same result would seem sound; because the other party has not called him, and therefore (*ante*, § 909) has not made the witness his own.

§ 917. *Same*: (6) **Necessary Witness**; (a) **Attesting Will-Witness**. On the correct theory (*ante*, § 899) there is no reason why the legal necessity of calling a particular witness should exempt from the rule the party calling him; for the subjective immunity of the witness from fear of character-abuse is just as important and just as liable to be induced in this kind of witness as in any other. Nevertheless, acting upon the cant theory of a party's guarantee of his witness' credibility (*ante*, § 898), and pressed by a desire to restrict the operations of so unruly and extensive a principle, the Courts have commonly refused to apply the rule to a necessary witness, *i. e.* one called by compulsion of law.⁵

(a) The *attesting witnesses to a will* are required by law to be produced or accounted for (*post*, § 1288); hence it has always been conceded that no rule prevents their impeachment by the proponent of the will.⁶ The precedents deal usually with impeachment by contradiction or self-contradiction, and it would not be safe to assume that the same Courts would take the logical step of permitting impeachment of character.⁷ Distinguish the question

⁴ 1902, *R. v. Hadwen*, 1 K. B. 882 (both at common law, and under the statute of 1898 making accused persons competent in their own behalf (*ante*, § 488), one jointly indicted may cross-examine a co-indictee's witness whose testimony criminate the former; and under the statute the same rule applies to permit the cross-examination of the co-indictee testifying on his own behalf); 1883, *McGruder v. State*, 71 Ga. 864 (here tried together, but under a consent that each might testify for the other; impeachment allowed); 1895, *State v. Goff*, 117 N. C. 755, 23 S. E. 355 (indictment for affray, G. and K. being one set of combatants, and G—s being of the opponents; the former were allowed to impeach the latter testifying for himself; "in such a case the witnesses for the one side stand, as to the parties on the other, in the relation of prosecuting witnesses and defendants"); 1897, *State v. Adams*, 49 S. C. 414, 27 S. E. 451, *semble*. So, too, for divorce and *crim. con.*, where a co-respondent testifies: 1894, *Allen v. Allen*, Prob. 248, *semble* (divorce for adultery; the co-respondent and the respondent are entitled to cross-examine each other).

⁵ The general principle has been broadly sanctioned in the following statutes: *Ark.*: Stats. 1894, § 2958 (allowable for a witness "in a case in which it was indispensable that the party should produce him"); *Ky.*: C. C. P. 1895, § 596 (had character excluded, "unless it was indispensable that the party should produce him").

⁶ *Eng.*: 1818, *Richardson v. Allan*, 2 Stark. 335, *Ellenborough, L. C. R.*; 1843, *Bowman v. Bowman*, 2 Moo. & Rob. 501, *Cresswell, J.*; 1861, *Jackson v. Thomasson*, 1 B. & S. 745,

747, *Cockburn, C. J.* ("I know of no authority that a party who claims under a will, and consequently is compelled to call the attesting witness to it, cannot, in the event of one of them disproving the will, give evidence to discredit him; as for instance by showing that he has been corrupted by the heir-at-law"); *U. S.*: 1838, *Raab v. Furnel*, 2 Harringt. 448, 454; 1898, *Thompson v. Owen*, 174 Ill. 229, 241, 51 N. E. 1046; 1840, *Dennett v. Dow*, 17 Me. 19, 22 (Sbepley, J. dissented from the ruling as to self-contradictions); 1851, *Shorey v. Hussey*, 32 Mass. 579, 581; 1900, *Wilton v. Humphreys*, 176 Mass. 253, 57 N. E. 374 (attesting witness, not called as such, but as scrivener, held not a necessary witness); 1885, *Whitman v. Morey*, 63 N. H. 448, 456, 2 Atl. 899; 1832, *Crowell v. Kirk*, 3 Dev. 357, per *Ruffin, J.*; 1846, *Williams v. Walker*, 2 Rich. Eq. 291 (subscribing witness to a mortgage to which the impeacher was not a party); 1869, *Alexander v. Beadle*, 7 Coldw. 126, 128.

⁷ The few precedents are not harmonious: 1892, *Diffenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. 37 (witness required by law, which was here in the case; character may be impeached); 1840, *Dennett v. Dow*, 17 Me. 19, 22, *supra* (*semble, Contra*); 1866, *Thornton's Ex'rs v. Thornton's Heirs*, 39 Vt. 122, 135 (impeachment allowable "to the extent of proving his former declarations on the subject"; whether character-impeachment could be used is left undecided). If the attesting witness is called by the contestant, he is not the proponent's witness in any aspect: 1834, *Solly v. Hind*, 6 C. & P. 316.

which arises under the preferred-witness rule, namely, whether the testimony of the subscribing witnesses is conclusive upon the proponent of the will; this question, once much controverted (*post*, § 1302), was unanimously answered in the negative; but it is obvious that if answered in the affirmative, it would have had the some practical effect that the present rule would have if applicable; and the two have not always been kept distinct.

§ 918. *Same*: (b) *Prosecution's Witness in Criminal Case*; *Witness called by the Judge*. Does the rule against impeaching one's own witness apply to limit the State in a criminal prosecution? The answer depends on two considerations.

(1) If there is in the jurisdiction a rule of evidence requiring the State to produce all known eye-witnesses of the crime, then such witnesses are compulsory witnesses, and on the principle just examined (*ante*, § 917) the prohibition against impeachment plainly does not apply. But such a rule of compulsion exists in one or two jurisdictions only, and is elsewhere repudiated (*post*, §§ 1339, 2079). Elsewhere, then, the answer must depend upon where there is anything peculiar in the position of the State which distinguishes it from the ordinary civil party. Superficially there may be; actually there is not. The person who is run over by a street-car is just as much restricted to the eye-witnesses whom chance has made passengers or passers-by, as is the State to the eye-witnesses of an affray. Even the defendant in a criminal case cannot select beforehand the persons who will be able to vindicate his innocence. The truth is that circumstances, not the parties, mark out the circle of eligible witnesses. As soon as we begin to reason on these lines, we are forced back to the irrationality of the entire rule (*ante*, § 898). If it is to go, it must go *in toto*; there is nothing reasonable in exempting the State more than any other party. To be sure, if it is to go piecemeal, the exemption for the State is the more plausible to begin with; and such seems in effect the attitude taken in that Court which is as yet the chief supporter of this exemption:

1897, *Powell, J.*, in *State v. Slack*, 69 Vt. 486, 38 Atl. 311 (applying the exemption to all witnesses called by the State on a criminal charge, since the State is bound to call all persons who may have any knowledge): "We are the more satisfied with the conclusion here reached because we think the State ought not to be hampered by such a rule. Prosecutions are carried on by the government, through the agency of sworn officers elected for that purpose, who have no private interests to serve nor petty spites to gratify, but whose sole and only duty is to faithfully execute their trust, and do equal right and justice to the State and accused. The course of public justice, thus directed, ought not to be obstructed by a rule without a reason. The ascertainment of the truth, which is the object of the prosecution, is of more consequence than the instrumentality by which it is sought to be ascertained; and when an instrumentality becomes an obstruction to the course of justice the State should be at liberty to remove it, and by trampling upon it if necessary."

Of such an exemption as this there are a few traces in the earlier English practice.¹ In the United States it is thus far little recognized outside of

¹ 1833, *R. v. Bodle*, 6 C. & P. 186 (murder; father, himself suspected of the crime, the Court called him for the defendant, but allowed

the jurisdictions which (under the principle of § 2079, *post*) acknowledge the compulsory rule for the State's witnesses.² It is worth noting, however, that by availing of the conceded exemption for witnesses called by the judge (*ante*, § 910), the same result may be effected.³

him to be cross-examined to discredit him, yet would not allow him to be contradicted by other witnesses); 1838, *R. v. Chapman*, 8 *id.* 550 (murder; the defendant's brother, an eye-witness; whichever side calls him "may cross-examine him"); 1844, *R. v. Carpenter*, 1 *Cox Cr.* 72 (prosecutor compelled to call an indorsed witness may impeach him by contradiction, but not by self-contradiction); 1845, *R. v. Strouer*, 1 *C. & K.* 650 (rape; witnesses not called by the prosecution were compelled to be called, but "every latitude in examining them" was allowed the prosecution); 1847, *R. v. Woodhead*, 2 *id.* 520 (whoever calls the witness, even defendant, makes them his own witnesses); 1858, *R. v. Cassidy*, 1 *F. & F.* 79 (Parke, B., ruled that the defendant who called an indorsed witness made him his own, and the prosecution could cross-examine).

² *Mich.*: 1874, *Weillar v. People*, 30 *Mich.* 16, 23 (prosecutor may "press them with searching questions"); 1895, *People v. Case*, 105 *id.* 92, 62 *N. W.* 1017 (witness, "whom the prosecutor was obliged by law to call," allowed to be cross-examined to contrary statements in a deposition); 1902, *People v. Eico*, — *id.* —, 91 *N. W.* 755 (point not decided; three judges for exclusion, ignoring the preceding case); *Vt.*:

1877, *State v. Magoon*, 80 *Vt.* 333, 340 (since the State is bound, under the principle of § 2079, *post*, to produce all material witnesses, "it is not to be prejudiced by the character of the witnesses it produces and uses"); 1894, *State v. Harrison*, 66 *id.* 523, 527, 39 *Atl.* 807 (preceding case applied to allow jury's rejection of part of such witness' testimony); 1897, *State v. Black*, 69 *id.* 486, 38 *Atl.* 311 ("We think no distinction can logically be made [between character-evidence and any other]; for the same reason that makes the rule inapplicable to one mode of impeachment makes it equally inapplicable to all modes, as the different modes are but different ways of doing the same thing, namely, discrediting the witness, and they are equal in degree and alike in essence. The reason of the rule does not fail in part and stand in part, — fail as to one mode of impeachment, and stand as to another mode. It is indivisible, and stands or falls as a whole").

³ 1902, *Carle v. People*, 300 *Ill.* 494, 66 *N. E.* 32 (State's attorney allowed to state that he did not wish to call a certain eye-witness, and to request the Court to call him, and then to cross-examine him, the defendant also cross-examining).

SUB-TITLE II (*continued*): TESTIMONIAL IMPEACHMENT.

TOPIC I: CHARACTER, MENTAL DEFECTS, BIAS, ETC., USED AS GENERAL QUALITIES TO DISCREDIT.

CHAPTER XXX.

A. MORAL CHARACTER.

§ 920. Actual Disposition, as distinguished from Reputation and other modes of evidencing Disposition.

§ 921. Relevancy and Auxillary Policy; their different bearings.

§ 922. Kind of Character; Veracity as the fundamental Quality.

§ 923. Same: the Rule in the various Jurisdictions.

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§ 925. Same: Accused's Character as Witness and as Party, distinguished.

§ 926. Same: Use of Prior Convictions and other Instances of Misconduct.

§ 927. Time of Character; General Principle.

§ 928. Same: the Competing Rules as to Prior Character in the various Jurisdictions.

§ 929. Same: Character *post litem motam*; Effects of Hearsay Rule.

§ 930. Place of Character.

B. INSANITY, INTOXICATION, AND OTHER ORGANIC INCAPACITY.

§ 931. In general.

§ 932. Insanity.

§ 933. Intoxication.

§ 934. Disease, Age, Morphine Habit, and auditory Derangements.

§ 935. Religious Belief.

§ 936. Race.

C. EXPERIENTIAL INCAPACITY.

§ 938. General Principle.

D. EMOTIONAL INCAPACITY, BIAS, INTEREST, AND CORRUPTION.

§ 940. General Principle.

A. MORAL CHARACTER.

§ 920. Actual Disposition, as distinguished from Reputation and other modes of evidencing Disposition. That which induces us to believe that a witness is or is not likely to be speaking truthfully is usually some circumstance of his actual personality. Just as his knowledge and his recollection, his sanity and his maturity of age, as bearing on his qualifications for admission, are actual qualities somewhere existent in or attributable to him, so also the moral character, the bias, or the corruption, which tend to discredit him and affect the probability of his truthfulness, are actual qualities, having probative force because conceived of as existent in or attributed to him. It may be necessary, in establishing one or more of these qualities, to resort to reputation or other evidence; but the reputation is not the immediate basis of our inference as to his probable truth-telling. Reputation is not resorted to at all for the purpose of discovering his bias, his knowledge, his recollection and the like; and the fact that it is resorted to for ascertaining his moral disposition must not be allowed to obscure the important truth that the thing immediately and fundamentally important is the actual disposition, and not the reputation.¹

¹ Compare the quotations to this effect *ante*, § 52, and *post*, § 1608 (reputation and character).

Reputation, then, is merely *evidence of disposition or character*, and, moreover, only one of three kinds of such evidence. First, there may be *particular instances of conduct*, good or bad, from which is inferrible the permanent disposition that has inspired them; questions of Circumstantial Evidence thus arise which are treated later (*post*, §§ 977-988). Secondly, there may be the *personal knowledge* of one who has observed the man, *i. e.* Testimonial Evidence, such as would be given of the qualities of a horse, the strength of an iron beam, or the circumstances of a death, by one who has personally observed the data; there ought in reason to be no evidential objection to this kind of testimony to character; yet the Opinion rule has here been invoked, and the admissibility of such testimony is generally denied (*post*, § 1980). Thirdly, there may be *reputation*, *i. e.* the net expression of a multitude of personal opinions of the preceding sort, based more or less on personal intercourse. This should at least stand on no better footing than the preceding class, though it does in fact; but it has to pass the gauntlet of the Hearsay rule, and its admissibility as an exception to that rule is there discussed (*post*, §§ 1608-1621). Moreover, the question may arise whether the *witness* who testifies to reputation is qualified by knowledge to do so, — a question treated under the head of the Knowledge Qualification (*ante*, §§ 691, 692). All these three varieties are merely kinds of evidence for proving Character; and here, as in all cases where the inference is from the existence of a certain character to the probability of certain conduct (in particular, from a defendant's character, *ante*, §§ 52, 55), the argument is based on the character or disposition itself (in the ordinary sense of the word); and it is for the present purpose immaterial whether the intention is to evidence that character by means of reputation or otherwise.

§ 921. **Relevancy, and Auxiliary Policy; their different bearings.** In arguing from a witness' character to his probable truth-telling, questions of relevancy are of course the primary ones, — questions as to the kind of character, the time at which it is predicated, and the like. But, as with all circumstantial evidence (*ante*, § 42), questions of auxiliary policy may be raised. It has already been seen, in dealing with a defendant's character (*ante*, § 57), that considerations of this sort are controlling; *i. e.* that which is relevant enough (the defendant's bad moral character for the quality in question) is not allowed to be used by the prosecution because of the undue prejudice to the case of the defendant on its merits; and that in civil cases (*ante*, § 64) the character of the parties, relevant though it may be, is for other reasons not usable. Are there here any such controlling reasons of auxiliary policy?

It is usually assumed that there are not. The reason for exclusion in the case of a criminal defendant is that he may be found guilty on the present charge, not because he is believed to be guilty, but because his bad character may be thought by the jury to deserve punishment or to deprive an erroneous verdict of its moral injustice. But this reason obviously is totally lacking in the case of a witness, because he is not on trial and can be found guilty of nothing. The reason for exclusion in the case of civil parties is that, even

where some moral turpitude is involved (and where character would therefore be relevant), the possibilities of protracting the trial, confusing the issues, and turning the proceeding into a contest of mere numbers of witnesses, are strong enough to outweigh the advantage of having evidence of such slight value; and these reasons and motives are again supposed to be inapplicable to evidence of witnesses' character. The law, then, as now universally accepted, attributes no controlling influence to any of these considerations, and therefore allows the character of witnesses to be offered freely in evidence; subject only, of course, to the general discretionary power of the trial Court to limit the number of witnesses on this as on any other point (*post*, § 1907).

But is it a proper assumption that none of the above considerations apply to the use of witnesses' character? It is true that the witness cannot be found guilty by the jury upon any charge, but the assault upon his character may bring it to public notice in such a way that, without any charge and without any trial, he may be condemned by public opinion and disgraced before the community. While we do not choose to regard with compunction the mere feelings of the witness, we may well hesitate if we find that the prospect of this ordeal of public disgrace threatens to make the witness-box a place of dread to its innocent occupants, and to deprive justice of the fullest opportunity to obtain useful testimony. Again, the reasons applicable to the use of parties' character in civil cases do also unquestionably in some degree apply to the use of witnesses' character; for no long experience at trials is needed to convince one that the danger of the protraction of the proceedings, the confusion of the issues, and the degeneracy of the trial into a contest between neighborhood factions is equally attendant upon such evidence. Judges have often protested against the abuses of this kind of evidence.¹ Considering the comparative triviality of its value, and the modern tendency to abandon the old notion (a mark of a primitive stage of culture) that a usually bad man will usually lie and a usually good man will usually tell the truth, and the widespread dislike of the witness-box (due largely to the license of counsel), it would seem desirable to consider the expediency of abandoning once for all the use of this feeble and petty class of evidence. Another and more advanced generation will possibly persuade itself to this decision:

1860, *Warllaw, J.*, in *Chapman v. Cooley*, 12 Rich. 660: "The consumption of the limited time which can be appropriated to the administration of justice, and of the money of parties and witnesses, required by the trial of collateral issues as to character, is a great and growing mischief. In this very case, involving in pecuniary interest the value of a cotton-screw and seven bags of cotton, the judge reports that three days of a former session were occupied, with no other fruit than mistrial by cessation of the term, and that at the trial which resulted in a verdict, notwithstanding his ruling to exclude such evidence as to the principal witness of the plaintiff, fifty-six witnesses were examined as to character. Great delay, expense, and exasperation necessarily follow such a course. Instead of trying the issue in the action, the procedure in many cases is a trial of the witnesses; and every wit-

¹ Compare § 1610, *post*.
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ness is expected to bring in his train a host of compurgators who will swear to their faith in him when he contradicts himself or is contradicted by others. These collateral issues as to character are practically and sometimes justly applied, not only to the witnesses as to the facts in controversy, but also to the witnesses as to character themselves, and really are unlimited and illimitable. In a large majority of cases, these collateral investigations are altogether sterile, either because the testimony of the witness assailed is immaterial, or because the number is nearly equal of those attacking and those defending his character. It is frequently a mere contest as to the number of the compurgators and the vilifiers, and in the muster the vicinage is canvassed and disquieted."

§ 922. **Kind of Character; Veracity as the fundamental quality.** In determining the relevancy of such evidence as affecting the credit to be given to a witness, the first question is, What kind of character is relevant? Since the argument is to be against or for the probability of his now telling the truth upon the stand, it is obvious that the quality or tendency which will here aid is his quality or tendency as to truth-telling in general, i. e., his *veracity*, or, as more commonly and more loosely put, his *character for truth*. This must be, and is universally conceded to be, the immediate basis of inference. Character for truth is always and everywhere admissible. Moreover, any other trait or quality, or combination of them, is relevant only so far as involving, necessarily or probably, the presence or absence of this quality as to truth-telling. This leads us to the chief topic of controversy in this department, namely, whether *bad moral character* in general, or some other *specific bad quality* in particular, is admissible.

The argument for the use of bad moral character to discredit a witness is, in brief, that it necessarily involves an impairment of the truth-telling capacity, that to show general moral degeneration is to show an inevitable degeneration in veracity, and that the former is often more easily betrayed to observation than is the latter. The following passages illustrate the various phrasings of the argument:

1650. *Bushnell's Trial*, 5 How. St. Tr. 633, 701; *Bushnell*, arguing against a witness whose many infamies he had related: "But may some say 'that all this, however true, makes him no more than a thief or a robber of both God and man, or a plunderer, or a parricide, a profaner, or a drunkard, or the like; but now this doth not wholly disenable his testimony; but could I make it appear that he had formerly foresworn himself, then I had something to the purpose.' To this I shall answer . . . that we cannot prove it that those who bore false witness against Naboth did ever bear false witness against any before, but this it was that rendered them despicable (and with just judges should have been cause enough to abhor them), because they were sons of Belial, wicked, mischievous lawless men, men of so much known infamy that they would not stick at anything which was put upon them, be it either to speak or to do, but in the general were ready for any wicked employment."

1820. *Toomer, J.*, in *State v. Russell*, 2 Dev 210: "Should a witness whose general character is proverbially bad as to licentiousness and lawlessness, who is in his habits regardless of the precepts of religion and reckless of the consequences of vice be entitled to the same credit as another whose character is without stain, and whose whole life has

§ 1893. *Simkins, J.*, in *Carroll v. State*, 32 Tex. Cr. 431, 24 S. W. 100 ("Experience clearly demonstrates that, in most efforts to swear away the character of a witness, animosity or revenge is the incentive or cause of the most positive impeaching testimony").

been marked by piety, virtue, and truth? . . . An unprincipled man, although grovelling in other vices which he has long practised, may for selfish purposes artfully conceal the weakness of his character on the score of veracity. Should not such habits lessen the weight and impair the credit of a witness, although he may have established no general character bad as to truth?"

1817, *Marcy, Sen., in Bakeman v. Rose*, 18 Wend. 146, 151: "That the credibility of a witness should be sought through his general moral character I have no doubt. . . . If the inquiry be confined to the general reputation of the witness in point of truth among his neighbors, it will happen in some cases that a witness whose general moral character is deservedly infamous is allowed to impress his testimony on the jury with unqualified weight, simply because mendacity may have been relatively too insignificant an item, in the catalogue of his vices, to have attracted the attention or elicited the remark of his acquaintance. Or it may happen that, though generally of so depraved or corrupt a life that no one would doubt the facility with which he might be suborned to swear falsely, yet from caution or calculation he may have observed that general veracity in his common intercourse, or from natural taciturnity a 'wilful stillness entertained,' which would render his reputation impregnable to this form of inquiry. . . . One of the great benefits of jury trial was supposed to exist in the circumstance that the jury, being from the vicinage of the parties and the witnesses, were better able to judge of their relative honesty and credibility. It would seem, therefore, in accordance with this principle, that under the modern forms of impanelling juries, which do not in many cases afford to jurors the means of judging, from personal knowledge of the character of witnesses, the measure of credit to be given to them, that as liberal a course for supplying this deficiency of knowledge should be allowed as would be compatible with the rights of the witnesses."

The arguments made in answer to this are chiefly three: (1) that, as a matter of human nature, a bad general disposition does *not* necessarily or commonly involve a lack of veracity, and that therefore the former is of little or no bearing probatively; (2) that the estimate of an ordinary witness as to another's bad general character is apt to be formed loosely from uncertain data and to rest in large part on personal prejudice and on mere differences of opinion on points of belief or conduct, — a chance of error which is relatively small in the specific inquiry as to the other's notorious untruthfulness; and (3) that the incidental unpleasant features of the witness-box are largely increased when the way is opened to this broad and loose method of abusing those who are called as witnesses. The following passages represent the various aspects of the argument:

1814, *Boyle, C. J., in Noel v. Dickey*, 3 Bibb 269: "It is an observation not less true than trite, that no one is entirely virtuous or entirely vicious. Such, indeed, is the general preponderance of the virtue or vice of individuals as to entitle them to the general character of good or of bad; but we cannot, merely from knowing what the general character is, say with certainty what vice or virtue enters into its composition. If, therefore, we would form a correct judgment of a man with regard to any particular vice or virtue, it is necessary we should be informed of his character in that particular respect. . . . A person, therefore, whose general character is bad, may notwithstanding possess such a degree of veracity as to entitle him to credit upon oath; and whether he does so or not can only be ascertained by inquiry into his character for truth."

1818, *Greene, J., in Carter v. Carver*, 1 Greene Ia. 173: "The method of questioning as to general character alone appears to us not only vague but subject to great abuse and injustice. Clannish witnesses, whose intercourse and business are always limited to

a particular class of kindred spirits, who may constitute a majority of the neighborhood, often entertain peculiar and contracted views of general character, when applied to those who may not agree with them in social, religious, or political tenets. And thus, by a decided majority of one neighborhood, a man might be represented as possessing an excellent general character; while in an adjoining neighborhood, where he is equally well known, he might be described as a man of great moral turpitude. . . . The requisites of a good character, and the components of a bad one, are so variously viewed by different and even adjacent communities that they never can become a safe and uniform test of veracity, without confining the inquiry particularly to character for truth. In some communities an ultra-Mason, in others a proscriptive anti-Mason, in this neighborhood an abolitionist, in the adjoining one an anti-abolitionist, would be regarded and styled a bad character; and thus, in many communities, he who plays cards, or engages in horse-racing, or frequents groceries, or works on the Sabbath-day, is looked upon and called a bad character; and yet such men — either the advocates of unpopular sentiments, or those addicted to objectionable habits — may have a most commendable regard for veracity. . . . Thus, by opening this boundless field of inquiry as to 'bad character,' in its multitudinous phases, the most truth-abiding man might often be impeached."

1856, *Ellsworth, J.*, in *State v. Randolph*, 24 Conn. 363, 367: "The more general enquiry in England is adopted to learn the witness' character for truth; ours is adopted for the same purpose, but is more simple and direct. In our courts the enquiry put is, 'Is the character for truth on a par with that of mankind in general?' The English rule has this advantage, that it brings the general character of the witness before the triers, which is important where the witness has not acquired a specific character on the subject of truth; and hence it is urged with some force that in such a case the general inquiry is essential, for no other will reach the case. . . . General bad character is undoubtedly a serious blemish in a witness, and might justly detract from the weight of his testimony; and so might the character of a witness for the specific blemish of licentiousness, especially in the female sex. But where shall we stop the enquiries? Witnesses, who can have no opportunity to exculpate themselves or give explanations of their acts, ought not to be exposed to unjust obloquy, nor should the trial be complicated and prolonged by trying collateral issues. If it were wise and just to enquire for one's reputation for virtue, why not for gambling, horse-racing, drunkenness, sabbath-breaking, etc.?"

1859, *Hell, J.*, in *Boon v. Weathered*, 23 Tex. 675, 681: "When a man's honesty (I mean his correctness in business transactions) is in question, his veracity is not in question. When his veracity is in question, one cares not to know whether he be of a peaceable or of a quarrelsome disposition. If the question is concerning honesty, the inquiry should be concerning honesty. If the question be one of veracity, the inquiry should be directed to the point at issue. . . . But the main argument, used by those who think that in impeaching a witness the inquiry ought to be as to his general moral character, is derived from the kindred nature of vices [quoting Mills, J., in *Hume v. Scott*]. . . . But observation of human nature has not established it as an infallible truth that the existence of one vice in an individual is proof of the existence of another [quoting Boyle, C. J., in *Nash v. Dickey*]. . . . No one can be so bold as to deny that, if a man be worthy of credit under oath, notwithstanding a general bad character in other respects, then no person to whom his testimony is of value should be robbed of it upon any ethical theory concerning the kindred nature of vices."

1869, *Zabritskie, Ch.*, in *Atwood v. Impson*, 20 N. J. Eq. 157: "With many, telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing, gambling, roystering, or making close bargains. With others, lying is the habit or principle, and if elevated to be senators or legislators, or made church-members or deacons, it does not always reform them. The object of the law is to show the character of the witness as to telling the truth."

There can be little doubt that the latter class of arguments represent the

better side. Attacking a witness' character is often but a feeble and ineffective contribution to the proof of the issue; and its drawbacks appear in their most emphasized form where the broader method of attack is allowed. The modern spirit tends to confine this mode of attack to its narrowest limits; and, in the minority of jurisdictions which permit the broader method, the annals of trials give the reader an unedifying impression of the unprofitable nature of such evidence.

§ 923. **Same: the Rule in the various Jurisdictions.** Historically, the use of bad general character appears as originally allowable, — fitting, as it does, a more primitive notion of human nature. In England, it was used without question down to the latter part of the 1700s (whence its appearance by transplantation in some of our earliest Courts). But about that time, in some obscure way, an opposition set in, and the propriety of using character for truth only was advocated. By the first part of the 1800s, a compromise had been reached; and, while character for truth only was taken as the fundamental requirement, the estimate was allowed to be based on the witness' knowledge of the other's general character; so that the inquiry in form became a compromise, *i. e.* "Knowing his general character, would you believe him on oath?"¹ In England, then, and in those States which allow that form of question,² a slight concession is made by allowing the witness, in giving his personal opinion as to veracity, to consider *in his own mind* the other's general qualities; but it is to be observed that the witness does not *state to the tribunal* what that general character is. In other words, for the purposes of proving by repute, general character is excluded, and character for veracity only is stated. This is the modern rule in England.

In this country, the use of the witness' personal belief as to the character of the other has always stood on a precarious footing;³ so that the inquiry is more commonly aimed at obtaining reputation as the mode of proof, and the question is thus more directly and clearly phrased for the contrast between general character and veracity-character. The positive opinion in favor of the latter in Chief Justice Swift's treatise, in 1810,⁴ had wide currency; and in one way or another, the great majority of jurisdictions finally gave adherence to that opinion.⁵ Those that withstand it are chiefly in the South and the Southwest.

¹ Post, § 1982, for passages illustrating this.

² Post, §§ 1983, 1985.

³ Post, § 1985.

⁴ Swift, Evidence, 143.

⁵ In the following citations are included, for convenience, those also which deal with the question of § 924, post: *Alabama*: Here general character was held admissible, except as otherwise noted: 1839, *McCutchen's Adm'rs v. McCutchen*, 9 Port. 850, 855; 1846, *Sorrelle v. Craig*, 9 Ala. 540 (left undecided); 1850, *Nugent v. State*, 18 Id. 526 (denied); 1856, *Ward v. State*, 28 Id. 53, 60, 64 (affirmed by two to one); 1871, *Boles v. State*, 46 Id. 206 (approving the preceding case); 1872, *De Kalh Co. v. Smith*, 47 Id. 412 (same); 1875, *Holland v.*

Barnes, 53 Id. 86 (excluding a woman's chastity); 1885, *Motes v. Bates*, 80 Id. 382, 385; 1888, *Davenport v. State*, 85 Id. 338, 339, 5 So. 152 (excluding character for honesty); 1889, *McInerney v. Irvin*, 90 Id. 275, 277, 7 So. 84 (excluding a woman's character for chastity); *Birmingham U. R. Co. v. Hale*, ib. 8, 11, 8 So. 142 (same); 1894, *Rhea v. State*, 100 Id. 119, 14 So. 653 (same); 1891, *Mitchell v. State*, 94 Id. 88, 73, 10 So. 516; 1895, *Byers v. State*, 105 Id. 31, 16 So. 716; 1895, *Yarborough v. State*, ib. 43, 18 So. 758; 1896, *McCutchen v. State*, 109 Id. 465, 19 So. 610 (same as *Davenport v. State*); 1896, *Crawford v. State*, 112 Id. 1, 21 So. 214 (admitting bad general character, but not character for chastity); 1897, *White v.*

§ 924. Same: Character as to Specific Traits (Chastity, etc.) other than Veracity. Where the principle is strictly maintained that veracity only is to

State, 114 id. 10, 22 So. 111; *Alaska*: C. C. P. 1900, § 669 (like Or. Annot. C. 1892, § 840); *Arkansas*: 1855, *Pleasant v. State*, 15 Ark. 634, 651, *semble* (truth only); Code, § 634, now State, 1894, § 2959 ("A witness may be impeached . . . by evidence that his general reputation, for truth or immorality, renders him unworthy of belief"); 1874, *Majors v. State*, 29 Ark. 112 (character for "immorality" admitted); 1890, *Hollingsworth v. State*, 51 id. 387, 391, 14 S. W. 41 (character for truth only, improper); *California*: C. C. P. 1872, § 2051 ("general reputation for truth, honesty, and integrity," admissible); § 1847 ("evidence affecting his character for truth, honesty, or integrity" is admissible); 1865, *People v. Yslas*, 27 Cal. 630, 631 (excluding chastity-character); *Curry, J., diss.*; 1883, *People v. Markham*, 64 id. 157, 163, 30 Pac. 620 (pointing out that the last two qualities named in the Code are additions to the common-law rule of the State); 1893, *People v. Johnson*, 106 id. 289, 39 Pac. 622 (woman's character for chastity, excluded); 1895, *People v. Chin Hane*, 108 id. 597, 41 Pac. 637 (excluding character as a prostitute); *Connecticut*: 1877, *State v. Shields*, 45 Conn. 256, 257, 260, 263 (rape; former prostitution of the prosecutrix admitted, but the principle not specified); *Florida*: 1878, *Robinson v. State*, 16 Fla. 835, 839, *semble* (veracity only); Rev. St. 1892, § 1037 ("general character" allowed, *semble*; see post, § 947); 1898, *Morris v. State*, 40 Fla. 216, 24 So. 154 (veracity only); *Georgia*: Code 1895, § 5223 ("general bad character," admissible); 1835, *Stokes v. State*, 18 Ga. 17, 37 (general character, followed by opinion as to belief on oath); 1858, *Smithwick v. Evans*, 24 id. 463 (general character); 1860, *Weathers v. Barkdale*, 30 id. 849 (same; the former of these two excludes, the latter admits, a woman's character for chastity); 1873, *Wood v. State*, 48 id. 192, 292, *semble* (excluding female character for chastity; here a habit of illegal intercourse with a particular person was considered); *Idaho*: Rev. St. 1897, § 5956 ("truth, honesty, or integrity"); § 6082 (like Cal. C. C. P. § 2051); *Illinois*: here character for veracity only is admissible; 1849, *Frye v. Bank*, 11 Ill. 367, 378; 1859, *Crabtree v. Kile*, 21 id. 183 ("general character" spoken of, perhaps carelessly); 1860, *Cook v. Hunt*, 24 id. 535, 545, 550; 1876, *Dimick v. Downs*, 82 id. 570, 573; 1884, *Tedens v. Schumers*, 112 id. 263, 266; 1887, *Splea v. People*, 122 id. 1, 208, 12 N. E. 865, 17 N. E. 898; *Indiana*: the Civil Code provided (R. S. 1898, p. 275; Civ. Code, § 242) that in civil cases general moral character should be admissible; and this has been construed as also admitting specific moral traits: 1841, *Walker v. State*, 6 Blackf. 3; 1873, *Indianapolis P. & C. R. Co. v. Anthony*, 43 Ind. 183, 193 (chastity of female witness, admitted); 1877, *Rawles v. State*, 56 id. 439 (bastardy proceedings; here the complainant's specific character for chastity was also received); 1879, *Smock v. Pierson*, 68 id. 403 (general moral character; bastardy proceedings). But this section was treated as not applicable in criminal cases: 1874, *Fletcher v. State*, 49 Ind. 131 (interpreting the common law; and therefore not extending to criminal cases the rule of Civ. C. § 242); 1877, *Farley v. State*, 57 id. 334; 1879, *State v. Bloom*, 68 id. 55; *State v. Beal*, 118 id. 346. In 1881, however (R. S. 1881, § 1803), the rule for civil cases was extended to criminal cases: 1884, *Wachetetter v. State*, 99 Ind. 298; 1885, *Anderson v. State*, 104 id. 471, 4 N. E. 364, 5 N. E. 711 (a woman's character for chastity, admitted); 1892, *Randall v. State*, 132 id. 543, 32 N. E. 305 (defendant's moral character); and the statute now reads: Rev. St. 1897, § 1894 ("In all questions affecting the credibility of a witness, his general moral character may be given in evidence"); *Iowa*: at first character for truth only was admitted: 1848, *Carter v. Cavanaugh*, 1 Greene 171; 1859, *State v. Sater*, 8 Ia. 420, 424; then by statute (*infra*) general moral character was made admissible: 1867, *Killbuck v. Mullen*, 22 id. 502 (excluding character for chastity, i. e. "a specific vice"); 1868, *State v. Vincent*, 24 id. 570, 574; 1882, *State v. Egan*, 59 id. 637, 13 N. W. 730; 1884, *State v. Kirkpatrick*, 63 id. 559, 19 N. W. 660; Code 1897, § 4614 ("general moral character," admissible); 1899, *State v. Seever*, 108 Ia. 718, 78 N. W. 705; *Kansas*: 1866, *Craft v. State*, 3 Kan. 450, 480, *semble* (woman's character for chastity, excluded); 1891, *Conter v. Sulan*, 21 id. 341 (no ruling; yet the practice seems to sanction character for truth only); *Kentucky*: 1814, *Noel v. Dickey*, 3 Bibb 268, *semble* (truth only); 1819, *Mohley v. Hamit*, 1 A. K. Marsh 591 (general character admissible, if followed by the witness' inference as to credibility upon oath); 1821, *Hume v. Scott*, 3 id. 261 (general character admissible, without limitation; expressly overruling the preceding case); 1857, *Thurman v. Virgin*, 18 B. Monr. 792 (general character admissible); 1869, *Yonng v. Com.*, 6 Bush 316, *semble*; 1895, *Com. v. Wilson*, — Ky. —, 32 S. W. 166 (either character for truth or general moral character); C. C. P. 1895, § 597 ("evidence that his general reputation for untruthfulness or immorality renders him unworthy of belief," allowable); *Louisiana*: general character is admissible; the controversy is as to other specific qualities than veracity: 1852, *State v. Parker*, 7 La. An. 83, 87, *semble*, "infamous" character admitted, but character for extortion, cheating, and dishonestness, not admitted by the majority); 1892, *State v. Jackson*, 44 id. 160, 162, 10 So. 600 (general character "of that kind which will show such moral turpitude" as to make him incredible, admissible; *semble*, "infamous" character, admissible, for violence, inadmissible); 1897, *State v. Taylor*, 45 id. 605, 609, 12 So. 927 (character for honesty, as well as truth; here a defendant on trial for larceny); 1901, *State v. Gny*, 106 Ia. 8, 30 So. 268 (general moral character admissible, but not character for honesty or other specific traits than veracity; *Broux, J., diss.*); *Maine*: character for truth only is admissible: 1841, *Phillips v.*

be the subject of inquiry, no question can arise as to admitting character for any other trait. But in jurisdictions where bad general character may be

Kingfield, 19 Me. 375, 377; 1844, *State v. Bruce*, 24 Id. 71 ("infamous" character, excluded); 1849, *Thayer v. Boyle*, 30 Id. 473, 481 (intemperate habits, excluded); 1856, *Shaw v. Emery*, 42 Id. 59, 64; 1875, *Sidelinger v. Lucklin*, 64 Id. 371 (bastardy; complainant's reputation as a prostitute, excluded); 1877, *State v. Morse*, 67 Id. 428 (prosecutrix in rape complaint); *Maryland*: 1795, *Hutchings v. Cavalier*, 3 H. & McIl. 389 (general character, admissible); 1890, *Hrower v. State*, 72 Md. 468, 475, 20 Atl. 186 (truth only; not a woman's chastity); *Brown v. State*, ib. 477, 480, 20 Atl. 140 (not general bad character); 1901, *Hoffman v. State*, 93 Id. 389, 49 Atl. 638 (truth only); *Massachusetts*: 1817, *Com. v. Murphy*, 14 Mass. 387 (*Per Curiam*: "A common prostitute must necessarily have greatly corrupted, if not totally lost, the moral principle, and of course her respect for truth and her regard for the sacredness of an oath"); 1846, *Com. v. Churchill*, 11 Pick. 539 (overruling the preceding case); 1858, *Quineigmond Bank v. Hobbs*, 11 Gray 257 (veracity only; not integrity); 1859, *Pierce v. Newton*, 13 Id. 528 (veracity only; allowing other questions in order to make it plain that the veracity-reputation was not confined to a failure to pay debts); *Michigan*: 1856, *Webber v. Hanke*, 4 Mich. 198, 203 (truth only); 1874, *Hamilton v. People*, 29 Id. 173, 185 (same); 1899, *Calkins v. Ann Arbor R. Co.*, 119 Id. 312, 78 N. W. 129 (character for honesty, excluded); 1900, *People v. O'Hare*, 124 Id. 515, 83 N. W. 279 (woman's character for chastity, excluded); *Minnesota*: 1372, *Ruedell v. Slingerland*, 18 Minn. 380 (truth only); 1876, *Moreland v. Lawrence*, 23 Id. 84, 88 (same); *Mississippi*: 1850, *Newman v. Macklin*, 13 Sm. & M. 383, 387 (truth only); 1870, *Head v. State*, 44 Miss. 731, 735, 751 (allowing proof of a female witness' prostitution); 1881, *Smith v. State*, 55 Id. 867, 873 (veracity only; woman's character as a prostitute excluded); *Head v. State* (repeated); 1885, *French v. Sale*, 63 Id. 386, 393 (truth only); 1896, *Tucker v. Tucker*, 74 Id. 93, 19 So. 955 ("probably unchaste character" of a woman, excluded; *Whitfield, J.*, reserving his opinion); *Missouri*: here it has always been conceded that general moral character is admissible: 1850, *State v. Shields*, 13 Mo. 236 ("bad moral character generally"); *Day v. State*, ib. 422, 426, *semble* ("general bad character"); 1874, *State v. Hamilton*, 55 Id. 520, 522 ("moral character generally"); 1875, *State v. Breeden*, 58 Id. 507 ("general moral character"); 1878, *State v. Clinton*, 67 Id. 380, 390 ("general character" for "honesty and morality"); 1880, *State v. Miller*, 71 Id. 591 ("general character for morality"); 1881, *State v. Grant*, 79 Id. 173 (also, general reputation as a common drunkard, as showing a "deterioration of that general moral character"); 1886, *State v. Rider*, 90 Id. 54, 63, 1 S. W. 825 ("morality"); 1888, s. c., 95 Id. 474, 486, 8 S. W. 723 ("morality"); 1889, *State v. Taylor*, 98 Id. 240, 245, 11 S. W. 570; 1891, *State v. Shroyer*, 104 Id. 441, 446, 16 S. W. 286 (approving *State v. Grant*); 1894, *State v. Smith*, 125 Id. 2, 6, 28 S. W. 181; 1896, *State v. Weeden*, 133 Id. 70, 34 S. W. 473; 1897, *State v. May*, 142 Id. 135, 43 S. W. 637; but an unedifying controversy (dealing much dole to the doctrine of *state decens*) long went on concerning the admissibility of a man's character for unchastity; it is perhaps not yet finally decided: 1850, *State v. Shields*, 13 Mo. 236 (woman; "general character for chastity" allowed, as "to some extent shaking the credibility"); 1878, *State v. Clinton*, 67 Id. 380, 382, 390 (forgery; defendant as a witness; character for chastity admitted); 1883, *State v. Grant*, 79 Id. 133 (admissible, for a female witness; *semble*, also, allowable to show that she was reputed a prostitute); 1886, *State v. Rider*, 90 Id. 54, 63 (in man; chastity admitted); 1888, s. c., 95 Id. 474, 486 (same); 1891, *State v. Shroyer*, 104 Id. 441, 447, 16 S. W. 287 (rape; the defendant being a witness, his character for chastity was admitted); 1895, *State v. Duffey*, 128 Id. 549, 31 S. W. 98 (chastity of a woman, admitted); 1895, *State v. Sibley*, 131 Id. 219, 31 S. W. 1033 (by Div. 2; not admitting unchastity against male witnesses, especially against a defendant in a seduction charge, as here; going on the supposed authority of *State v. Grant*; *Gault, P. J.*, diss.); 1895, s. c., 132 Id. 102, 33 S. W. 167 (by the Court in banc; affirming the preceding ruling; *Bruce, C. J.*, *Macfarlane, Gantt, and Barclay, JJ.*, diss.); 1897, *State v. Dyer*, 139 Id. 199, 40 S. W. 768 ("chastity and virtue," against a man, admitted; *Burgess and Sherwood, JJ.*, undecided); 1898, *State v. Summar*, 143 Id. 220, 45 S. W. 254 (woman's chastity, admitted); 1903, *State v. Pollard*, 174 Id. 607, 74 S. W. 969 (rape; defendant's reputation for "chastity and morality," admitted to impeach him; *Fox, J.*, writing the opinion, but in effect dissenting); *Montana*: C. C. P. 1895, §§ 3123, 3379 (like Cal. C. C. P. §§ 1847, 2051); *Nevada*: 1874, *State v. Ferguson*, 9 Nev. 106, 120 (truth only); 1876, *State v. Larkin*, 11 Id. 314, 330 (truth only; "though there perhaps are exceptional cases" in which "utter depravity of moral character" might be shown; here excluding the unchastity of a woman); *New Hampshire*: character for truth only is admissible: 1818, *State v. Howard*, 9 N. H. 486, *semble*; 1850, *Hoit v. Monlton*, 21 Id. 592; 1861, *State v. Forscher*, 43 Id. 89; *New Jersey*: 1795, *State v. Mair*, 1 N. J. L. 456 (not allowed to prove quarrelsome character; "a man may be a boxer or a bully and yet speak the truth upon oath"); 1869, *Atwood v. Impson*, 20 N. J. Eq. 150, 157 (truth only); *King v. Ruckman*, ib. 316, 337 (truth only); *New Mexico*: *Comp. L.* 1897, § 5026 ("general evidence of bad moral character not restricted to his reputation for truth and veracity," admissible); 1895, *Territory v. De Guzman*, 8 N. M. 92, 42 Pac. 68, *semble* (general immorality, admissible); *New York*: 1817, *Jackson v. Lewis*, 13 Johns 505 (veracity only); 1818, *Troup v. Sherwood*, 3 Johns Ch. 558, 566, *Kent, C.* (veracity-character assumed to be the only proper one); 1837, *Bakeman*

used, the question must also arise whether some other specific vice or group of vices is not as significant as bad general character in indicating a degeneration of the truth-telling capacity. One of the objections, indeed, urged against the use of bad general character¹ is that it necessarily brings in its train a number of consequential difficulties such as this. The better opinion, and the one usually reached, is that in spite of logic's demands, policy requires that the line be drawn at bad general character, and that no specific quality other than that of veracity be considered :

1817, *Walworth, C.*, in *Bakeman v. Rose*, 18 Wend. 146: "It is perfectly well settled, both in this State and in England, that the general character of the witness alone can be inquired into for the purpose of impeaching his credibility; — that is, what is his general character for truth and veracity, or whether his general character is such that he is not

v. Rose, 18 Wend. 146 (general character, admitted, but not specific traits, such as unchastity; quoted *supra*); 1838, *People v. Abbott*, 19 *id.* 198 (general character; the opinion of Cowen, J., for the Supreme Court, so far as it may have allowed the specific trait of unchastity, was in effect overruled by the decision of the Court of Errors and Appeals in *Bakeman v. Rose*, *supra*, delivered shortly afterwards); 1838, *People v. Rector*, *ib.* 579, *semble* (general character, admitted); if not so intended, the language was no longer law after *Bakeman v. Rose*, *supra*; 1842, *Johnson v. People*, 3 Hill 178 (bad general character); 1859, *People v. Blakeley*, 4 Park. Cr. 182 (same); 1895, *Carlson v. Winterson*, 147 N. Y. 652, 723, 42 N. E. 347, *semble* (bad general character); *North Carolina*: 1804, *State v. Stallings*, 2 Hayw. 300 (admitting "bad moral character"); 1829, *State v. Bonwell*, 2 Dev. 209 (same); 1843, *State v. O'Neale*, 4 Ired. 88 (same); 1849, *State v. Dove*, 10 *id.* 469, 473 (general character as to honesty and morals, admitted); 1872, *State v. Perkins*, 66 N. C. 127, *semble* (general bad character admissible, but not for a particular quality); *Ohio*: 1834, *Wilson v. Ranyan*, Wright 652 (truth only); 1851, *Bucklin v. State*, 20 Oh. 18 (obscure); 1853, *French v. Millard*, 2 Oh. St. 50 (left undecided); 1854, *Craig v. State*, 5 *id.* 607 (truth only); 1875, *Hillis v. Wylle*, 26 *id.* 576 (same); *Oregon*: C. C. P. 1892, § 840 ("that his general reputation for truth is bad, or that his moral character is such as to render him unworthy of belief," may be shown); *Pennsylvania*: 1835, *Gilchrist v. M'Kee*, 4 Watts 380 (veracity only; a woman's character for chastity, excluded); 1903, *Com. v. P'syne*, 203 Pa. 101, 54 Atl. 489 (general reputation excluded, even when coupled with reputation for veracity); *South Carolina*: 1813, *Auon*, 1 Hill 258 (O'Neill, J.: "If the witness assailed is of general bad moral character, his general character in legal contemplation is a bad one in all respects"); 1848, *Clark v. Bailey*, 2 Strobb. Eq. 143, 144 (to impeach the defendant's answer; general bad character excluded, "as unwarranted by the principles and practice of this court"); *Tennessee*: 1835, *State v. Coatsuev*, 8 Yerg. 1 (complainant in bastardy, allowed to be impeached by bad character); 1858, *Gilliam v. State*, 1 Head 38 (general bad character, admissible); 1879, *Merriman v. State*, 3 Lea 393, 394 ("the whole moral character," allowed, but, *semble*, not specific character for unchastity); *Texas*: 1854, *Jones v. Jones*, 13 Tex. 168, 176 (unchastity, in either sex, admissible); in the ensuing cases, character for veracity only is admitted, except as otherwise noted: 1859, *Boon v. Weathered*, 23 Tex. 675, 678 (quoted *supra*); 1864, *Ayres v. Duprey*, 27 *id.* 593, 599; 1879, *Johnson v. Brown*, 51 *id.* 65, 77; 1896, *Kennedy v. Uphaw*, 66 *id.* 442, 452, 1 S. W. 308 ("honesty" excluded); 1893, *Carroll v. State*, 32 Tex. Cr. 431, 24 S. W. 100 (general character, admitted); 1902, *Hall v. State*, 43 *id.* 479, 66 S. W. 783 (chastity, excluded); except that on cross-examination the witness herself may be asked as to being a common prostitute); *United States*: 1836, U. S. v. White, 5 Cr. C. C. 43 (veracity only); 1840, U. S. v. Vansickle, 2 McLean 219 (same); U. S. v. Dickinson, *ib.* 325, 329 (same); 1851, Wayne, J. (the others not touching the point), in *Gaines v. Relf*, 12 How. 555 (general moral character, admissible); 1859, *Teese v. Huntington*, 23 How. 2, 13 (expressly left undecided); *Utah*: 1889, U. S. v. Breedmeyer, 6 Utah 143, 146, 22 Pac. 110 (adultery; the female paramour's "bad character" for chastity, admitted); 1898, *State v. Marks*, 16 *id.* 304, 51 Pac. 1089 (truth and veracity only, not honesty and integrity; here applied to a defendant as witness); Rev. St. 1898, C. C. P. § 3412 (character for "truth, honesty, or integrity"); *Vermont*: 1832, *Morse v. Pineo*, 4 Vt. 281 (truth only; excluding character as prostitute); 1835, *State v. Smith*, 7 *id.* 141 (same); 1843, *Spears v. Forrest*, 15 *id.* 435 (same); 1846, *Craus v. Thayer*, 18 *id.* 168 (veracity only); 1896, *State v. Fournier*, 68 *id.* 262, 35 Atl. 178 (same); *Virginia*: 1816, *Ligon v. Ford*, 5 Munf. 10, 16 (general bad character, admissible); 1849, *Uhl v. Com.*, 6 Grati. 706, 708 (truth only; yet the witness, in saying whether he would believe on oath, may "take into consideration the whole moral character"); *West Virginia*: 1870, *Lemons v. State*, 4 W. Va. 755, *semble* (veracity only); *Wisconsin*: 1858, *Ketchingman v. State*, 6 Wis. 426, 431 (truth only, "commonly").

¹ As urged by Ellsworth, J., in the passage quoted *ante*, § 922.

entitled to credit. But you cannot prove . . . that he has the reputation of being guilty of any particular class of crimes. You cannot therefore inquire whether the witness has the general reputation of being a thief, prostitute, murderer, forger, adulterer, gambler, swindler, or the like; although each and every of such offences, to a greater or less degree, impairs the moral character of the witness and tends to impeach his or her veracity"; *Tracy, Sen.*: "It has been pressed upon us with earnestness and eloquence that the condition of a public prostitute, being the most debased and demoralized state of human being that can be imagined, necessarily presupposes the absence of all moral principle, and especially that of regard for truth; and it is therefore contended that a common reputation of public prostitution necessarily includes a common reputation for falsehood. . . . If Courts had the power [to change rules of evidence], it might not be a very discreet exercise of it to attempt to gauge crimes and graduate a standard of vices and immoralities. Loathsome, deplorable, and even detestable as is a condition of public prostitution, it is not the only vice of a great kindred; theft, forgery, swindling, drunkenness, gambling, adultery, are also well allied; and if we undertake to determine that the reputation of one vice necessarily includes the reputation of another, it would be difficult to say when or where we could stop. But . . . [after noting the rule of the Roman and other laws,] the common law in this respect certainly is founded on juster notions of human nature; for while it so far recognizes the affinity of vice as not to regard the testimony of a witness of bad moral character as above all exception, it rejects the conclusion that a person guilty of one immoral habit is necessarily disposed to practise all others. And seeing that the absolute exclusion of an immoral witness may operate more to the prejudice than to the advancement of justice, it recognizes that dictates of common sense which no theory can refute, that the natural love of truth, when combined with the fear of temporal punishment, is some restraint, even upon the most depraved, against the commission of a gratuitous falsehood."

But a few Courts, restrained by no such considerations of policy, allow the use, not only of bad general character, but also of bad character for a specific trait, such as chastity. One result of this is the recurrence of speculative discussions upon such questions as whether a man's, or only a woman's, character for unchastity is relevant.² Another is that an attack on the personal character of the witness is available as a mere instrument of revenge for his opposing attitude, or as a threat for coercing the suppression of important

² 1895, *State v. Sibley*, 131 Mo. 519, 33 S. W. 167 (Burgess, J., pro): "It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman. It is no compliment to a woman to measure her character for truth by the same standard that you do that of a man's, predicated upon character for chastity. What destroys the standing of the one in all the walks of life has no effect whatever on the standing for truth of the other. Thus in *Bank v. Stryker*, 3 Wheeler Cr. Cas. 332, it is said: 'Adultery has been committed openly by distinguished and otherwise honorable members [of the bar] as well in Great Britain as in our own country, yet the offending party has not been supposed to destroy the force of the obligation which they feel from the oath of office.' Dr. Johnson said, in discussing the difference of turpitude between lewdness in a man and in a woman, 'that he would not receive back a daughter because her husband, in the mere wantonness of appetite, had gone into the servant girl.' And

so Macaulay said, respecting the weakness of Lord Byron for sexual pleasure, 'that it was an infirmity he shared with many great and noble men, — Lord Somers, Charles James Fox, and others.'" Gantt, J., *contra*: "It is important to get at the reason underlying the decision, and the Massachusetts Court put it upon the ground of the loss of moral principle. This testimony is admitted upon the ground that the prostitute, by her life of vice, has so impaired her moral sense that the obligation to speak the truth is no longer binding, or has become more or less lax. If this be true of the female, why not true of her habitual companions; and why, though there be degrees in the vice, may not a man's disregard of the laws of chastity, which compel his association with the prostitute, be shown as tending to prove a disposition to lightly regard the obligations of his oath. The rule only admits the evidence when it has ripened into a general reputation for the vice. For my part, I think it rests upon the same foundation whether the witness be male or female."

opposing testimony. The trial is thus given indirectly a flavor of filth and rancor which is at once unnecessary and harmful to justice. Logically, almost any specific trait might be invoked for the purpose of this attack; practically, the usage is confined to a few of the more disagreeable ones.²

§ 925. **Same: Accused's Bad Character as Witness and as Party, distinguished.** The prosecution in a criminal case may not use the accused's bad character as evidence that he probably did the act charged, if the accused has not himself first attempted to use his good character in his exoneration (*ante*, §§ 57, 58). Moreover, even when that condition is fulfilled, both the defence and the prosecution may use only the character for the trait appropriate to the crime charged (*ante*, § 59). On the other hand, if the accused has taken the stand as a witness, the prosecution may impeach him as a witness (*ante*, § 890). From these principles it follows that the prosecution, when thus impeaching the accused as a witness, may introduce his character for *veracity only*, except in those jurisdictions where impeachment is allowed to include general bad character or a specific bad trait; but that it may do this regardless of whether the accused has attempted to use his good character as relevant to his innocence.¹

§ 926. **Same: Use of Prior Convictions and other Instances of Misconduct.** In those jurisdictions in which veracity-character alone is allowed to be used to impeach, it would logically follow that when particular instances of misconduct are allowed to be used as throwing light on credibility — that is to say, conviction of crime, when shown by extrinsic evidence, and other misconduct, when brought out on cross-examination (*post*, §§ 980, 981). — only such instances should be used as are relevant to show a lack of truthfulness of disposition, — for example, forgery, cheating, and the like. Entire consistency, however, is not shown in thus carrying out the strict principle. In the first place, conviction of crime is everywhere allowed to be used as affecting credibility of character, and while distinctions are sometimes made as to the grade of the crime, little effort is made to employ those crimes only which directly involve lack of honesty (*post*, § 980). In the second place, a few Courts, in dealing with the use of specific misconduct on cross-examination, permit the use of such misconduct only as directly bears on credibility, *i. e.* truthfulness; but most Courts make no attempt to do this, although logic and policy alike require such a restriction (*post*, § 982).

² The rulings are collected, for convenience, *ante*, § 923.

¹ 1886, *Dolan v. State*, 81 Ala. 11, 18, 1 So. 707 (general character admissible, but "only to the extent it affected his credibility," and thus not character for turbulence); 1891, *Mitchell v. State*, 34 id. 68, 73, 10 So. 518 ("inquiry into his general character," not restricted to veracity, is proper); 1891, *Jones v. State*, 96 id. 102, 105, 11 So. 399 (similar); 1896, *People v. Hickman*, 113 Cal. 80, 45 Pac. 175 (allowing against a defendant an inquiry as to the statutory qualities); 1898, *People v. Prather*, 120 id. 660, 53 Pac. 259 (same); 1898, *People v. Silva*, 121 id. 668, 54 Pac. 146 (same); 1900, *Herren v. People*, 28

Colo. 23, 62 Pac. 833 (character as witness only, allowable); 1889, *Keyes v. State*, 122 Ind. 527, 531, 23 N. E. 1097 (general bad character, allowed); 1888, *Lockard v. Com.*, 87 Ky. 201, 204, 8 S. W. 266 (similar); 1895, *Barton v. Com.*, — id. —, 32 S. W. 172 (similar); 1901, *Calhoun v. Com.*, — Ky. —, 64 S. W. 965 (character as witness only, allowed; compare the Kentucky rule *ante*, § 923); 1903, *State v. Casey*, 110 La. —, 34 So. 746; 1897, *State v. Traylor*, 121 N. C. 674, 28 S. E. 493 (general character, allowed).

For the use of particular instances of misconduct on cross-examination, see *post*, § 2277.

For the accused's use of his good character as witness before impeachment, see *post*, § 1104.

§ 927. *Time of Character; Theory.* No real dispute as to principle or policy is here to be found; the differences of ruling that occur are due almost entirely either to an erroneous application of admitted principles or to a confusion of other and unrelated principles with the matter in hand.

On analyzing the nature of the argument from witness' character, we find it to be really this: "The moral qualities of the person who is speaking to us from the stand will throw some light on the probability of his truthfulness, because as he speaks they will influence him to be sincere or the reverse; let us therefore inquire into his quality in that respect." Obviously, our argument, because it believes in the present influence of the testifier's disposition upon his testimony, expects and requires us to exhibit to the tribunal his *present* character. This much seems indisputable. But it is equally obvious that the nature of the witness' character at the precise moment of his utterance is practically not ascertainable directly. We may have to go back only an hour or a day or a week, but we are at least going back some space of time when we call for either personal knowledge (of another witness) or reputation, which cannot possibly carry the proof down to the precise moment of utterance; and, besides this, the character of a former period, more or less distant, always enters into every estimate (reputed or individual) of character, even though it may be expressly predicated as of the present moment. Nevertheless, there is nothing improper in thus resorting, in part or entirely, to the character of a prior time. We are simply adding another step to the argument; for while first using present character to throw light on the probability of speaking the truth, we then have this present character to prove in its turn, and we argue from prior character to the probability of its persistence at the time of utterance. This second step of argument is an entirely legitimate one; it is merely the ordinary argument (*ante*, §§ 225, 233) from a past condition, having features of permanency, to the continuance of the condition at a later time.

The logical analysis, then, is: (1) Present character, at the time of speaking, is evidence upon the probability of sincere speaking; and (2) character at some prior time, more or less distant, is evidence to prove the premise (*i. e.* present character) of the first inference. Thus the source of possible confusion appears. For if we were to insist upon a categorical answer to the question, "May character at a prior time be used to show that the witness is probably not speaking the truth?", the answer must be a paradox. Prior character is *not* usable as showing directly that the witness is now speaking truthfully or the reverse; yet prior character *is* admissible to show present character, and the latter to show the proposition desired. Confronted by such a paradox, many Courts, not seeing the explanation, have thought themselves obliged to accept one or the other answer unqualifiedly; and the result has naturally been some confusion and error of principle.

§ 928. *Same: the Competing Rules as to Prior Character.* What, then, should be the rule as to the use of character at a prior time?

(1) On principle, the correct solution seems to be that prior character at

any time may be admitted, as being relevant to show present character, and therefore, indirectly, to show the probability as to truth-speaking. The only limitation to be applied would be that applicable to all use of a former condition to show a present one (*ante*, §§ 43, 233), i. e. that the character must not be so distant in time as to be void of real probative value in showing present character; this limitation to be applied in the discretion of the trial Court:

1838, *Cowen, J.*, in *People v. Abbot*, 19 Wend. 200: "It was proposed to follow that out [the impeachment of character] by showing that it was also bad several years before. The inquiry is not in its nature limited as to time. The character of the habitual liar or perjurer seven years since would go at least to fortify the testimony which should now fix the same character to the same person. Witnesses must speak on this subject in the past tense. Character cannot be brought into court and shown to them at the moment of trial. A long-established character for good or for evil is always more striking and more to be relied on than that of a day, a month, or a year."

1847, *Bearrsley, J.*, in *Sleeper v. Van Middlesworth*, 4 Den. 429 (upon an offer of the character of the witness four years before, when living elsewhere): "In speaking to the question of character, witnesses are never restricted to the precise time when their testimony is given. The nature of the inquiry precludes this, for the evidence must necessarily refer to reports and reputation of which a knowledge had been acquired before the witness came to the stand. To what period of time shall the inquiry be restricted? Shall it be to a day, a week, or a month? All will agree that either would be too short, and that the inquiry may be pushed further. . . . It might be too much to say that a character, when once formed, is presumed to remain unchanged for life. Still, the law, founded on a full knowledge and just appreciation of the general course of human affairs, indulges a strong presumption against any sudden change in the moral as well as the mental and social condition of man. . . . It is not, looking to common experience in human conduct, generally found to be true that a thorough change from a bad to a good character is wrought within four years. It may and, it is hoped, often does occur; but such is not the common course in life. . . . No certain limit, in point of duration, can be laid down for inquiries like this."

1894, *Campbell, C. J.*, in *Norwood & B. Co. v. Andrews*, 71 Misc. 641, 16 So. 262 (admitting bad character in another place two years before): "To hold otherwise would be to preclude the possibility of impeaching the character of one who had changed his residence, in many cases. The rule must work both ways; and, under the rule we condemn, one who had maintained an unblemished reputation through a long life, in case of removal, and had occasion in his new home to prove his good character where he had spent his life, would be denied the right to call witnesses who had known him at his former residence, because not acquainted with his reputation at his new place of abode; and one who had not lived long enough at a place to become known there would not be able to prove reputation at all."

(2) Another solution is that prior character should not be resorted to unless for some reason *present character cannot be directly shown*, either by the witness on the stand or by any witness at all. This solution is not an incorrect one on principle i. e. it recognizes the relevancy of prior character; but it is objectionable in policy, because it imposes conditions not always kept in mind in the hurry of a trial, and because it complicates the proof by unnecessary restrictions. Moreover, these conditions for admitting such evidence vary in different jurisdictions and are never systematically laid down in advance so as to be easy of application:

1856, *Barrett, J.*, in *Willard v. Goodenough*, 30 Vt. 397: "It is well settled that the question should be 'What is the general character or reputation for truth?' . . . It may be proper under some circumstances — as in case an impeaching witness should answer the question thus put, that he does not know what the *present* character is, or that he has not heard it talked about *recently*, or in some other way implying his knowledge of former bad character — to inquire of him as to his knowledge of it at former periods. But we think this should be done only as following upon such a kind of answer to the questions above indicated. The *present* character is the point in issue. What the character had formerly been is relevant only as it blends with the continuous web of life and tinges its present texture."

1806, *Brown, J.*, in *Brown v. Perez*, 80 Tex. 282, 34 S. W. 725 (leaving it largely to the discretion of the trial Court): "It may safely be said that where the evidence of a witness is such that it fairly raises the issue of his veracity, or where the testimony of other witnesses relating to his character at or near the time of the trial tends to impeach his character for truth and veracity, or in case the person whose character is in issue has removed beyond the jurisdiction of the court, or has been transient, so that he has no fixed and known residence for a time sufficient to make a reputation for truthfulness, resort may be had to evidence of the reputation of such witness at the place of his former residence, and at a time remote from the time of trial. No definite rule can be stated which will apply to all cases."

(3) A third solution *altogether excludes* prior character. This is wholly incorrect on principle, because it is founded on a fallacious analysis of the problem. It is objectionable in policy, because it excludes a class of evidence often meritorious in itself and sometimes the sole kind that is available:

1878, *Brewer, J.*, in *Fisher v. Conway*, 21 Kan. 25: "Impeaching testimony is for the purpose of discrediting the witness by showing that the community in which he lives do not believe what he says, — that he is such a notorious liar that he is generally disbelieved. It is his present credibility that is to be attacked. Is he now to be believed? What do his neighbors think and say of him at the present time? not, What did they think and say months or years ago? . . . Surely a man's reputation may have changed very much in that length of time [two years and a half]. If it were bad, he may have reformed; if it were good, he may have become a moral wreck."

Of these three competing rules, each finds a following in some jurisdictions; but the last is little favored, and the first is tending to predominate.¹

¹ The following citations include also the rulings upon an *accused's* prior character (*ante*, § 60), which rest upon precisely the same principle: *Alabama*: 1854, *Martin v. Martin*, 25 Ala. 210 (in another place, whence the person had shortly before removed, admitted); 1878, *Kelly v. State*, 60 id. 19 (character in a different place, three years before, admitted); 1895, *Yarbrough v. State*, 105 id. 43, 18 So. 758 (character years before, in a different town, admitted); 1895, *Prater v. State*, 107 Ala. 26, 18 So. 239 (character in a town six miles away where the witness formerly lived; admitted); *Arkansas*: 1874, *Snow v. Grace*, 29 Ark. 131, 136 (within the discretion of the trial Court as to surprise and remoteness; here character seven years before in another place was received); 1877, *Lawson v. State*, 32 id. 220, 222 (same; character two years before in another place, held

improperly rejected); *Connecticut*: 1846, *Caldwell v. State*, 17 Conn. 467, 472 (lawdy-house; character at a prior time, admitted); *Georgia*: 1888, *Watkins v. State*, 82 Ga. 231, 8 S. E. 875 (former character admissible subject to discretion; here a character eight years before in Georgia, the witness having been since absent, admitted); *Illinois*: 1855, *Hobbes v. Stateler*, 17 Ill. 453 (character in another State than his present residence, for a period of ten years, ending eight years before the trial, admitted; "if the witness did so reform, it was quite as easy for the plaintiff to prove that fact as for the defendant to prove that his character still continued bad"); 1877, *Blackburn v. Mann*, 85 id. 222 (preceding case approved); 1897, *Kirkham v. People*, 170 id. 9, 48 N. E. 465 (reputation at a place left by the witness four years before, admissible); *Indiana*: citations from this



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§ 929. Same: Character post litem motam; Effect of Hearsay Rule. So far as the foregoing theory is concerned, it is immaterial whether the infer-

jurisdiction on this point may be ignored by other Courts; during more than sixty years the rulings vacillated: 1841, Walker v. State, 6 Blackf. 3 (at time of trial only); 1850, King v. Hersey, 2 Ind. 403 (good character before suit begun, proved in rebuttal of bad character after suit begun); 1851, Rucker v. Beaty, 3 id. 71 (former bad character not admissible, except to corroborate a bad one at time of trial); 1862, Rogers v. Lewis, 19 ind. 405 (same as Walker's Case); 1863, Aurora v. Cobb, 21 id. 510 (same); 1866, Abshire v. Mather, 27 id. 381, 384 (at time of trial only, though there may be exceptions, the need of which the impeacher must show; here character five years before was excluded); 1870, Cbance v. R. Co., 32 id. 475 (like Walker's Case); 1873, Indianapolis P. & C. R. Co. v. Anthony, 43 id. 192, *semble* (same); 1874, Stratton v. State, 45 id. 468, 472 ("it has never been held that the testimony must have reference to that exact time [of his testimony]"; so that evidence is to be received "of his character within a reasonable time before the trial," as pointing forward to his character at the time of testifying, which is the objective point; here admitting character two years before in another region); 1877, Rawles v. State, 56 id. 439 (such evidence "should have reference to . . . the time he testified"; hence a question not so specifying the time was held improper); 1879, Louisville N. A. & C. R. Co. v. Richardson 66 id. 50 (admitting character six weeks before the trial, the witness having then removed elsewhere); 1879, Smock v. Pierson, 68 id. 405 ("must relate to the time the witness is testifying"); 1882, Memphis & O. R. P. Co. v. McCool, 83 id. 392 (where bad reputation at the time of the trial in E. had been shown, further evidence of bad reputation two or three years before in another town was admitted; the preceding conflict in rulings being noted); 1888, Inpe v. Wright, 116 id. 509, 19 N. E. 459 ("a time reasonably near the time of the examination"; here reputation two months before was admitted); 1890, Sage v. State, 127 id. 15, 27, 26 N. E. 667 (admitting character seven years before, the witness having been in the meantime in jail at another place; yet the general principle is treated as doubtful and unsettled); 1897, Hnuk v. State, 148 id. 238, 46 N. E. 127, 47 N. E. 465 (after evidencing present character, character at another place, fifteen months before, was admitted; the rule allowing character at the time of the trial "or somewhere reasonably near"); 1902, Lake Lighting Co. v. Lewis, 29 Ind. App. 164, 64 N. E. 35 (character "within a reasonable time before the trial" is admissible, the trial Court to determine); Iowa: 1887, Hanners v. McClelland, 74 Ia. 318, 322, 37 N. W. 389 (reputation in another place a few miles away, before and after the time in question, admitted); 1889, State v. Potts, 78 id. 659, 43 N. W. 534 (reputation in another place five years before, excluded, the witness having resided continuously for that period at the place of trial, and his bad character there being also

offered; *semble*, that character at a former time and other place is admissible only where the residence at the time of trial has been brief); 1898, Schoep v. Ins. Co., 104 id. 356, 73 N. W. 825 (in the absence of permanent residence, reputation at a place lived in a year before for eight months, received); 1900, McGnire v. Keneffick, 111 id. 147, 82 N. W. 485 (reputation in another town seven years before, not admitted; otherwise if he had only recently acquired residence at his present place); 1902, State v. Prins, — id. —, 91 N. W. 758 (reputation in another city several years before, admitted on the facts); Kansas: 1878, Fisher v. Conway, 21 Kan. 18, 25, *semble* (character at the time of trial only); 1891, Coates v. Sulan, 46 id. 341, 343, 26 Pac. 720 (character at C., whence he had removed to his present place less than a year before, admitted; "there is no arbitrary iron-clad rule in relation to such evidence; sometimes it may be sought some distance away both in point of time and space"); Kentucky: 1869, Young v. Com., 6 Bash 317 (character six years before, in another county, excluded; the time of testifying being the true standpoint); 1874, Marion v. Lambert, 10 id. 295 (no limitation to character at the time of the trial); 1879, Mitchell v. Com., 78 Ky. 219 (anterior bad character elsewhere, admitted only when present character at the place is unavailable or is *prima facie* shown bad); 1895, Turver v. King, 98 id. 253, 32 S. W. 941 (must not be too long before; reputation for chastity sixteen years before, excluded); Louisiana: 1893, State v. Taylor, 45 La. An. 605, 609, 12 So. 927 (character twelve miles away, five years before, excluded); Massachusetts: 1863, Parkhurst v. Ketchum, 6 All. 408 (general bad character, ten years before, admitted); 1867, Com. v. Billings, 97 Mass. 405 (admitting character a year and a half previous); Michigan: 1856, Webber v. Hauke, 4 Mich. 198, 204 (usually character in his present residence must be asked; the discretion of the trial Court may relax this general rule; here the character five years before in Europe was held improperly received, the witness having lived continuously in this country since that time); 1874, Hamilton v. People, 29 id. 173, 188 (where domicile has changed, reputation in both places within a reasonable time is admissible; other possibilities obscurely mentioned); 1875, Keator v. People, 32 id. 485 (character at another place four years before the trial, admitted on the circumstances, the witness having led a roving life); Mississippi: 1894, Norwood & B. Co. v. Andrews, 71 Miss. 641, 16 So. 262 (bad character in a neighborhood whence the witness had removed two years before, admitted; see quotation *supra*); Missouri: 1881, Wood v. Matthews, 73 Mo. 477 (character at the time of trial only; following the early Indiana rulings; here excluding character three years before); 1887, Waddingham v. Hulet, 92 id. 533, 5 S. W. 27, *semble* (same principle); 1893, State v. Pettit, 119 id. 410, 414 (character of the deceased more than ten years before, excluded); 1898, State v. Sum-

ence is from prior or subsequent character; that inference, like its general type, the argument from prior or subsequent condition (*ante*, §§ 225, 233, 241), stands on precisely the same footing in both cases. If character in 1875 indicates probatively the future character in 1877, then by the same token character in 1877 indicates the past character in 1875. Moreover, witness-character must always, except in one case, involve the argument from prior character exclusively, *i. e.* prior to the time of his testifying; the excepted case being that in which the impeaching witness predicates the character as subsequent to the moment of the other's testimony, and this practically can only be where the impeached testimony was given by deposition before trial begun. The fact that the character offered in evidence is in this single instance a subsequent character does not affect its relevancy at all. Thus, the mere circumstance that the character offered is character after trial begun does not affect its admissibility; first, because it will usually still be prior character (*i. e.* prior to the time of testimony), and, next, because in the single case when it is really subsequent, its relevancy is the same.

mar, 143 id. 220, 45 S. W. 254 (character at the time of trial is the material thing; though it may be stated as ranging back before that time; here, more than three years before was held too remote on the facts); 1900, *State v. Miller*, 156 id. 76, 56 S. W. 907 (not to be confined "to the immediate present"); *Nebraska*: 1896, *Davison v. Cruse*, 47 Nebr. 829, 66 N. W. 823 (bastardy proceedings; chastity before probable period of gestation excluded); 1901, *Faulkner v. Gilbert*, 61 id. 602, 85 N. W. 843 (reputation in another county several years before, excluded); *New Hampshire*: 1861, *State v. Forsclmer*, 43 N. H. 89 (it was conceded that a witness' character before trial could be received as indicating character at the time of trial, since "a state of facts proved to have once existed is presumed to continue"; but the character for chastity of the prosecutrix in a rape charge must be her character at the time of the alleged rape, and not any later, since "the bad character a person may have now is not assumed to have always existed"; but it is not clear whether the Court, in promulgating this illogical doctrine, rest solely on the above principle; for they also invoke the doctrine that a reputation formed *post litem motam* is untrustworthy; *post*, § 1618); *New Jersey*: 1898, *Shuster v. State*, 62 N. J. L. 521, 41 Atl. 701 (reputation in another place eighteen years before; excluded in trial Court's discretion); *New York*: 1838, *People v. Abbot*, 19 Wend. 200 (prior character admissible; see quotation *supra*); 1842, *Losee v. Losee*, 2 Hill 613 (merely holds that the time of testifying is to be the starting-point, and does not declare that the character at that time cannot be shown by the character at a former time); 1847, *Sleeper v. Van Middlesworth*, 4 Den. 429 (prior character admissible; see quotation *supra*); 1865, *Graham v. Chrystal*, 2 Abb. App. 265 (admitting character eight or ten years before); *North Carolina*: 1878, *State v. Lanier*, 79 N. C. 622 (character two or three years before, in another

town, admitted); *Ohio*: 1877, *Hamilton v. State*, 34 Oh. St. 82 (character two years before, the witness having ever since been in prison, admitted); *Pennsylvania*: 1850, *Morss v. Palmer*, 15 Pa. St. 51, 56 (character more than ten years before, in another county, admitted in rebuttal); 1897, *Smith v. Hine*, 179 id. 203, 36 Atl. 222, *semble* (character at the time of trial only, and not prior to that time); 1898, *Miller v. Miller*, 187 id. 572, 41 Atl. 277 (character four years before, excluded); *Rhode Island*: 1896, *Vaughn v. Clarkson*, — R. I. —, 34 Atl. 989 (character five years before, in England, excluded); *Tennessee*: 1896, *Fry v. State*, 96 Tenn. 467, 35 S. W. 883 (character in another State six years before, held not too remote, as tending to show character at the time of the alleged offence); *Texas*: 1864, *Ayres v. Duprey*, 27 Tex. 593, 599 (left undecided); 1879, *Johnson v. Brown*, 51 id. 65, 75 (a charge referring the witness' credibility to the time of the act spoken of, not the time of trial, held properly refused); 1886, *Myvatt v. Hudson*, 66 Tex. 66, 17 S. W. 396 (admitting bad reputation in a different county four years before where he was a permanent resident); 1896, *Brown v. Perez*, 89 id. 282, 34 S. W. 725 (see quotation *supra*); *United States*: 1859, *Teese v. Huntington*, 23 How. 2, 14 (prior character admissible; but the time must not be "so remote from the transaction involved in the controversy as thereby to become entirely unsatisfactory and immaterial"); *Vermont*: 1858, *Willard v. Goodenough*, 30 Vt. 397 (see quotation *supra*); 1882, *Amidon v. Hosley*, 54 id. 25 (same rule); *Wisconsin*: 1902, *State v. Chittenden*, — Wis. —, 88 N. W. 588 (under a statute providing for licenses to graduates of a "reputable" dental college, the reputation of a college one year before the applicant's graduation may be sufficient); 1903, *State v. Knight*, — id. —, 95 N. W. 390 (reputation at another town two years before, admitted; good opinion by Dodge, J.).

But when the emphasis is upon the *modes of evidencing* character, a different question may arise. If reputation is the kind of evidence chosen, and if the reputation is offered as of a time after trial begun, this evidence must face the Hearsay rule and its cardinal principle that the hearsay offered must have been uttered under impartial conditions. Whether a reputation formed *post litem motam* is trustworthy, from that point of view, may be a matter for hesitation; and we thus find some Courts declining to admit reputation-evidence of character when the reputation is stated as of a time after trial begun or controversy aroused. But this is distinctly and solely a question of the Hearsay rule, and has nothing to do with the present principle. Nevertheless the two have sometimes been confused, and character after trial begun has been excluded as if a rule of Relevancy, and not of Hearsay, led to this.¹

§ 930. **Place of Character.** A similar confusion is apt to occur in rulings as to the place where the character is predicated. From the point of view of Relevancy, place or locality has no bearing on the present principle. The actual qualities of the man himself must be the same in whatever place he is. Whether we take his character at Millville or at Sierra is in itself immaterial.

Difference of place, however, does enter the question from two other points of view. (1) First, character in another place must of course always be character at another time; and hence, if at the present (and therefore primarily important) time he is at Millville, his character when he was at Sierra immediately raises the question whether *character at a prior time* is admissible. But it is here the priority of time, and not the difference of place, that raises the question of relevancy; the difference of place is merely an immaterial incident. Wherever prior character at another place is offered, the circumstance of priority of time is the material one.¹ (2) From the point of view of the Hearsay rule and its exception for Reputation, the place becomes important. If A lives at Millville, and has never been in Sierra, one hundred miles away, it is difficult to see how a trustworthy reputation about his character can arise in the latter place; for *reputation must arise in the community of residence*, where he moves and exhibits his conduct. Hence, under the Hearsay exception for Reputation as to Character, various questions arise as to the place from which an admissible reputation must be offered. These, however, have nothing to do with the present principle, namely, the conditions under which actual character is relevant to show the probability of truth-telling, but with an entirely different one, namely, in proving this actual character by reputation, the conditions under which such hearsay will be admitted.²

B. INSANITY, INTOXICATION, AND OTHER ORGANIC CAPACITY.

§ 931. **In general.** We have already seen that the general organic capacity to observe, recollect, and narrate, must exist to a certain minimum

¹ The rulings are collected *post*, § 1618.

² The rulings have been placed *ante*, § 928.

³ The rulings are collected *post*, §§ 1615,

degree in order that the witness may be admitted at all. Insanity, idiocy, and the like, if existing to such a degree as practically to destroy the mental capacities, render the witness incompetent to that extent (*ante*, §§ 492-500). But the defect may not exist to such a degree, and yet the capacity may by no means be of the normal sort; and this may therefore be made to appear for the purpose of discrediting the witness. The modern tendency, as already noted (*ante*, § 492), is to avoid treating any such mental condition as a cause of total incompetency, except in extreme cases, and to admit the person as a witness, leaving the defect in question to have whatever weight it deserves as discrediting the witness' powers of observation, recollection, or communication. This tendency enlarges and emphasizes the application of the present principle.

The exact bearing of such evidence is sometimes misunderstood, by confusion with the principle (*post*, § 979) that a witness' character cannot be attacked by extrinsic testimony of particular acts of misconduct. But the difference between the two can be easily appreciated. (1) Evidence that a witness was drunk at the time of an affray to which he testifies discredits him by involving a greater or less inability on his part to get correct impressions of what he saw or might have seen; the drunkenness means, and might be translated, "derangement of the nervous system caused by alcoholic stimulation," *i. e.* the impeacher, by alleging intoxication, implies in the very word an affection (more or less extensive) of the power of observation, precisely as he does in asserting insanity. But (2) the circumstance that the witness was drunk a month before the affair has obviously no such significance, and in itself in no way affects testimonial capacity at the time of the affray; it can be relevant only as tending to show a dissolute character, and in that aspect it is of course obnoxious to the rule above referred to. That rule, which in truth has no bearing whatever on matters involving a defective organic capacity, is probably the motive of some of the rulings which erroneously exclude the present sort of evidence. They must be regarded as unsound; for there is no recognized principle or rule to exclude such evidence except so far as is contained in the principle now to be dealt with.

Since the theory of this evidence is that any defect of capacity, insufficient to exclude, and yet involving less than the normal testimonial capacity, should legitimately discredit the witness, carrying whatever weight it may have in a given case, the only proper limit upon such evidence would seem to be as follows: Any fact importing in itself a defective power of observation (at the time of the matter testified to), or of recollection, or of communication, is admissible, provided the power is substantially defective as judged by the average standard of faculties and is not merely a slight variation within the range of the average. The latter limitation is necessary for several reasons: (1) Courts cannot and do not attempt to take account of trifling variations in such matters; (2) the witness on the stand will in his demeanor reveal ordinary peculiarities of that sort; (3) the trial would be

liable to be unduly protracted and confused by raising such issues; (4) there is no reason why, when A testifies to some trifling peculiarity of B, we should regard B rather than A as the peculiar one. All these reasons disappear if the resort is only to substantial deviations from the normal standard.

What specific defects, then, may be shown for this purpose? It must be remembered (as noted *ante*, § 478) that the faculties of Observation (Knowledge), Recollection, and Communication are all called into play in every piece of testimony; and hence a defect affecting any one of these three faculties at the time it is required would be relevant.

§ 932. **Insanity.** The existence of a derangement of the sort termed insanity is admissible to discredit, provided that it affected the witness at the time of the affair testified to (*i. e.* his power of Observation), or while on the stand (*i. e.* his power of Recollection or Narration), or in the meantime (so as to cripple his powers of Recollection).¹

§ 933. **Intoxication.** Intoxication, if it is of such a degree as to deserve the name, involves a numbing of the faculties so as to affect the capacity to observe, to recollect, or to communicate; and is therefore admissible to impeach:

1861, *Bigelow, C. J.*, in *Com. v. Fitzgerald*, 2 All. 297: "It was certainly competent for the defendant to show that the witness had been drinking to such excess as to impair his ability to see and understand what was passing before him at the time and to recollect it afterwards so as to testify intelligibly and with accuracy."

1895, *Winslow, J.*, in *Mace v. Reed*, 89 Wis. 440, 62 N. W. 186: "It would certainly have been competent to show that the witness was not in fact present, or that, although present, he was blind or asleep or in a condition of stupefaction, so that he could not apprehend what was going on about him. The proof that he was intoxicated is of the same general character. It is not strictly impeaching, but it tends to show that his faculties of observation were either entirely gone or much impaired."¹

¹ The rulings are few, but the principle is unquestioned: 1692, *Duke of Norfolk's Divorce*, 12 How. St. Tr. 912 (insanity); 1775, *Fowke's Trial*, 20 id. 1175 ("he is not a sensible man, and yet not quite an idiot"); 1877, *Allen v. State*, 60 Ala. 19 (that a weak-witted negro-witness entertained certain superstitious was held not to bear on his powers of observation); 1805, *Tuttle v. Russell*, 2 Day 202 (insanity at time of event); 1859, *Holcomb v. Holcomb*, 28 Conn. 179 (insanity); 1895, *State v. Hayward*, 62 Minn. 474, 65 N. W. 63 (this evidence is not merely for the judge on the preliminary question of competency, but goes to the jury to affect credibility); 1879, *Free v. Buckingham*, 59 N. H. 219, 225 (cross-examination of the plaintiff as to whether the spirit of Daniel Webster was present aiding him in the trial, held allowable or not, in discretion); 1862, *Fairchild v. Bascomb*, 35 Vt. 417 (a disease of the brain some time before the trial, affecting Observation and Recollection). *Ancestral or collateral insanity* is admissible only on the conditions noted *ante*, § 232: 1896, *State v. Hayward*, 62 Minn. 474, 65 N. W. 63 (ancestors' insanity, plus evidence of temporary and different prior illusions, was

held, even taken together, to be inadmissible to impeach a witness unless direct testimony of his own insanity nearer the time of the events was offered).

For the *mode of evidencing insanity*, see *ante*, §§ 227-233, *post*, § 993.

¹ 1794, *Walker's Trial*, 23 How. St. Tr. 1157 ("You do not know how much liquor he had drunk?" "No, I do not." "Do you know whether he had drunk any?" "He had had a little, but he was quite sensible; he knew what he was saying and doing." "Just as much as he knows now?" "He was not half so much in liquor then as he is now"); 1878, *Lester v. State*, 32 Ark. 730 (a confession); 1805, *Tuttle v. Russell*, 2 Day 202; 1879, *State v. Felton*, 51 Ia. 496, 1 N. W. 755; 1883, *State v. Costello*, 62 id. 407, 17 N. W. 605; 1894, *State v. Nolan*, 92 id. 491, 61 N. W. 181; 1857, *Com. v. Howe*, 9 Gray 112; 1861, *Com. v. Fitzgerald*, 2 All. 297; 1871, *Strang v. People*, 24 Mich. 1, 7; 1881, *State v. Grear*, 28 Minn. 426; 1894, *Willis v. State*, 43 Nebr. 102, 61 N. W. 254; 1862, *Jefferts v. People*, 5 Park. Cr. C. 547; 1893, *State v. Rollins*, 113 N. C. 722, 732, 18 S. E. 394; 1823, *Brindle v. M'Ilvaive*, 10 S. &

But a general habit of intemperance tells us nothing of the witness' testimonial incapacity except as it indicates actual intoxication at the time of the event observed or the time of testifying; and hence, since in its bearing upon moral character it does not involve the veracity-trait (*ante*, § 923), it will usually not be admissible.²

§ 934. **Disease, Age, Morphine Habit, and sundry Derangements.** Any diseased impairment of the testimonial powers, arising from whatever source, ought also to be considered:

1879, *Beck, C. J.*, in *Alleman v. Stepp*, 52 Ia. 627, 3 N. W. 636: "Mental defects in the witness, or loss or impairment of memory, will according to the observation of all men detract from the credibility otherwise due a witness, just as surely as do moral defects. It is not reasonable to hold that the law will permit impeachment of a witness by showing the moral defects of his character, and will not permit impeachment by proof of defects of memory caused by diseases of the body or mind. . . . It is proper to say that the rule we recognize extends no farther than to permit the impeachment of a witness by showing an abnormal condition of the mind caused by disease or habits which impair the memory. . . . The law can devise no standard of measurement or test of mind in its normal condition."

Accordingly, the *morphine habit*, so far as it may have had such an effect, should be received.¹ An *illness* at the time of observing or narrating may also be significant,² as well as the condition of a *dying declarant*.³ A *defect of speech* may detract from the weight of testimony communicated under that disadvantage.⁴

An impairment of *memory* caused by *disease* or by *old age* or *idiocy* stands on the same footing, and should be admissible.⁵ But the mere fact of being

R. 282, 285, *semble*; 1895, *State v. Rhodes*, 44 S. C. 325, 21 S. E. 807, 22 S. E. 306; 1845, *Fleming v. State*, 5 Humph. 564; 1890, *International & G. N. R. Co. v. Dyer*, 76 Tex. 159, 13 S. W. 377 (asked on cross-examination); 1895, *Mace v. Reed*, 89 Wis. 440, 62 N. W. 186.

For the *mode of evidencing* intoxication, see *ante*, § 235, *post*, § 993.

¹ 1846, *Rector v. Rector*, 8 Ill. 105, 117 (intemperance, admitted); 1849, *Thayer v. Boyle*, 30 Me. 475 (here treated as a question of character, veracity-character alone being admissible); 1850, *Hoyt v. Moulton*, 21 N. H. 586, 591 (intemperate habits, excluded, as veracity-character alone is admissible); 1898, *Kuenster v. Woodhouse*, 101 Wis. 216, 77 N. W. 165 (habitual intoxication during a given month, admitted to show intoxication on a certain day of that month).

² 1858, *McDowell v. Preston*, 26 Ga. 535 (evidence of general mental impairment or of temporary mental affection by laudanum, admissible); 1895, *State v. Gleim*, 17 Mont. 17, 41 Pac. 998 (excluded, unless the witness was under its influence at the time of the events or of the testimony or unless it impaired her recollection); 1893, *People v. Webster*, 139 N. Y. 73, 86, 34 N. E. 730 (that the witness was an habitual opium-eater at the time of the events, admitted); 1895, *State v. Robinson*, 12 Wash. 491, 41 Pac. 884 (a question as to the effect upon the

mental faculties was regarded as proper, but not a question as to the effect upon the witness' veracity). *Contra*: 1898, *Botkin v. Cassady*, 106 Ia. 334, 76 N. W. 723 (taking morphine habitually, excluded); 1903, *State v. King*, 88 Minn. 175, 92 N. W. 965 (that a witness was a confirmed opium-eater, and that the use of opium "renders the user unreliable," excluded); 1890, *Franklin v. Franklin*, 90 Tenn. 49, 16 S. W. 557 (that the witness "had carried the use of morphine and whiskey to such excess as to impair his mind and affect his moral character").

³ 1878, *State v. Brown*, 48 Ia. 384 (illness at the time of confession); 1872, *State v. Matthews*, 66 N. C. 113 (a woman had made a confession shortly after a child's birth).

⁴ 1895, *Basve v. State*, 45 Nebr. 261, 63 N. W. 811; and cases cited *post*, §§ 1446, 1451.

⁵ 1882, *Quinn v. Halbert*, 55 Vt. 228 (the witness could merely nod the head).

⁶ 1833, *People v. Genung*, 11 Wend. 18 (that the witness was "an old man, intemperate, and his mind and memory very much impaired"); 1876, *Isler v. Dewey*, 75 N. C. 466 ("that his memory is weak naturally or has been impaired by disease or age"); 1878, *Lord v. Beard*, 79 id. 12 (old-age paralysis). *Contra*: 1858, *Merritt v. Merritt*, 20 Ill. 65, 80 (that a witness' memory was impaired by illness, excluded). *Not decided*: 1858, *Carpenter v. Dame*, 10 Ind. 125, 130 (that

endowed with a less satisfactory memory than other persons is something less pronounced, and falls properly within that range of average variations which constitutes normality, and its presence must be left to the cross-examiner to detect. No doubt the line may be sometimes hard to draw, but the distinction of principle is clear between that general variation of all powers which would be found in any given number of healthy persons, and that specific impairment which, when associated with disease or with other extensive mental derangement, marks the person as abnormal:

1861, *Day, J.*, in *Bell v. Rinner*, 10 Oh. St. 40: "The question presented by the record is whether the credibility of a competent witness may be impeached by general evidence that the witness is not possessed of ordinary intelligence or powers of mind. It would not only be novel in practice, but would be entirely impracticable, to permit the parties on the trial of a case to go into general proof as to the strength of the mental capacity of the several witnesses. It might lead to as many collateral issues as there are witnesses, and thus divert the minds of the triers from the substantial issues of the case. Moreover, if it be conceded that the credibility of a witness is to be graded in proportion to his strength of intellect, the tribunal before which he testifies can better estimate his capacity and the weight to which his testimony is entitled by his manner and by his statements on cross-examination, than can ordinarily be done by the testimony and conflicting opinions of other witnesses as to the extent of his mental powers or the degree of his intelligence. . . . The degree of credit to which he is entitled in the testimony given cannot be practically better ascertained than by the usual tests, without resort to other proof of his capacity."*

§ 935. **Religious Belief.** (1) On principle, the fact of a *cacothestic* belief (to use Bentham's word¹) should be admissible to cast doubt on the witness' sense of duty to tell the truth; and, at a time when it was supposed that the believers in a certain form of religion universally subscribed to and practised such a tenet (*i. e.* that it may be righteous to lie upon the stand) such evidence was no doubt sometimes considered:

1679, L. C. J. *Scroggs*, in *Langhorn's Trial*, 7 How. St. Tr. 481 (to the jury, commenting on the testimony of certain young Roman Catholic students who came over from Flanders to testify for the defendant): "They came here to defend all the Roman Catholics, whom we would hang here for a plot. . . . Did not the principles of their religion so teach and make us to know that they will not stick at any wickedness to propagate it? Did not the best and chiefest of the doctors of their church preach and print it? Did not they teach and practise all sorts of equivocations, and that a lie does good service, if it be for the propagation of the faith? . . . The way they take to come off from all vows, oaths, and sacraments, by dispensations beforehand or indulgence and pardons afterwards, is a thing still so much worse that they are really unfit for human society. . . . [These doctrines are] such that it does take away a great part of the faith

a deponent was "not of sound memory," spoken of by the Court as "a weakness in a given faculty"; left undecided).

* 1896, *Ah Tong v. Fruit Co.*, 112 Cal. 679, 45 Pac. 7 (weakness of memory, excluded, unless involving mental derangement); 1856, *Goodwyn v. Goodwyn*, 20 Ga. 620 (*Lumpkin, J.*): "It would be attended with great inconvenience and hinder and delay the progress of business, by turning aside to form these collateral is-

sues"). Apparently *contra*, and yet reasonable: 1862, *Com. v. Cooper*, 5 All. 497 (admitting a tendency of the witness to mistake the identity of persons); 1821, *Mechanics' & F. Bank v. Smith*, 19 Johns. 123 (question allowed "whether he was in the constant habit of making mistakes," to show that a particular entry by a teller was erroneous). Compare the other modes of exposing a defective memory: *post*, § 995.

¹ *Ante*, § 518.

that should be given to these witnesses. Nevertheless, we must be fair and should hear them, if we could not answer what they alledge by evidence to the contrary."²

But in modern times, whether because no religion is credited with possessing such a tenet, or because religious disputes less affect men's feelings, such evidence would probably not be listened to anywhere.³

(2) Much less, in these days, should evidence be admitted, not of cacothemism, but of mere *disbelief in a personal Deity*, i. e. atheism, — a belief quite consistent with the strictest sense of moral obligation to speak the truth. Some statutes, however, preserve a permission to use such evidence, — a sop of mediavalism left to satisfy those who would otherwise not have consented to abolish theological qualifications for the oath.⁴ But some Courts justly treat even this much use of theological heterodoxy as improper.⁵

§ 936. **Race.** The racial disqualifications (of the Negro and of the Chinese) that once existed in some States have been abolished (*ante*, § 516); and it may be assumed as law that, where no express enactment provides, nativity in a specific race is in no way to be treated as involving a general tendency to avoid the truth. A broader acquaintance with the various types of human nature in the world is beginning to convince us that the virtues and the failings are found in all, and with little racial difference. Any attempt to attribute a rooted lack of veracity to any one branch of the human family is based on a self-conceited assumption or a narrow experience:

1902, *Ray, J.*, in *U. S. v. Lee Huen*, 118 Fed. 442, 463: "This Court cannot assent to the proposition that in one of these [deportation] cases a witness for the person sought

² In 1696, Sir John Freind's Trial, 13 How. St. Tr. 31, 43, 58, L. C. J. Holt said that such evidence (in that case against the prosecution's witnesses) "hath no weight." But the prior practice had been clear: 1678, Ireland's Trial, 7 How. St. Tr. 79, 100 (L. C. J. Scroggs: "But if you have a religion that can give a dispensation for oaths, sacraments, protestations, and falsehoods that are in the world, how can you expect we should believe you?"); 1679, Whitebread's Trial, *ib.* 311, 386 (to be a Roman Catholic went to the witness' credit).

³ 1856, *Darby v. Onseley*, 1 H. & N. 6, 10 (where the question excluded concerned the belief of the witness in certain alleged doctrines of the Roman Catholic church justifying the breaking of faith with heretics); 1834, *Com. v. Buzzell*, 6 Pick. 156 (it was argued that as confession and absolution were parts of the Roman Catholic faith, there was a possibility of false swearing in the expectation of absolution; per Curiam: "Such a course of argument cannot be permitted. You might as well argue upon the effect of any other particular doctrine, for instance, if the witness belongs to a sect which holds that the duration or extent of future punishment will be less than it will be according to the tenets of a different sect.")

⁴ The statutes cited below are quoted in full *ante*, § 488, and *post*, § 1828: *Ariz. Rev. St.* 1887, § 2037, *semble*; *Colo. (Mills) Annot. St.*

1891, § 4822, *semble*; *Ga. Code* 1895, § 5268; *Ind. Rev. St.* 1897, § 518; *Ia.*: 1877, *State v. Elliott*, 45 Ia. 486; 1881, *Searcy v. Miller*, 57 id. 613, 10 N. W. 912 (under a statute providing that all facts formerly disqualifying may now be used in discredit; erroneous); *Me. Rev. St.* c. 82, § 92; *Mass. Pub. St.* c. 169, § 17; 1860, *Com. v. Burke*, 16 Mass. 33 (holding that G. S. c. 131, § 12, allowing religious belief to be used to discredit, did not alter the law as to the mode of proof); *Minn. Gen. St.* § 5658, *semble*; *N. H. Comp. L.* § 3016; *N. Y.*: 1891, *People v. Most*, 128 N. Y. 108, 27 N. E. 970 (belief in a Supreme Being); 1903, *Brink v. Stratton*, 176 id. 150, 68 N. E. 148 (similar; two judges dissenting; good opinion by Cullen, J., diss.); *S. C.*: 1892, *State v. Turner*, 36 S. C. 534, 543, 15 S. E. 602 (on cross-examination here); *Tenn. Code* 1896, § 5593; 1871, *Odell v. State*, 61 Tenn. 91.

⁵ 1887, *People v. Copsey*, 71 Cal. 548, 550, 12 Pac. 721 (that he was a person "who entertained no religious belief," excluded); 1858, *People v. Jenness*, 5 Mich. 305, 319 (under statute; excluding both questions to the witness and outside testimony); 1879, *Free v. Buckingham*, 59 N. H. 219, 225 (it is "not customary"); *Vt. Stats.* 1894, § 1244.

For the propriety of inquiring into religious belief for the purpose of ascertaining the most binding form of oath, see *post*, § 1818.

to be deported is interested *in* only because he is a Chinese person. . . . There is no rule of law that justifies the assumption that a Chinese person is more interested in his countrymen than is a person of some other nationality in his. A Yankee may testify for a Yankee, but he is not therefore interested. An Irishman may testify for an Irishman, an Englishman for an Englishman, a German for a German; but such witnesses are not, in the eye of the law, interested. No discredit can legally attach to the testimony of a person because he gives his evidence in behalf of a party belonging to his own nationality. A Chinese witness in one of these cases, if engaged in securing the entrance of Chinese persons into the United States, is open to suspicion; and if he is engaged in aiding the entrance of such a person, and gives evidence in that behalf, he is interested, and such fact legitimately tends to discredit his testimony. We are all brothers in the family of Adam, — all brothers in the national family to which by birth or adoption we belong; but these ties of race or color do not make us interested witnesses when we testify in court, within the rule that permits interest to be used as a discrediting circumstance. If it affirmatively appears that a witness has a bias in favor of persons of his own nationality, in whose behalf he is testifying, or against the other party to the litigation, or a bias in favor of persons of his own nationality generally, or against those of another nationality, such fact may be used to discredit his testimony."¹

3. Experiential Incapacity.

§ 938. **General Principle.** For testimony upon some subjects an Experiential Capacity is necessary (*ante*, § 555), and must be shown *prima facie* before the witness may speak. By way of impeachment, then, the lack of this capacity, in a greater or less degree, is relevant. How it is to be evidenced by specific instances is another question (*post*, § 991). It is enough here to note that the general quality of such incapacity may be offered to discredit.¹ No questions seem to have arisen of the sort already noticed as to Character.² It may be assumed in general that the discrediting quality offered must be in kind the same as that required in advance to show incompetency; and that incapacity at a former time may be used as the basis of the argument in the same way that character at a former time may be used.

4. Emotional Incapacity (Bias, Interest, and Corruption).

§ 940. **General Principle.** Impartiality of Feeling (Emotional Capacity) is no longer regarded as an essential preliminary to testimony (*ante*, § 576), except in a few instances. But the force of a hostile emotion, as influencing the probability of truth-telling, is still recognized as important; and a partiality of mind is therefore always relevant as discrediting the witness and affecting the weight of his testimony.

But it is practically of rare occurrence that we attempt directly to prove this partiality of mind; we are usually able to get at it only by inference

¹ *Accord*: 1896, *People v. Foo*, 112 Cal. 17, 44 Pac. 453 (Chinese); 1897, *Shelp v. U. S.*, 26 C. C. A. 570, 81 Fed. 694 (an Indian is not as such to be discredited); 1902, *U. S. v. Lee Huen* (quoted *supra*). Compare the Federal rule requiring corroboration for a Chinese witness (*post*, § 2066).

² 1844, *Washington v. Cole*, 6 Ala. 214 (that

a pretended medical witness was not a physician, allowed).

³ As with Character, so here, a question has been raised under the Opinion rule whether one person may testify directly to another's lack of Experiential Capacity; the authorities are dealt with *post*, § 1984. Compare also §§ 67, 87, 208, *ante*.

from some specific circumstance; for example, we infer partiality from the circumstance that the witness is a party in the cause, or is a brother of a party, or has on some occasion expressed hostility to the opponent, or has received money for his testimony. In such cases we are concerned with another question, *i. e.* *how to evidence this partiality of mind*; and this falls properly under other principles (*post*, §§ 948-968). Where it is thought worth while, however, there is no objection to a direct question, "Are you not anxious to have the defendant convicted?"¹

As in the case of Character (*ante*, § 927), a *partiality of mind* at some former time may be used as the basis of an argument to the same state at the time of testifying;² though the ultimate object is to establish partiality at the time of testifying.³

¹ As with Character and Experiential Capacity, the Opinion rule has here also been rashly invoked to exclude such testimony, the absurdity of the suggestion being here more pronounced; the rulings are collected *post*, § 1963.

The modern emasculation in this country of the judicial function has raised some questions entirely novel in the history of the common law. The principle that the judge is not to charge the jury upon matters of fact, as distinguished from

matters of law, has led, among other things, to doubting whether the judge may tell the jury that bias or interest affects the weight of testimony. This doubt, however (an instance of which may be found in *Hess v. Lowrey*, 122 Ind. 234, and *People v. Shattuck*, 109 Cal. 673, 42 Pac. 315), has nothing to do with our present subject; compare § 968, *post*.

² *Post*, § 930.
³ 1892, *Consaul v. Sheldon*, 35 Nebr. 254, 52 N. W. 1104.

SUB-TITLE II (continued): TESTIMONIAL IMPEACHMENT.

Topic II: EVIDENCING BIAS, INTEREST, AND CORRUPTION (BY CONDUCT AND CIRCUMSTANCES).

CHAPTER XXXI

INTRODUCTORY.

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- § 966. General Principle; Parties and Witnesses in a Civil Case.
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INTRODUCTORY.

§ 943. **General Principle; No Prohibition against Extrinsic Testimony.** The various qualities available for impeachment having been surveyed, and their limitations marked out, the next problem (*ante*, § 876) concerns the admissible modes of evidencing those qualities. These sources of evidence will be chiefly either the conduct of the witness or external circumstances. The evidence will thus consist most commonly of particular acts of behavior or particular events. Thus the distinction already noted (*ante*, § 878), between extracting the impeaching facts on cross-examination and presenting them by other witnesses, becomes now of vital importance. The first topic may most properly deal with those qualities for the evidencing of which this prohibition of extrinsic testimony does not apply, namely, the qualities of bias, corruption, and interest, — all being merely varieties of the single quality of emotional partiality (*ante*, § 940). Cross-examination will here be an important but not the exclusive mode of presentation. The chief inquiries will concern the relevancy of the various kinds of conduct and circumstances, and the occasional bearing of considerations of auxiliary policy (*ante*, § 42). Under Topic III may afterwards be considered the evidencing of moral character and other qualities, to which the prohibition of proof by extrinsic tes-

timony commonly applies. In general, then, there is for the present class of qualities no such prohibition:

1858, *Rice, C. J.*, in *Mellugh v. State*, 31 Ala. 320: "In considering the various modes by which the credit of a witness may be assailed, Courts must observe the distinction between an attack upon his general credit, and an attack upon his credit in the particular case. Particular facts cannot be given in evidence to impeach his general [i. e. moral character] credit only, but may be to affect his particular credit, that is, his credit [due to bias or interest] in the particular cause. Thus, the general credit of a witness for the prosecution may be unassailable; he may be hostile to the prisoner, and on cross-examination may deny that he is so; in such case, who can doubt the right of the prisoner to prove the hostility?"

§ 944. **Cross-examination; Broadness of Scope.** But even in this first class of evidence we find the influence of a part of this above principle,—a species of corollary, which provides that in extracting evidence by cross-examination the *largest possible scope* shall be given to evidence attempted to be procured in that way; the scope in a given instance being left chiefly to the *discretion of the trial Court*. This principle strictly grows out of the doctrine that extrinsic testimony should be excluded, and is intended somewhat as an offset to that exclusionary rule; it has therefore no essential application to such evidence as does not come within that exclusionary rule. Yet it is commonly spoken of as not so restricted, but as applying to all sorts of discrediting evidence. Throughout all the ensuing sorts of evidence, then, there is to be understood a general canon that on cross-examination the range of evidence that may be elicited for any purpose of discrediting is to be very liberal:

1840, *Redfield, J.*, in *Stevens v. Beach*, 12 Vt. 587: "It is no doubt competent for the party to put almost any question, upon cross-examination, which he may consider important to test the accuracy or veracity of the witness."

1842, *Hubbard, J.*, in *Perkins v. Adams*, 5 Metc. 48: "A witness may always be subjected to a strict cross-examination as a test of his accuracy, his understanding, his integrity, his biases, and his means of judging."

1843, *Shaw, C. J.*, in *Hathaway v. Crocker*, 7 Metc. 266: "In cross-examination, an adverse party is usually allowed great latitude of inquiry, limited only by the sound discretion of the Court, with a view to test the memory, the purity of principle, the skill, accuracy, and judgment of the witness, the consistency of his answers with each other and with his present testimony, his life and habits, his feelings towards the parties respectively, and the like; to enable the jury to judge of the degree of confidence they may safely place in his testimony."

1885, *Danforth, J.*, in *Langley v. Wadsworth*, 99 N. Y. 63, 1 N. E. 106: "So far as the cross-examination of a witness relates either to facts in issue or relevant facts, it may be pursued by counsel as a matter of right; but when its object is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge, and unless abused, its exercise is not the subject of review."¹

¹ It is unnecessary here to collect all the cases in which this doctrine has been uttered, first, because it is an unquestioned truism, and secondly, because like most commonplaces it is too indefinite to be of service as a rule, for it always yields when it comes in conflict with any

definite rule; some of the more definite rules that are applicable to cross-examination will be found *post*, §§ 981-983 (conduct affecting character), §§ 992-994 (testing the memory, etc.), §§ 1004, 1022 (collateral contradiction, etc.), and §§ 1871, 1885 (order of putting in the case);

It may be doubted whether in practical effect this canon enlarges the rules of relevancy. Probably it merely leaves the trial Court to pass upon the matter of relevancy without revision from above. Moreover, in many sorts of evidence even this effect is not given, for strict rules of relevancy are required to be followed. While it must be kept in mind, then, as representing a broad underlying tendency, it can hardly be trusted as a general guide and never as overriding any other concrete rule.

But the foregoing doctrine concerns at most the subject and scope of facts that may be covered. It does not concern the peculiar virtues of cross-examination as a mode of extraction distinguished from *direct examination*. The contrast is between cross-examining a witness already called, and calling new witnesses, — not between the cross-examination and the direct examination of the same witness. In the latter aspect, cross-examination is a right, because of its efficacy in securing more than could have been expected from a direct examination by a friendly examiner. The peculiar virtues which thus elevate cross-examination into a right are to be considered under another head (*post*, § 1368).

§ 945. **Kinds of Evidence.** Three different *kinds of emotion* constituting untrustworthy Partiality may be broadly distinguished, — Bias, Interest, and Corruption. *Bias*, in common acceptance, covers all varieties of hostility or prejudice against the opponent personally or of favor to the proponent personally. *Interest* signifies the specific inclination which is apt to be produced by the relation between the witness and the cause at issue in the litigation. *Corruption* is here to be understood as the conscious false intent which is

in the following cases two things are usually emphasized, first, that this broad scope of the examination is especially allowable in issues involving *fraud*, and secondly, that its limits are left to the *determination of the trial Court*: *Ala.*: 1857, *Stoudenmeier v. Wilson*, 29 *Ala.* 564; 1859, *Seale v. Chambliss*, 35 *id.* 21; 1895, *Long v. Booe*, 106 *id.* 570, 17 *So.* 716; 1896, *Rhodes Furn. Co. v. Weedon*, 108 *id.* 252, 19 *So.* 317; 1897, *Nelms v. Steiner*, 113 *id.* 562, 22 *So.* 435; 1902, *Southern R. Co. v. Brantley*, 132 *id.* 655, 32 *So.* 300; *Cal.*: 1895, *Sandell v. Sherman*, 107 *Cal.* 391, 40 *Pac.* 493; 1899, *People v. Westlake*, 124 *id.* 452, 57 *Pac.* 465; *Conn.*: 1846, *Steene v. Aylesworth*, 18 *Conn.* 244, 251; 1868, *Kelsey v. Ins. Co.*, 35 *id.* 225, 233; 1889, *State v. Duffy*, 57 *id.* 528, 18 *Atl.* 791; *D. C.*: 1898, *Davis v. Cohlens*, 12 *D. C. App.* 51, 51; 1899, *Hortou v. U. S.*, 15 *id.* 310, 324; *Fla.*: 1903, *Volusia Co. Bank v. Bigelow*, — *Fla.* —, 33 *So.* 704; *Ill.*: 1900, *Merricourt v. Norwalk F. I. Co.*, 13 *Ill.* 218, 226; *Ill.*: 1889, *Tindor Iron Works v. Weber*, 129 *Ill.* 535, 21 *N. E.* 1078; *Iad.*: 1891, *Pennsylvania Co. v. Newmeyer*, 129 *Ind.* 405, 28 *N. E.* 860; 1895, *McDonuld v. McDonald*, 142 *id.* 55, 41 *N. E.* 342; *Kan.*: 1902, *Basett v. Glass*, 65 *Kan.* 500, 70 *Pac.* 336; *La.*: 1852, *State v. Benjamin*, 7 *La. An.* 47, 49; 1896, *State v. Southern*, 48 *id.* 628, 19 *So.* 668; 1896, *Sturgis v. Robbins*, 62 *Me.* 289, 292; *Mass.*: 1873, *Miller v. Smith*, 112 *Mass.* 470

("to test the truthfulness, judgment, and credibility"); 1903, *Jennings v. Rooney*, — *id.* —, 67 *N. E.* 665; *Mich.*: 1899, *Bennett v. Eddy*, 120 *Mich.* 300, 79 *N. W.* 481; *N-br.*: 1894, *Omaha Nat. Bank v. Thompson*, 39 *Nehr.* 269, 275, 283, 5, *N. W.* 997; 1897, *Davis v. State*, 51 *id.* 301, 70 *N. W.* 984; 1849, *Seavy v. Dearborn*, 19 *N. H.* 335 ("a great deal of latitude is allowed for the purpose of testing the memory, the capacity, or the honesty of the person under examination"); 1879, *Free v. Buckingham*, 59 *id.* 219, 226; *N. J.*: 1872, *Jones v. Ins. Co.*, 36 *N. J. L.* 29, 42; *N. M.*: 1896, *Borrego v. Territory*, 8 *N. M.* 446, 46 *Pac.* 349; 1900, *Orange Co. F. E. v. Hubbell*, 10 *id.* 47, 61 *Pac.* 121; *Oh.*: 1877, *Martin v. Elden*, 32 *Oh. St.* 282, 287; *Or.*: 1895, *Maxwell v. Bolles*, 28 *Or.* 1, 41 *Pac.* 661; *Pa.*: 1893, *Myerstown Bank v. Roessler*, 186 *Pa.* 431, 40 *Atl.* 963; *U. S.*: 1861, *Johnston v. Jones*, 1 *Black* 216, 226; 1873, *Rea v. Missouri*, 17 *Wall.* 542; 1876, *Storm v. U. S.*, 94 *U. S.* 84 (further declining to interfere with that discretion simply because the answer might have furnished other witnesses who could have disproved the opponent's case); 1892, *Fames v. Kaiser*, 142 *id.* 488, 12 *Sup.* 302; 1894, *Blitz v. U. S.*, 153 *id.* 308, 312; 1899, *Davis v. Cohlens*, 174 *id.* 719, 19 *Sup.* 872; *Utah.*: 1895, *People v. Thiede*, 11 *Utah* 241, 39 *Pac.* 837; 1899, *Cahoon v. West*, 20 *id.* 73, 57 *Pac.* 715; *Vt.*: 1902, *State v. Bean*, 74 *Vt.* 111, 52 *Atl.* 269.

inferrible from giving or taking a bribe or from expressions of a general unscrupulousness for the case in hand.

The kinds of evidence available are two, (a) the *circumstances of the witness' situation*, making it *a priori* probable that he has some partiality of mind for one party's cause; (b) the *conduct of the witness* himself, indicating the presence of such partiality, the inference here being from the expression of the feeling to the feeling itself. These two sorts correspond to two of the three generic sorts of all circumstantial evidence (*ante*, § 43), — Prospectant and Retrospectant.

§ 946. **Same: Demeanor of the Witness, as evidence.** The conduct of the witness is formally offered in evidence, when it has occurred outside of the court-room. But it is no less admissible when exhibited in the court-room and on the stand, even though no formal offer of it is then required. The *demeanor of the witness on the stand* may always be considered by the jury in their estimation of his credibility.¹ So important has this form of evidence been deemed in our system of procedure that by a fixed rule of Confrontation (*post*, § 1395) the witness is required to be present before the tribunal while delivering his testimony. The main feature of contrast between the civil-law and the common-law systems of taking evidence was the difference between *viva voce* testimony and written depositions. Only when the former cannot be procured is the latter allowed to be employed. The witness' demeanor, then, without any definite rules as to its significance, is always assumed to be in evidence.²

A. BIAS.

§ 948. **General Principle; Particular Circumstances always admissible.** The doctrine of excluding facts offered by *extrinsic testimony* (*post*, § 979) has never been applied to this subject.¹ No explanation for this seems ever to have been clearly expressed. The reason, however, is probably this, that particular conduct and circumstances form the only means practically available for effectively demonstrating the existence of bias. Another witness' individual knowledge of the witness' bias is seldom asked for,² and would not be trusted without a specification of the grounds for the belief; and reputation is out of the question; so that the conduct of the witness and the circumstances of his situation become practically the sole available material. This class of facts, then, may be offered either by extrinsic testimony or by cross-examination, without discrimination against the former.³

¹ 1901, *Blair v. State*, 69 Ark. 558, 64 S. W. 948; 1860, *Evaus v. Lipscomb*, 31 Ga. 107; 1897, *Georgia H. I. Co. v. Campbell*, 102 id. 106, 29 S. E. 148 ("personal appearance" thought not to be properly considered); *Ida. Rev. St.* 1887, § 5956; 1892, *Purdy v. People*, 140 Ill. 46, 50, 29 N. E. 700; *Siebert v. People*, 143 id. 571, 593, 32 N. E. 431; 1868, *Callanan v. Shaw*, 24 Ia. 447; 1885, *Jennings v. Machine Co.*, 138 Mass. 594, 598; 1899, *Kirchner v. Collins*, 152 Mo. 394, 53 S. W. 1081.

² See *post*, § 1395, for passages expounding

the value of an opportunity to observe the witness' demeanor.

¹ This has seldom been even questioned: 1858, *Mellugh v. State*, 31 Ala. 320 (quoted, *ante*, § 943); 1833, *Rixey v. Bayse*, 4 Leigh 331.

² Whether it is admissible under the Opinion rule is noticed *post*, § 1964. Compare also § 661, *ante*.

³ It has been said that where the witness in general admits the existence of bias, no further inquiry into circumstances will be allowed, either on cross-examination or otherwise; the notion

§ 949. **Relationship and other External Facts as Evidence of Bias.** The range of external circumstances (*ante*, § 945) from which probable bias may be inferred is infinite. Too much refinement in analyzing their probable effect is out of place. Accurate concrete rules are almost impossible to formulate, and where possible are usually undesirable. In general, these circumstances should have some clearly apparent force, as tested by experience of human nature, or, as it is usually put, they should not be too remote.¹

Among the commoner sorts of circumstances are all those involving some *intimate family relationship* to one of the parties by blood or marriage or illicit intercourse,² or some such relationship to a person, other than a party, who is involved on one or the other side of the litigation,³ or is otherwise

being that it is a waste of time to allow a further attempt to prove a thing already conceded: 1879, *State v. Glynn*, 51 Vt. 580 ("the witness in this case admitted that she had unfriendly feelings against the prisoner, and such inquiry is so collateral to the issue that a court will never permit detail, but only the general inquiry whether the witness is friendly or otherwise"; here the question asked was, "Have you ever told S. that you would get the old man [the defendant] into State prison if you could?"). But this view is unsound; because a general admission of the existence of bias can never be so vivid and forceful as the inference from his situation or his utterances. The doctrine has no support elsewhere; 1869, *Blake v. Damon*, 103 Mass. 207, 209 (repudiating the argument that "the witness should first be asked if he has bias, and to what extent; if he concedes bias, then it is wholly collateral to inquire into the circumstances showing it").

¹ 1869, *State v. Dee*, 14 Minn. 35; 1882, *Langhorne v. Com.*, 76 Va. 1016 (limiting this mode of showing bias to circumstances strongly significant). Whether, without resorting to this evidence, the witness may be asked directly whether he is biased, has been already considered *ante*, § 940.

² In the following rulings the circumstance was admitted, except where otherwise noted: *Eng.*: 1836, *Thomas v. David*, 7 C. & P. 350 (mistress of the plaintiff); *Ala.*: 1900, *Martin v. State*, 125 Ala. 64, 28 So. 92; *Cal.*: 1868, *Lyou v. Hancock*, 35 Cal. 377 (wife); *Ga.*: Code 1895, § 5289 (feelings and relationship to parties, admissible); 1886, *Simpson v. State*, 78 Ga. 97 (relationship); 1901, *Cochran v. State*, 113 id. 726, 39 S. E. 333 (brothers, and others); *Ind.*: 1896, *Smith v. State*, 143 Ind. 685, 42 N. E. 913 (assault with intent to kill; the prosecuting witness' sister having testified for the defendant, her relations with him were admitted to show bias); 1900, *Keesier v. State*, 154 id. 242, 56 N. E. 232 ("near relatives"); *Ia.*: in the following three cases a wife's testimony was held not to be discredited by her relationship: 1859, *State v. Rankin*, 8 id. 355 (Wright, C. J., diss.); 1865, *State v. Collins*, 20 id. 85, 92; 1876, *State v. Bernard*, 45 id. 234; *contra*: 1859, *State v. Nash*, 10 id. 81, 89; *Ky.*: 1895,

Preston v. Dills. — *Ky.* — 32 S. W. 945 (relationship should not "discredit" (*i. e.* reject!) the testimony); 1896, *Holly v. Com.*, — id. — 36 S. W. 532 (that a female witness for the defendant had lived with him without being married); 1898, *Franklin v. Com.*, 105 id. 237, 48 S. W. 986 (killing of a woman said to have been seduced; that a witness for the prosecution was the real seducer, admissible); *La.*: 1881, *State v. Willingham*, 33 La. An. 537 (relationship); 1896, *State v. Johnson*, 48 id. 437, 19 So. 476 (defendant's mistress); *Mo.*: 1901, *State v. Fisher*, 162 Mo. 169, 62 S. W. 690 (relationship); *N. C.*: 1846, *State v. Ellington*, 7 Ired. 66 (parental and fraternal relations); 1847, *State v. Nash*, 8 id. 36 (same); 1858, *State v. Nat.*, 6 Jones L. 117 (fellow-slaves); 1897, *State v. Apple*, 121 N. C. 584, 28 S. E. 469 (father and mother); 1897, *State v. Lee*, ib. 544, 28 S. E. 552 (defendant's wife); *S. D.*: 1896, *State v. Smith*, 8 S. D. 547, 67 N. W. 619 (relationship); *U. S.*: 1888, *U. S. v. Davis*, 33 Fed. 865 (near relatives); *Wis.*: 1895, *Porath v. State*, 90 Wis. 527, 63 S. W. 1061 (illicit relations; excluded, wrongly). It should be understood that relationship is merely a circumstance which may be invoked by counsel as discrediting the witness; but it does not follow that the jury must so use it. The confusion of the first with the second result serves in part to explain the conflict of rulings.

³ Here the circumstance has usually been excluded; but the rulings are too final; a complete exposure of the relations is better: 1899, *Lodge v. State*, 122 Ala. 97, 26 So. 210 (that the father of a child-witness was hostile to the opponent, admitted); 1903, *Stall v. State*, — id. — 34 So. 680 (that the witness was the husband of the deceased's washerwoman, excluded); 1875, *Peppo v. Partron*, 49 Cal. 637 (mere marital relationship of witnesses to person claimed to have conspired to prosecute falsely the defendant, excluded); 1859, *Stater. Bilansky*, 3 Minn. 246, 249, 260 (criminal intimacy of a female witness for the prosecution with a man with whom the female defendant was also intimate, rejected as too remote to show probable jealousy and bias); 1859, *State v. Montgomery*, 28 Mo. 594 (bias to third persons, excluded, "no matter in what relation, however

prejudiced for or against one of the parties. The relation of *employment*, present or past, by one of the parties, is also usually relevant.⁴

The *pendency of civil litigation* between the witness and the opponent is usually relevant, not only as a circumstance tending to create feeling,⁵ but also as involving conduct expressive of feeling (*post*, § 950); and while the mere fact of litigation upon a disconnected matter may not necessarily show bias, still it is useless to attempt to distinguish and refine for the purpose of exclusion.⁶ That the witness is or has been *under indictment* may have several bearings; (1) if the indictment, present or past, was had by the opponent's procurement or for an injury to him, it is relevant as having tended to excite in the witness a hostile feeling to him;⁷ (2) if the indictment was pro-

duced by the party"; here bias against the defendant's husband); 1898, *State v. Welch*, 33 Or. 33, 54 Pac. 213 (whether he had any trouble with the defendant's brother or mother, not proper); 1901, *State v. Ogden*, 39 id. 195, 65 Pac. 449 (witness' sons' quarrel with defendant, excluded); 1880, *State v. Conkle*, 16 W. Va. 736, 742, 757, 764 (attempt to kill; a witness for the State lived in the house with the defendant and his wife; a question as to his intercourse with the latter was excluded, in an obscure opinion).

⁴ It is obvious that where the employment is a *present* one, the effect is to suggest an interest (under § 969, *post*) rather than a personal bias; but the rulings can most conveniently be collected here in one place: 1895, *Long v. Booe*, 106 Ala. 570, 17 So. 716 (former employment of witness' father by the party, admitted); 1897, *Postal Tel. Cable Co. v. Hulsey*, 115 id. 193, 22 So. 854 (whether a witness' employment depended on the issue of his employer's case, and why the witness was interested, allowed); 1899, *Preferred Acc. Ins. Co. v. Gray*, 123 id. 482, 26 So. 517 (that the physician-witness was employed by the corporation insured by the defendant, allowed); 1900, *Louisville & N. R. Co. v. Tegner*, 125 id. 593, 28 So. 510 (that a witness was a large shipper over defendant's road, allowed; *Tyson, J., diss.*); 1901, *Alabama G. S. R. Co. v. Johnston*, 128 id. 283, 29 So. 771 (that the witness had free transportation on defendant's road, admissible); 1898, *Douley v. Dougherty*, 174 Ill. 582, 51 N. E. 714 (employment by a party, admissible); 1903, *Chicago C. R. Co. v. Carroll*, — id. —, 68 N. E. 1087 (similar); 1900, *Chicago & Erie R. Co. v. Thomas*, — Ind. —, 55 N. E. 86 (whether the witness believed that he would be discharged if he testified to his own negligence, allowed); 1875, *Wallace v. R. Co.*, 119 Mass. 93 (that a witness for defendant corporation was also employed by another corporation among whose stockholders were officers of the former, excluded in discretion); 1900, *Koplan v. Gaslight Co.*, 177 id. 15, 58 N. E. 183 ("the fact that one has been discharged 'for cause' from the service of another against whom he testifies would not ordinarily be an independent ground of impeachment," but here allowed in discretion); 1895, *Wastl v. R. Co.*, 17 Mont. 213, 42 Pac. 772 (that a witness against a railroad company is an employee of one; an obscure

and illogical treatment of the subject, apparently forbidding the consideration of such a fact); 1903, *Koenig v. Union D. R. Co.*, 173 Mo. 698, 73 S. W. 637 (that he was an attorney testifying for his client, allowed); 1900, *O. Haver v. R. Co.*, 64 N. J. L. 312, 45 Atl. 593 (whether the defendant's employee charged as culpable was not afraid of losing his position if the verdict was against the defendant, allowed); 1902, *Hedlun v. Holy Terror Min. Co.*, — S. D. —, 92 N. W. 31 (that the witness was agent of the company insuring the defendant, admitted); 1899, *Missouri K. & T. R. Co. v. St. Clair*, 21 Tex. Civ. App. 345, 51 S. W. 666 (that a witness was the opponent's discharged employee, excluded); 1898, *Tennessee C. I. & R. Co. v. Haley*, 29 C. C. A. 328, 85 Fed. 534 (wages of employee-witness, as affecting credit, admissible); 1897, *Klatt v. Lumber Co.*, 97 Wis. 641, 73 N. W. 563 (employment by a party, admissible).

For the admissibility of the fact of *accident insurance* and of *employment as a detective*, as affecting interest, see *post*, § 969.

⁵ 1897, *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 169 (the pendency of a suit for a similar claim, admitted).

⁶ 1888, *Hitchcock v. Moore*, 70 Mich. 115, 37 N. W. 914 (that the plaintiff in an action for slander against his wife's father had been compelled in a divorce suit to pay out money to his wife; admitted); 1881, *Olive v. State*, 11 Nebr. 1, 23, 7 N. W. 444 (that he was an attorney for the prosecution, that he was interested in a suit against the defendant, admitted on cross-examination); 1897, *Lane v. Harlan Co.*, 51 id. 641, 71 N. W. 302 (damages for the taking of land by a county; a county-supervisor who had helped fix the line and estimate the damages; these facts considered as affecting bias); 1837, *Pierce v. Gilson*, 9 Vt. 222 ("that a lawsuit has existed, calculated to excite personal dislike," admitted); 1882, *Langhorne v. Conn.*, 76 Va. 1024 (excluding the fact that a bill charging the State's witness with infamous conduct had been filed by the accused, because knowledge of the charge had not come to the witness before testifying; and also holding that the mere fact of litigation on a disconnected matter is not admissible). Compare the doctrine of § 951, *post*.

⁷ 1903, *Purdue v. State*, — Ga. —, 46 S. E.

cured by the opponent against another party to the cause, it is relevant as an expression of hostile feeling, usable against the opponent as a witness (*post*, §§ 950, 951); (3) if it is now pending over a witness for the prosecution for the accused in a criminal case, it is relevant to show the witness' interest in testifying favorably for that side (*post*, § 967).

Beyond these common varieties of circumstances, no generalization can be attempted. New circumstances will constantly be presented, as suggestive of personal prejudice;⁸ and the decision should be left entirely in the hands of the trial judge.

§ 950. **Expressions and Conduct as Evidence of Bias.** The line between external facts in a witness' situation and expressions or conduct (*ante*, § 945) is sometimes hard to draw; but for the purposes of relevancy it is of little more than theoretical consequence, the relevancy being usually in such cases clear enough. The argument in the present sort of evidence is from conduct or language to the feelings inspiring it;¹ the only question is whether from the conduct or language a palpable and more or less fixed hostility (to one party) or sympathy (for the other) is inferrible.² Such questions should be left largely to the discretion of the trial Court.³ The variety of the evidence is infinite. Among the commonest sorts are the witness' expressions of a desire to have the opponent defeated in the present proceeding,⁴ and of

606 (indictments for offences by a witness against the defendant, admitted); 1869, *R. v. Brown*, 3 Haw. 114, 116 (defendant's testimony before the magistrate, charging B, an accomplice, admitted, to show B's motive and credibility in incriminating the defendant by his testimony). *Contra*: 1875, *Tilton v. Beecher*, Abbott's Rep. I, 517 (that the principal witness for the plaintiff, Mr. Moulton, had been indicted for libel on Mr. Beecher's complaint, excluded; Mr. Everts, for defendant: "Does your Honor say that to show that the party against whom he is testifying here has pursued him is not evidence that he does not stand impartial?"; Judge Neilson: "It is very clear that if A claims an immense estate against B, and B can pursue the principal witness and indict him in many indictments, that he don't ruin the witness whose testimony may be brought in support of the case against him").

⁸ 1892, *Fcx v. Lead Works*, 92 Mich. 249, 52 N. W. 623 (that a person was a total abstainer, who testified to the plaintiff's discharge for drunkenness, excluded); 1877, *Guterson v. Morse*, 54 N. H. 165 (taking part as a grantee from the defendant in a conveyance fraudulently made to defeat the collection of the claim in suit, admitted); 1896, *State v. Mace*, 118 N. C. 1244, 24 S. E. 798 (murder; that the witness for the prosecution had "been drunk with the deceased many times," excluded); 1895, *Fenstermaker v. Pub. Co.*, 12 Utah 439, 43 Pac. 112 (plaintiff had been charged, with others of his family, with cruelty to a child; questions to his wife as to her cruelty to others of the children were held inadmissible to show bias).

¹ A direct assertion, "I am biased," or "I am ready to lie against him," is seldom made;

in such an instance we are of course strictly not dealing with a circumstantial inference (*ante*, § 394), but with a hearsay assertion, admissible under the Exception for Declarations of a Mental Condition (*post*, § 1730). But in practice no such distinction is drawn, and all is treated as circumstantial evidence. For the admissibility of such a general answer on the stand, see *ante*, § 940.

² In New York the principle is phrased in apparently a stricter form; the evidence must there be "direct and positive,"—whatever that means: 1879, *Gale v. R. Co.*, 76 N. Y. 595; 1882, *Schultz v. R. Co.*, 89 id. 248.

³ This statement, when made by the Courts, is usually said of extraction on cross-examination, and is thus merely an instance of the general principle already spoken of (*ante*, § 944); but there is no reason for any limitation of the doctrine to cross-examination: 1861, *Floyd v. Wallace*, 31 Ga. 690, 692; 1857, *Mayhew v. Taylor*, 8 Gray 172; 1892, *Consaul v. Sheldon*, 35 Nehr. 254, 52 N. W. 1104; 1892, *People v. Brooks*, 131 N. Y. 326, 30 N. E. 189; 1893, *Garnsey v. Rhodes*, 138 id. 467, 34 N. E. 199.

⁴ 1679, *Lewis' Trial*, 7 How. St. Tr. 249, 254 (Defendant: "Dorothy James' . . . evidence is grounded upon plain malice"; Witness: "Dorothy James said to several persons . . . that she would wash her hands in Mr. Lewis' blood, and that she would have his head to make pottage of as of a sheep's head"); 1681, *Collidge's Trial*, 8 id. 549, 640 (Oates testifies that Smith, the informer, a chief witness, had said of the defendant: "God damn that Collidge, I will have his blood," and on Oates reproving him that "these words do not become

conduct indicating a partisan feeling either in the present or in other legal proceedings.⁵ No generalization of the different sorts of evidence is of any utility; there is merely a greater or less degree of significance according to the circumstances and the personality of the witness.⁶

a minister of the Gospel," Smith replied, "God damn the Gospel"; 1752, Blandy's Trial, 18 id. 1164 (the defendant was charged with poisoning her father; her female servant, who had been discharged, had been the chief witness against her; testimony as to the servant's bias: "I have heard her curse Miss Blandy, and damn her for a bitch, and said she would not stay. Since this affair happened I heard her say, 'Damn her for a black bitch, I shall be glad to see her go up the ladder and swing'"); 1888, *R. v. Shaw*, 16 Cox Cr. 503 (a statement two years before, after a quarrel: "It is in my power to do him a good one, and when I do it, it will be a good one"); 1894, *People v. Anderson*, 105 Cal. 32, 38 Pac. 513 (that she would hang the defendant if her evidence would do so); 1889, *State v. McFarlain*, 41 La. An. 687, 6 So. 728 (that the witness had proposed, just after the shooting, to lynch the accused); 1892, *Consul v. Sheldon*, 35 Nebr. 253, 52 N. W. 1104 ("There goes a man I will do up, by God"); 1853, *Drew v. Wood*, 26 N. H. 363 ("If the D. family come over that hill, they shall not go home alive"); 1896, *State v. Ellsworth*, 30 Or. 145, 47 Pac. 199 (that the defendant ought to be hung).

⁵ The following rulings admitted the evidence, except where otherwise noted: 1887, *Burger v. State*, 83 Ala. 38 (concealing knowledge from an officer, to show bias for the accused); 1897, *Scott v. State*, 113 id. 64, 21 So. 425 (keeping a witness away); 1885, *People v. Lee Ah Chuck*, 66 Cal. 667, 6 Pac. 859 (that the prosecuting witness had already caused the defendant's arrest for the same matter on another charge); 1899, *People v. Bird*, 124 id. 32, 56 Pac. 639 (trying to persuade defendant's bail-bondsman to withdraw); 1894, *Jacksonville T. & K. W. R. Co. v. Lockwood*, 33 Fla. 573, 578, 15 So. 327 (whether he has not testified against the same opponent in a dozen suits in fifteen months, excluded); 1881, *Johnson v. Wiley*, 74 Ind. 238 (the witness testified she had been threatened with suit on a note by heirs unless she testified against the will); 1884, *Stone v. Huffine*, 97 id. 346, *semble* (in an action to require a bond to keep the peace, that the relator had instituted a prosecution for attempt to provoke an assault); 1859, *Com. v. Byron*, 14 Gray 31 (activity in procuring an indictment, *semble*, admissible); 1860, *Crippen v. People*, 8 Mich. 128 (that the witness had with others arranged to procure the indictment as a speedy way of attaining the end for which they had brought civil suits); 1848, *Lohman v. People*, 1 N. Y. 386 (taking part in instigating a prosecution); 1868, *Nation v. People*, 6 Park. Cr. C. 259 (declaration that the witness would withhold his evidence if the defendant would restore the money lost; excluded); 1865, *Gainey v. Com.*, 50 Pa. 328 (a witness for defendant, asking what could be proved against defendant); 1896,

Philadelphia v. Reeder, 173 Id. 281, 34 Atl. 17 (that the defendant's witness had charged corrupt conduct against one concerned with the plaintiff in the public work upon which the suit was brought); 1900, *Wadley v. Com.*, 98 Va. 803, 35 S. E. 452 (whether he worked for an indictment of the defendant in order to compel the payment of a debt by defendant).

⁶ The following rulings admitted the evidence, except where otherwise noted: 1899, *Magness v. State*, 67 Ark. 594, 50 S. W. 554, 59 S. W. 529 (expressions of hatred to Africans, the defendant being a negro); 1886, *Hartman v. Rogers*, 69 Cal. 646, 11 Pac. 581 (sundry conduct); 1891, *People v. Thomson*, 92 id. 509, 28 Pac. 589 (that the witness on hearing of the shooting went out to kill the defendant); 1896, *Jauge v. Schoettler*, 115 id. 388, 47 Pac. 139 (threat to kill the opponent); 1830, *Daggett v. Tollman*, 8 Conn. 171 (refusing to leave the State to give a deposition for one party, but doing it for the other); 1903, *Fields v. State*, — Fla. —, 35 So. 185 (quarrels); 1888, *Gardner v. State*, 81 Ga. 144, 1 S. E. 144 (adultery; letter showing that defendant's witness, with whom the adultery was charged, had conspired with defendant to blackmail a third person on a charge of criminal intercourse, excluded); 1897, *Daniel v. State*, 103 id. 202, 29 S. E. 767 (that he was "very intimate and friendly with the decedent and was his 'partner'"); 1900, *Whitney v. State*, 154 Ind. 573, 57 N. E. 398 (stoning the house of defendant's brother, where defendant was staying, held not evidence of bias); 1842, *Perkins v. Adams*, 5 Metc. 44 (defendant, a town clerk, was sued for not recording a mortgage; the mortgagor testified that the defendant had lost it; a letter from the defendant to a creditor threatening him with trouble if he sold on execution was admitted); 1852, *Long v. Lamkin*, 9 Cush. 365 (whether a witness had had a quarrel with the witness whom his testimony was discrediting); 1857, *Starks v. Sikes*, 8 Gray 609, 612 (hostility in another transaction, excluded); 1860, *Chapman v. Coffin*, 14 id. 454 (a statement that the witness, having testified for the defendant, would if called again testify for the plaintiff); 1863, *O'Neill v. Lowell*, 6 All. 110 (declaration that the plaintiff "ought to get a good pile of money out of the [defendant] city"); 1867, *Day v. Stickney*, 14 id. 257 ("I mean to get the money on this bond of old F., so as to get back the rent I paid him for the M. House"); 1868, *Clement v. Kimball*, 98 Mass. 537 (reputation for unchastity of a man or woman associating with a woman or man, admissible, if known to the latter, to show the latter's disposition towards the former; because it involves in effect conduct significant of disposition or feeling); 1869, *Blake v. Damon*, 103 id. 209 (sundry conduct); 1873, *Com. v. Kelley*, 112 id. 452 (that a constable testifying to liquor

§ 951. *Details of a Quarrel on Cross-examination.* It is obvious that, in ascertaining the state of feeling from the fact of a quarrel or other circumstances, the mere fact alone has little significance; without a knowledge of the details, we cannot well know the extent of the ill-feeling and the allowance to be made against the testimony. This necessity for ascertaining details is recognized by some courts without limitation:

1851, *Perley, J.*, in *Titus v. Ash*, 24 N. H. 323, 331 (a quarrel between the plaintiff's witnesses and defendant having been shown, the Court admitted details as to the throwing of stones, etc., during the quarrel): "The quarrel in such case is not the substantial fact; it is no more than a circumstance tending to show prejudice and ill-will in the witness. . . . The degree of violence in the quarrel is manifestly material to the point in question. Was it a slight and accidental difference on some trifling subject, such as would be likely to leave behind no trace of ill-will or prejudice? Or a serious and inveterate feud, such as would perpetuate a grudge in the mind of the witness against the party?"¹

But in two ways inconvenience may ensue: (1) the detailed inquiries, the denials, and the explanations, are liable to lead to multifariousness and a confusion of issues; (2) the detailed facts of the dispute may involve a prejudice to the character of the witness, or of his opponent, which it would be desirable to keep out of the case. From this point of view, some line of limitation must be drawn, and an effort made to avoid these two drawbacks:

1869, *Steele, J.*, in *Ellsworth v. Potter*, 41 Vt. 689 (the plaintiff testified that the ill-feeling between herself and the witness was such that she had turned the witness out of her house): "The plaintiff was at liberty . . . under the direction of the Court to state enough to indicate the extent or degree of the difficulty and consequent ill-feeling. . . . This testimony was not intended or calculated to show which party was in fault, but only the degree of estrangement between them. It is impracticable by any general rule to fix a precise limit which should govern the admission of such evidence, and necessarily it must be left to a considerable extent to the discretion of the *nisi prius* Court."

Accordingly, it is commonly held that the details of the quarrel or other conduct may be excluded, in the trial Court's discretion.²

found had made oath in the search-warrant that he believed the defendant had large quantities there; excluded in discretion); 1878, *Com. v. Gallagher*, 126 id. 55 (offering a third person money to go bail for the defendant); 1887, *Com. v. Trider*, 143 id. 180, 9 N. E. 510 (that the husband, testifying against his wife charged with adultery, had offered a servant money to watch the wife, and had habitually accused the wife without foundation of improper conduct; excluded); 1871, *Strang v. People*, 24 Mich. 8 (connivance at the defendant's alleged conduct, admitted); 1879, *People v. Gordon*, 40 id. 71 (burglary; questions to the police, whether the arrest was not by connivance of a confederate, allowed); 1875, *State v. Breeden*, 58 Mo. 508 (in general); 1896, *State v. Punshon*, 133 id. 44, 34 S. W. 25 (defacement of the opponent's pictures; excluded, in discretion); 1847, *Starks v. People*, 5 Den. 106 (expression of a plan to kill defendant); 1879, *Gale v. R. Co.*, 76 N. Y. 595 (that the witness had been refused employment

by the defendant; excluded); 1884, *Kent v. State*, 42 Oh. 428, 429 (sundry conduct); 1903, *State v. McCann*, — Or. —, 72 Pac. 137 (injured person's expression, at the time of injury, excluded on the facts); 1837, *Pierce v. Gilson*, 9 Vt. 222 ("that a violent altercation has taken place, arising to personal violence").

¹ *Accord*: 1872, *Durham v. State*, 45 Ga. 516 (details admissible).

² 1884, *Jones v. State*, 76 Ala. 15 (the fact and the gravity of the quarrel admissible but not its merits or its details); 1888, *People v. Goldenson*, 76 Cal. 349 (details may be excluded); 1878, *Patman v. State*, 61 Ga. 379 (excluded, the witness having admitted ill-feeling); 1899, *Boldon v. Thompson*, 60 Kan. 856, 56 Pac. 131 (details of lawsuit with opponent, excluded); 1871, *Com. v. Jennings*, 107 Mass. 488 (the trial Court has discretion); 1872, *Morrissey v. Ingham*, 111 id. 65 (same); 1879, *Com. v. Allen*, 128 id. 48, 51 (same); 1903, *Brink v. Strawn*, 176 N. Y. 150, 68 N. E. 148 (the discretion of

§ 952. Same; Explaining away the Expressions or Circumstances; Details on Re-examination. On the general principle of explaining away circumstantial evidence (*ante*, § 34), any circumstance of conduct or expression, or of the external situation, of the witness may be explained away as due to some other cause than the emotion desired to be shown by it, or as not indicating a deep-seated hostility:

1743, *Chadwick's Trial*, 18 How. St. Tr. 362; Prisoner's Counsel (to the chief prosecuting witness): "Had not you and the prisoner a quarrel at Carlisle?" Witness: "That I confess, and I will tell you what it was about; it was about a very foolish affair. Provisions being a little scarce at Carlisle [where both were in the Pretender's army], I had some sausages, and the prisoner would have them from me, and I not caring to part from them caused a quarrel, and we fought together. . . . I would not swear any man's life away for a sausage."

1871, *Woodruff, J.*, in *U. S. v. 18 Barrels, etc.*, 8 Blatchf. 478: "When cross-examining counsel see fit to call out from the witness collateral facts which tend to create distrust of his integrity, fidelity, or truth, it is entirely competent for the adverse party to ask of the witness an explanation which may show that the facts thus elicited were in truth wholly consistent with his integrity, fidelity, and truth, although they thereby prove circumstances foreign to the principal issue, and which, but for such previous cross-examination, they would not be permitted to prove."¹

But there are limitations to the use of this evidence: (1) In the first place, the general principle (*post*, § 2113) that allows the whole of a conversation to be shown in order to explain the true sense of the fragment first offered must not be allowed to introduce purely *irrelevant matter*; the object is to explain, and no more should be listened to than is strictly necessary for that purpose:

1820, *Abbott, C. J.*, in *The Queen's Case*, 2 B. & B. 294 (a witness for the plaintiff on cross-examination stated that he had mentioned that he was to be a witness against the defendant; it was proposed to ask him about the whole conversation): "The counsel has a right upon re-examination to ask all questions which may be proper to draw forth the sense and meaning of the expressions used by the witness on cross-examination, and

the trial Court determinés); 1899, *McKnight v. U. S.*, 38 C. C. A. 115, 97 Fed. 208 (letter of accused unfavorably criticising a witness, not admitted to show witness' probable bias, because of improper details contained in it); 1837, *Pierce v. Gilson*, 9 Vt. 222 (only the fact of a quarrel admissible, not the nature of it); 1897, *Bertoli v. Smith*, 69 id. 425, 38 Atl. 76 ("the simple fact of trouble" alone allowed, in the trial Court's discretion).

¹ *Accord*: 1838, *R. v. McKenna, Cr. & Dix Abr.* 579 (the witness on cross-examination admitted that some time had elapsed before he disclosed his information to the officials. A re-examination for the purpose of explaining his reasons was objected to, but "Foster, B., permitted a re-examination on this point, and the witness thereupon in reply stated that he was prevented by sickness from sooner lodging the informations"); 1874, *Hall v. State*, 51 Ala. 15 (to prove improper intimacy between the defendant and a female witness, the fact that they were seen at a revival whispering at the

back of the church had been admitted; to "repel the inference," the fact was admitted that other men and women were also seen there whispering); 1898, *McAlpine v. State*, 117 id. 93, 23 So. 130; 1895, *People v. Johnson*, 106 Cal. 289, 39 Pac. 622 (zeal based on strong conviction of defendant's innocence); 1895, *People v. Fultz*, 109 id. 258, 41 Pac. 1040 (the witness had quarrelled with the defendant, her husband, and called him names; explanation was allowed that this was after defendant had struck her); 1896, *Dennehy v. O'Connell*, 66 Conn. 175, 34 Atl. 920 (the reason why a supposed dispute had taken place); 1871, *Com. v. Jennings*, 107 Mass. 488 (the trial Court's discretion controls); 1872, *Morrissey v. Ingham*, 111 id. 65 (same); 1875, *Brooks v. Acton*, 117 Mass. 204, 209; 1850, *Somerville & E. R. Co. v. Doughty*, 22 N. J. L. 500 (explanation allowed); 1848, *Clapp v. Wilson*, 5 Den. 286, 289 (the defendant's witness was shown to be his son-in-law; counter-evidence admitted that they had for some time been at variance).

also of the motive by which the witness was induced to use those expressions; but I think 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. . . . [The conversation] becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations and by the motive under which he made them; but when once all which had constituted the motive and inducement and all which may show the meaning of the words and declarations has been laid before the Court, the Court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is in my opinion irrelevant and incompetent."²

(2) When to a witness is imputed hostility to the opponent, the true process of explanation consists in showing that the facts offered do not really indicate the conclusion suggested, *i. e.* the hostility. Thus, when the counter-evidence does not attempt to do this, but admits the hostility and desires to show that it was *justifiable by the opponent's conduct*, the offer is improper in two ways, first, because it does not at all explain away, but concedes that hostility exists, and, secondly, because it tends to prejudice unfairly the cause of the opponent by showing him to be an unjust man; and for these reasons such evidence may be excluded:

1852, *Johnson, C. J.*, in *Cornelius v. State*, 12 Ark. 801: "A long and tedious detail by the witness of the numerous charges which he has heard against the accused could not aid the jury in the least possible degree in their deliberations, as they could not thereby ascertain the extent of his prejudice. . . . The question for the jury to determine is not what it is that constitutes the basis or foundation of the feeling or prejudice that may be entertained by the witness towards the accused; but, on the contrary, it is as to the existence of such prejudice. . . . In this case the effect of the re-examination was to disclose the defendant's general character, and that too by particular acts."³

§ 953. **Preliminary Inquiry to Witness.** On the principle of fairness and of the avoidance of surprise, the settled rule obtains (*post*, § 1025), in offering evidence of prior self-contradictory statements, that the witness must first be asked, while on the stand, whether he made the statements which it is intended to prove against him. Does the same rule apply to the use of evidence of former utterances of the witness indicating Bias? Must the witness first be asked whether he made them? He must, as a matter of

² The authorities on this point are placed *post*, § 2115.

³ *Accord*, but usually laying down the rule too strictly: 1852, *Cornelius v. State*, 12 Ark. 787, 800 (rumors of previous similar crimes by the defendant, stated by the witness in detail on re-examination as the ground of his prejudice; excluded); 1879, *Butler v. State*, 34 id. 484 (details of charges reported to witness by H. as having been made against her by defendant, and causing ill-feeling on her part; excluded on cross-examination); 1886, *Selph v. State*, 22 Fla. 537, 541 ("It is permissible to prove that witness and prisoner had a controversy, from which hostility was engendered; it is of no consequence which was in the right in such controversy"); 1881, *State v. Gregory*, 33 La. An. 743 (detail of reasons for animosity, excluded); 1902, *State v. Frank*, 109 La. 131, 33

So. 110 (details excluded); 1900, *People v. Zigouras*, 163 N. Y. 250, 57 N. E. 465 (admitted, subject to discretion of trial Court; three judges dissenting); 1902, *State v. Warren*, 41 Or. 348, 69 Pac. 679 (admissible in the trial Court's discretion); 1902, *State v. Stevens*. — S. D. —, 92 N. W. 420 (reasons for hostility, excluded); 1900, *Hyde v. Swanton*, 72 Vt. 242, 47 Atl. 790 (details of a quarrel, excluded).

This rule was apparently not recognized in England, though the following ruling may perhaps be otherwise explained: 1840, *R. v. St. George*, 9 C. & P. 488 (where a witness who testified to an altercation with his father was asked on cross-examination about hostile language formerly used by him against his father, and was then allowed to explain it by his father's prior misconduct).

principle; for the same reasons of fairness that require a witness to be given an opportunity of denying or explaining away a supposed self-contradictory utterance (*post*, § 1025) require him also to have a similar opportunity to deny or explain away a supposed utterance indicating bias. Should force be given to this principle, in spite of the absence of fixed common-law precedent? Under ordinary circumstances, it should be. But the rule requiring such an inquiry before proving a prior self-contradiction has been pushed so far, and applied so stiffly and arbitrarily, that on the whole it now does quite as much harm as good. To import it in its present shape into any subject where it does not strictly belong by precedent seems unwise. Were the rule properly administered, no doubt it should have a place here also. Moved perhaps by these conflicting considerations, the different jurisdictions are found ranged on opposite sides in the present question.¹ Wherever the rule requiring this preliminary inquiry is in force, it carries with it, as of course, the developed details of the rule as established for self-contradictions (*post*, §§ 1029-1038).

¹ *Eng.*: here the inquiry seems to have been regarded as necessary: 1820, *The Queen's Case*, 2 B. & B. 313 (the broad rule is laid down that "the legitimate object of the proposed proof is to discredit the witness," "to bring the credit of the witness into question by anything he may have said or declined touching the cause," and hence in every such case the asking should be required); 1840, *Patterson, J.*, in *Carpenter v. Wall*, 11 A. & E. 804 ("I like the broad rule that, where you mean to give evidence of a witness' declarations for any purpose, you should ask him whether he ever used such expressions"); 1847, *Alderson, B.*, in *Attorney-General v. Hitchcock*, 1 Exch. 102 ("It is only just and reasonable that the question should be put," though implying that it is not necessary); *Ala.*: 1843, *Weaver v. Traylor*, 5 Ala. 564 (necessary); *Ark.*: 1890, *Hollingsworth v. State*, 53 Ark. 387, 388, 14 S. W. 41 (left undecided); *Cal.*: 1860, *Baker v. Joseph*, 16 Cal. 177 (necessary); *Del.*: 1900, *State v. Deputy*, 3 Pen. 19, 50 Atl. 176 (necessary); *Ill.*: 1890, *Aneals v. State*, 134 Ill. 401, 414 (necessary); 1901, *Blanchard v. Blanchard*, 191 id. 450, 61 N. E. 481 (necessary); *Ky.*: 1897, *Horner v. Com.*, — Ky. —, 41 S. W. 561 (necessary); *Ia.*: 1871, *Lucas v. Flinn*, 35 Ia. 14 (not necessary; the witness denied that he was biased, and former expressions of enmity were subsequently offered against him); *La.*: 1896, *State v. Goodhler*, 48 La. An. 770, 19 So. 755 (necessary); *Miss.*: 1859, *Newcomb v. State*, 37 Miss. 383, 403 (necessary); *Nebr.*: 1897, *Davis v. State*, 51 Nebr. 301, 70 N. W. 984 (necessary); *N. H.*: 1851, *Tilts v. Ash*, 24 N. H. 331 (unnecessary); 1857, *Cook v. Brown*, 34 id. 471 (same); *N. Y.*: 1856, *Stacy v. Graham*, 14 N. Y. 492, 498 (necessary; here a confession of falsity; overruling in effect *People v. Moore*, 15 Wend. 419, 424, *semble, contra*); 1892, *People v. Brooks*, 131 id. 325, 30 N. E. 184 (necessary); 1903, *Brink v. Stratton*,

176 id. 150, 68 N. E. 148, *semble* (not necessary); *N. C.*: 1842, *State v. Patterson*, 2 Ired. 354 (necessary); and the following cases, *accord*: 1847, *Pipkin v. Bond*, 5 id. Eq. 101; 1848, *Edwards v. Sullivan*, 8 id. 304; 1856, *Hooper v. Moore*, 3 Jones 429; 1869, *State v. Kirkman*, 63 N. C. 248; 1876, *State v. Wright*, 75 id. 440; 1897, *Burnett v. R. Co.*, 120 id. 517, 26 S. E. 819; *Or.*: 1895, *State v. Brown*, 28 Or. 147, 41 Pac. 1042 (necessary); 1896, *State v. Ellsworth*, 30 id. 145, 47 Pac. 199 (necessary); 1898, *First Nat'l Bank v. Com. U. Ass. Co.*, 33 id. 43, 52 Pac. 1050 (necessary "as a general rule"); *U. S.*: 1880, *U. S. v. Schindler*, 18 Bltchf. 230, *semble* (not necessary); 1899, *McKnight v. U. S.*, 38 C. C. A. 115, 97 Fed. 208, 212, *semble* (necessary); *Va.*: 1880, *Davis v. Franke*, 33 Grmtt 424, *semble* (necessary); *Vt.*: 1837, *Pierce v. Gilson*, 9 Vt. 222 ("whenever the credit of a witness is to be impeached by proof of what he has said, declared, or done," this inquiry is proper; but it is not invariably to be required, for "we can see no reason why, in some such cases, the inquiry should be first made of the witness; the aggression may have been on the part of the party, and not of the witness; the witness may think that he entertains no ill-will towards the party"); 1847, *State v. Goodrich*, 19 id. 116, 119, *semble* (not necessary); 1869, *Ellsworth v. Potter*, 41 id. 689 (not applicable to the fact of a quarrel, but "there is some reason for applying the same rule [as for self-contradictions] to mere proof of ill-feeling which has only been evinced by unkind or threatening remarks about a party"); 1879, *State v. Glynn*, 51 id. 579 (holding that the witness' attention must be called, but not referring to *Ellsworth v. Potter, supra*); *Wis.*: 1858, *Martin v. Barnes*, 7 Wis. 242, *semble* (not necessary).

The rule, in any case, applies only to utterances, not to conduct or circumstances such as an assault or an employment.

B. CORRUPTION.

§ 956. **General Principle.** The theoretical place of this sort of impeachment is not easy to determine. It is related in one aspect to Interest, in another to Bias, in still another to Character (i.e. involving a lack of moral integrity). It suffices to point out that the essential discrediting element is a willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony. We here are not concerned with a party's similar conduct as equivalent to consciousness of guilt (*ante*, § 278), but solely with a witness' discrediting conduct. The testimony of one who exhibits such a willingness must suffer the same doubts as that of one who is prejudiced. There are several distinct situations: (1) A prior expression by the witness of a general willingness to lie upon the stand; (2) an offer to give false testimony for money or other reward; (3) a statement, after testifying, that he has lied; (4) an attempt to bribe another witness; (5) the receipt of money for his testimony; (6) the having been offered money for his testimony; (7) habitual falsities, and sundry dishonorable conduct.

§ 957. **Willingness to swear falsely.** This, beyond any question, is admissible as negating the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence:

1833, *O'Neill, J.*, in *Anon.*, 1 Hill S. C. 259: "It was proved that Nimrod Mitchell had said that 'if he heard any man say he would not swear a lie, he would not believe him, for on some particular occasions he would, for he thought any man would.' The substance of this declaration was that he would not, on some occasions, feel himself bound to declare the truth on oath. . . . The man who believes that he is under no legal or moral obligation at all times and under all circumstances to tell the truth under the sanction of an oath has destroyed the only test by which he can claim credit at the hands of men. Such evidence is not establishing bad character from particular facts."¹

§ 958. **Offer to testify corruptly.** An offer to testify corruptly should stand on the same footing; it is only a little less broad in its bearings than the preceding evidence, but it indicates a similar untrustworthiness.¹

¹ 1781, *De la Motte's Trial*, 21 How. St. Tr. 791 (the witness had said "I swear anything," speaking of the trial in hand; admitted); 1793, *Newhal v. Adams*, 1 Root 504 ("he would swear to anything, if he could get 6s by it," admitted); 1835, *State v. Allen*, 37 La. An. 685, 687 (trial Court allowed in discretion to exclude such questions as "Would you in order to save your own life swear to a falsehood?"); 1842, *Hinley v. Welster*, 21 Me. 461, 464 (statements "that he had lost his devotion; that he intended now to serve the devil as long as he had served the Lord," etc., excluded); 1854, *Harrington v. Lincoln*, 2 Gray 133 (that the witness had said he would lie on the stand; inadmissible, *semble*); 1864, *Beaulieu v. Crotte*, 12 Mich. 484 ("he played good Lord and good devil, because he did not know into whose hands he might fall," admitted); 1898, *Sweet v. Gilmore*, 52 S. C. 530 30 S. E. 395 (willingness to lie, admissible).
² *Admitted*: 1861, *Jackson v. Thomason*, 8 Jur. n. s. 134 (admitting letters apparently

implying a willingness to withhold for a bribe what he knew); 1887, *Barkly v. Copeland*, 74 Cal. 1, 5, 15 Pac. 307 (statements of a convict that he intended to testify falsely for C. in order to get the assistance of C.'s influence for a pardon, admitted); 1892, *Roberts v. Com.*, — Ky. —, 20 S. W. 267 (an offer to swear for the opponent if he would help to clear the witness from a criminal charge, admitted); 1895, *Alward v. Oaks*, 63 Minn. 190, 65 N. W. 270 (a letter showing "a corrupt disposition to make his testimony in this case depend upon the pecuniary or other valuable consideration that might be offered him"). *Excluded*, but very singular rulings: 1833, *People v. Geisung*, 11 Wend. 18 (a charge of obtaining a note by false pretences; an offer by the defrauded witness not to testify if the defendant would make a settlement, excluded); 1847, *People v. Anatin*, 1 Park. Cr. C. 157 (an offer to refrain for money from testifying, by a father who had a claim under the statute for the loss of services of the

§ 959. **Confession that Testimony was False.** This is evidentially of the same value as the preceding conduct. The difficulty is that it is apparently not circumstantial evidence at all, but testimonial (*i. e.* is to be taken as the assertion of a past fact), and therefore obnoxious to the Hearsay rule. If this were correct, it could be used only under the Hearsay Exception for Declarations against Interest, and yet it is barred there by the arbitrary exclusion of confessions of a crime (here, perjury) by a third person (*post*, § 1476). That arbitrary limitation ought to be ignored, here as in other cases; but it is not necessary to resort to that expedient, for the evidence in question need not be treated as a hearsay assertion. It is in effect a self-contradictory statement (*i. e.* "I now say that the facts are just the opposite of what I formerly asserted"), and may therefore be used by virtue of the principle which admits them (*post*, § 1040). Such is the solution usually reached.¹

§ 960. **Attempt to suborn another Witness.** The witness' attempt to bribe another witness to speak falsely or to abscond indicates for the case in hand a corrupt intention on the first witness' part, and thus affects his trustworthiness.¹

son whose death was the subject of the charge, excluded).

¹ *Admitted*: 1675 (?), Woodford's Case, Vin. Abr. XII, 40 (the confession of one who had falsely accused another of piracy and had deposed against him, held inadmissible only because of the former's subsequent attainer); 1855, Romilly, M. R., in *Greenlade v. Dare*, 20 Beav. 284, 290 (admitted testimony of a witness' admissions of perjury, but declared that he paid no attention to it unless corroborated¹); 1898, *People v. Prather*, 120 Cal. 660, 53 Pac. 259 (previous confessions of falsehoods as to the matter in hand, allowed to be asked for on cross-examination); 1875, *McGinnis v. Grant*, 42 Conn. 77 (affidavit by the witness that his testimony had been falsely given for hire, admitted); 1896, *Georgia R. & B. Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 794 (admission that he had made a false affidavit in connection with the trial, admitted); 1853, *Perkins v. State*, 4 Ind. 222 (statements of a prosecuting witness that he had falsely made the charge, admitted); 1836, *Savage, C. J.*, in *People v. Moore*, 15 Wend. 419, 424 ("If a witness, the moment he leaves the stand, should declare that his whole testimony was a fabrication," it would destroy his credit; admitting such a statement, made in jail after leaving the stand); 1856, *Stacy v. Graham*, 14 N. Y. 492, 498 (confession that the testimony was false, and that he regretted having so testified; assumed as admissible). *Excluded*: 1896, *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591 (questions to a defendant eliciting testimony that he had willfully lied at the coroner's inquest, excluded; clearly unsonnd); 1883, *Crafts v. Com.*, 81 Ky. 253 (confession of perjury).

Compare the cases cited *ante*, § 527 (invalidating one's own former testimony), *post*, § 1040 (self-contradictory conduct), and *post*, § 1476 (statements against interest).

¹ 1680, *Lord Stafford's Trial*, 7 How. St. Tr. 1401 (that the witness had offered a bribe to another in the same suit, admitted); 1681, *Stapleton's Trial*, 8 Id. 519 (same); 1775, *Trial of Maharajah Nandocomar*, 20 Id. 1035 (same); 1820, *Queen Caroline's Trial*, Linn's ed., 111. 38, 45 (same); 1885, *Luhra v. Kelly*, 67 Cal. 289, 291, 7 Pac. 696 (an attempt to bribe another witness; admissible only where the former has testified on material points); 1867, *Barkly v. Copeland*, 74 Id. 1, 3, 15 Pac. 307 (an offer of the defendant's influence for a pardon, the witness being a convict, admitted); 1897, *People v. Wong Chney*, 117 Id. 624, 49 Pac. 833 (attempt to bribe another witness); 1897, *State v. Van Tassel*, 103 Ia. 6, 72 N. W. 497 (falsehood and deception by a detective in obtaining a confession may be considered); 1849, *Cooley v. Norton*, 4 Cnsh. 94 (attempt to bribe defendant, when witness in another suit, not to testify, excluded); 1884, *People v. White*, 53 Mich. 537, 540, 19 N. W. 174 (bastardy; questions allowed to the prosecutrix whether she had not said that she was going to get a prostitute to swear a case against the defendant); 1896, *Matthews v. Lumber Co.*, 65 Minn. 372, 67 N. W. 1008 (attempt to corrupt a witness, admissible in discretion); 1883, *State v. Stein*, 79 Mo. 330 (offer for money to furnish testimony, admitted); 1893, *State v. Hack*, 118 Id. 92, 23 S. W. 1089 (that she had offered a witness money to leave the city, admitted); 1903, *State v. Thornhill*, — Id. —, 76 S. W. 948 (attempt to induce an opposing witness to abscond); 1882, *Schultz v. R. Co.*, 89 N. Y. 248 (attempt to get another witness to testify falsely, admitted); 1898, *Beck v. Hood*, 185 Pa. 32, 39 Atl. 842 (attempt to corrupt a juror on the preceding trial of the same case, admitted, on cross-examination).

For such evidence against a party, not a witness, see *ante*, §§ 278, 280.

§ 961. Receipt of Money for Testimony; Payment of Witness' Expenses.

The witness' receipt of money for testimony may indicate corruption in two ways: first, from the conduct in receiving it, may be inferred a willingness to speak falsely; secondly, from the fact of its having been received or promised, may be inferred an interest in favor of the cause of the giver, just as any fact of pecuniary interest makes probable such a partiality. It is important to distinguish the two kinds of inference, for the former inference can only legitimately be drawn where the money or other reward has been taken consciously with a view to *false testimony*; where such an understanding attends the bargain, the witness' conduct raises a clear inference of his willingness to speak falsely.¹ But the second inference is not only of a different sort, but is much weaker; it is not from the witness' own conduct, but from the mere external circumstance that money has come or will come to him for his testimony; *i. e.* the element of knowing *false testimony* is lacking, and the inference may merely be that the money is likely to have some biasing effect of the same general sort that is attributable to all pecuniary interest (*post*, § 966). This second inference is ordinarily the only allowable one in the usual case where it is made to appear that a witness' expenses are paid by his party or that as expert he is to receive an extra fee from that party. These facts may legitimately be brought out, but they are not to be understood as involving necessarily a corrupt intention.²

§ 962. Mere Receipt of Offer of a Bribe. Where the witness in question has merely been offered a bribe, no inference of any sort as to the witness' testimony can be drawn; the rejection of the bribe deprives the offer of all its force in that respect.¹ From the point of view of the party offering it,

¹ 1875, *McMath v. State*, 55 Ga. 303, 307 (an agreement for money not to testify, admissible); 1900, *Schmertz v. Hammond*, 47 W. Va. 527, 35 S. E. 945 (agreement to give witness a share in proceeds of judgment if recovered, admissible); 1858, *Martin v. Barnes*, 7 Wis. 242 (a bargain by which a medical witness was to testify to imaginary injuries, admitted).

² 1901, *Southern R. Co. v. Crowder*, 130 Ala. 256, 30 So. 392 (payment of sundry expenses of attendance beyond the amount of legal fees, admissible); 1899, *Bryan v. State*, 41 Fla. 643, 26 So. 1022 (that a witness' attendance was procured by funds of a certain association, allowed); 1903, *Sylvester v. State*, — id. —, 35 So. 142 (payment of fare by the party calling him, admitted); 1898, *North Chicago S. R. Co. v. Anderson*, 176 Ill. 635, 52 N. E. 21 (relations of witness with party, including interviews with counsel, admissible; so also the fact that the witness had been promised pay for time lost in attendance); 1902, *Kerfoot v. Chicago*, 195 id. 229, 63 N. E. 101 (expert witnesses to land-value, testifying for the city, allowed to be cross-examined to the amount of money received by them in the preceding year as witnesses, and to other facts tending to show a professional occupation for the city as value-witnesses); 1903, *Wrisley Co. v. Burke*, 203 id. 250, 67 N. E. 818 (that a physician had been paid for his exam-

ination to qualify, admitted); 1896, *Jackson v. Con.*, — Ky. —, 37 S. W. 847 (whether she was paid anything for coming from an adjoining county to testify, allowed); 1879, *State v. Toney*, 26 Minn. 262, 3 N. W. 345 (liquor selling; receipt of money by witness as detective for such offences, admitted); 1895, *State v. Hayward*, 62 id. 474, 65 N. W. 63 (that a witness for the prosecution was being boarded by the State, admitted); 1898, *Com. v. Farrell*, 187 Pa. 408, 41 Atl. 382 (what contract for pay a detective had, allowed on cross-examination); 1903, *State v. Mulch*, — S. D. —, 96 N. W. 101 (that witness fees of a dollar a day were promised, admitted); 1881, *Moats v. Raymer*, 18 W. Va. 642, 645 (what fee is to be received by an attorney testifying for his client, admitted). Compare the authorities cited for *interest*, *post*, § 969.

¹ 1820, *The Queen's Case*, 2 H. & B. 303 (to show the probability of testifying witnesses having been bribed, evidence that another person, not put on the stand, had been offered a bribe by the opponent's agent, excluded); 1847, *Attorney-General v. Hitchcock*, 1 Exch. 91 ("It is totally irrelevant to the issue that some person should have thought fit to offer a bribe to the witness . . . if that bribe was not accepted; it is no disparagement to a man that a bribe is offered to him; it may be a disparagement to the person who makes the offer"). A question

of course, such an attempt at corruption is admissible against him, as showing his consciousness of a bad cause (*ante*, §§ 278, 280); but this involves the necessity of proving the identity of the offeror with the party,—a matter not always feasible.

§ 963. **Habitual Falsties, and Sundry Corrupt Conduct.** In various ways a witness may indicate a state of mind which partakes of the nature of corruption and of bias, and is not easily to be exactly labelled; the nature and strength of the inference will vary in different circumstances.¹ The only difficult question is present by conduct indicating a disposition or habit or *general scheme to make false charges or claims*. On this point there is much difference of opinion.² The only distinction that is legitimate is between conduct indicating a corrupt moral character in general and conduct indicating a specific corrupt intention for the case in hand. Facts offered with the former purpose fall under the character-rule (*post*, § 979), and could be proved by cross-examination only, not by extrinsic testimony. Facts offered for the latter purpose could be proved by either mode (*ante*, § 943). But there ought to be no doubt that on cross examination at any rate such facts could be inquired for, whichever the purpose be; for even the character-rule does not forbid them on cross-examination (*post*, § 981).

§ 964. **Preliminary Inquiry of the Witness.** Whatever rule is adopted as to the necessity of a preliminary inquiry to the witness about former expres-

whether the witness had been offered a bribe in the name of the opponent was permitted in *Com. v. Sackett*, 22 Pick. 395 (1839), on the ground that an affirmative answer might be followed up by further questions leading to the fact of the acceptance of the bribe.

¹ 1778, *Captain Hallie's Case*, 21 How. St. Tr. 343 (an offer to suppress an inquiry, admitted); 1858, *Winship v. Neale*, 10 Gray 382 (whether certain proceedings in the case had not been taken really with a view to hampering the opponent's case; admitted in discretion); 1888, *Hitchcock v. Moore*, 70 Mich. 116, 37 N. W. 914 (an attempt to have the opponent made drunk at the time of trial; admissible, *semble*); 1869, *People v. Thompson*, 41 N. Y. 6 (that a witness had left the jurisdiction in order to cause the trial's postponement, admitted). Compare the cases cited *ante*, § 950.

² With the following cases compare some of those cited *ante*, §§ 280, 340, 342: 1902, *D'Avignon v. Jones*, 9 Br. C. 359 (the issue involved an alleged forgery of the plaintiff's name by the defendant; the witness to the forgery, B., was allowed to be impeached by evidence of a conspiracy between B. and the plaintiff, involving past transactions also, to give false evidence against the defendant); 1885, *Russell v. Crutenden*, 53 Conn. 564, 4 Atl. 267 (action on a warranty of a horse's soundness; a question as to how many other such purchases the defendant had in 20 years tried to revoke for unsoundness, excluded); 1870, *Com. v. Hegau*, 105 Mass. 593 (rape; former false charges against others of having made her pregnant, excluded); 1893, *Miller v. Curtis*, 158 id. 127, 131, 32 N. E. 1039

(charge of indecent assault; admissions of other similar false charges made against others, receivable to show a purpose to get money by such charges, but here the statements were not so construable); 1888, *People v. Evans*, 72 Mich. 367, 377, 40 N. W. 473 (rape by father; former charges of a similar sort by the prosecutrix against all sorts of persons, and the falsity of the charges, admitted); 1879, *Plummer v. Owspee*, 59 N. H. 55, 57 (highway injury; cross-examination of plaintiff's husband as to a prior claim against another town for the same injuries, held properly excluded in discretion); 1881, *Watson v. Twombly*, 60 Id. 491 (assault; prior false charge of assault by the plaintiff against the defendant, held allowable or not in discretion; but here it was held erroneously excluded as being *per se* irrelevant); 1896, *Cecil v. Henderson*, 119 N. C. 422, 25 S. E. 1018 (plea of the statute of limitations; whether he had not pleaded thus to various other claims, excluded); 1903, *State v. Lewis*, — Id. —, 45 S. E. 521 (surrender of money from G. when drunk; that G. was "in the habit of getting drunk and losing money, and accusing people of stealing same," admitted to discredit G.); 1899, *Fairfield P. Co. v. Ins. Co.*, — Pa. —, 44 Atl. 317 (intentional misstatement in another proof of loss to the same defendant for goods lost in same fire, allowed to be proved); 1896, *Hart v. Atlas K. Co.*, 23 C. C. A. 198, 77 Fed. 399 (breach of contract; whether the defendant had not about the same time cancelled similar orders to other business houses, admitted in discretion).

sions of Bias (*ante*, § 953) obtains also for proof of former expressions indicating corrupt intention; the two kinds of evidence are treated as standing practically on the same footing in this respect.¹

C. INTEREST.

§ 966. **General Principle; Parties and Witnesses in Civil Cases.** The abolition of disqualification by reason of Interest (*ante*, § 576) was merely a removal of the absolute bar to testimony, and left untouched the relevancy of all facts which bear on the probable partiality of the witness by reason of his pecuniary interest in the result of the suit. Rulings under the old disqualification are practically no longer precedents; the scope of the circumstances of interest that may be used to discredit witnesses is indefinite and is not the subject of frequent rulings. Statutes provide in some States that every fact which would formerly have served to disqualify may still be used to discredit; but the body of precedents under the modern régime is comparatively small, as it ought to be. There is no doubt that the interest of a party or of a witness in the event of the cause is a circumstance available to impeach him:

1895, *Brown, J., in Trinity Co. Lumber Co. v. Denham*, 88 Tex. 203, 30 S. W. 856: "If it be admitted, however, that Borden had parted with his interest in the suit before he first gave his testimony, still we think it was permissible to show that he had been interested in the case, the extended character of that interest, and the time and circumstances under which he parted with his interest, all of which would go to his credibility. At common law a witness was rendered incompetent to testify by reason of his interest in the result of the suit. A release would restore his competency, but it is by no means certain that it would remove from his mind the bias, if any, that such interest would occasion; and every fact or circumstance which would tend to show to the jury his relation to the case or the parties was admissible, in order that they might determine what weight they ought to give to his evidence."¹

¹ 1820, *The Queen's Case* 2 B. & B. 313, Linn's ed., III, 246, 258 (asking, as necessary, before proving an act of corruption, since "an inquiry into the act of corruption will usually be, both in form and effect, an inquiry as to the words spoken by the supposed corrupter"; opinion by all the judges; erroneous, (1) because the object of asking is to afford an opportunity to explain an apparent inconsistency, and there is here no question of inconsistency and nothing to explain, (2) because to carry the rule this far would be in effect to apply it to all discrediting conduct, which would unfairly hamper the impeaching party and often render impeachment impracticable); 1853, *Pleasant v. State*, 13 Ark. 460, 477 (offer to stifle prosecution); 1880, *Davis v. Franke*, 33 Gratt. 424 (conversation in which an attempt to suborn a witness was made); 1858, *Martin v. Barnes*, 7 Wis. 242 (a bargain showing the witness' corrupt interest in the suit).

¹ The following rulings and statutes declare the general principle, which is unquestioned; the statutes are quoted in full, *ante*, § 488: Alaska C. C. P. § 1033; Ariz. Rev. St. § 2037; 1901, *Laucashire Ins. Co. v. Stanley*, 70 Ark. 1, 62 S. W. 66; Colo. Annot. St. § 4822, *semble*;

Conn. Gen. St. § 1096; Ga. Code, § 5146; Ill. Rev. St. c. 51, § 1; 1897, *West Chicago St. R. Co. v. Dougherty*, 170 Ill. 379, 49 N. E. 1000; Ind. Rev. St. § 519; Ia. Code, § 4602; Kan. Gen. St. c. 95, § 330, c. 102, § 217; La. Rev. Civ. C. § 2282; Me. Rev. St. c. 82, § 93; Md. Pub. Gen. L. Art. 35, § 5; Mich. Comp. L. c. 282, § 99; Minn. Gen. St. § 5658; Miss. Gen. St. L. §§ 1738, 1746 (quoted *post*, § 987); Mo. Rev. St. §§ 4218, 8918; Nehr. Comp. St. § 5904; Nev. Gen. St. § 3398; N. J. Gen. St. Evid. § 3; N. M. Comp. L. § 3016; Oh. Annot. Rev. St. § 7284 (criminal cases); Okl. St. c. 66, § 331; Or. Codes & G. L. § 710; 1895, *Hanson v. Red Rock*, 7 S. D. 38, 63 N. W. 157; 1895, *Trinity Co. Lumber Co. v. Denham*, 88 Tex. 203, 30 S. W. 856; Vt. St. § 1236; Wash. Annot. C. & St. § 5991. The few judicial rulings concern instructions in which counsel has attempted improperly either to control the jury's freedom of judgment or to juggle with words for the purpose of securing a judicial error; for example: 1900, *North Chicago St. R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796 (whether an instruction is required); 1895, *Rucker v. State*, — Miss. —, 18 So. 121 (it is error to tell the jury that they should disregard

§ 967. **Accomplices and Co-indictees in a Criminal Case.** It bears against a witness' credibility that he is an accomplice in the crime charged and testifies *for the prosecution*;¹ and the pendency of any indictment against the witness indicates indirectly a similar possibility of his currying favor by testifying for the State;² so, too, the existence of a promise or just expectation of pardon for his share as accomplice in the crime charged.³ When the co-indictee testifies *for the accused*, his situation here also may be considered as tempting him to exonerate the other accused and thus help towards his own freedom.⁴

§ 968. **Accused in a Criminal Case.** The fact of being a party in the cause (*ante*, § 966) and in particular a defendant in a criminal cause, may be considered as affecting the witness' credibility.¹ The only question that

the testimony of interested persons); 1898, *Bolce v. Palmer*, 55 Nebr. 389, 75 N. W. 849 (interest is to be considered; but there is no doctrine that such a one "will not be as honest" as others).

¹ This is unquestioned; compare the authorities cited *ante*, §§ 526, 580 (accomplice not disqualified), and *post*, § 2056 (accomplice requires corroboration).

² 1868, *People v. Robles*, 34 Cal. 591, 593; 1895, *People v. Dillwood*, 106 id. 129, 39 Pac. 439 (that other charges are pending against the witness, admitted); 1866, *Craft v. State*, 3 Kan. 450, 478; 1858, *Quinsigmond Bank v. Hobbbs*, 11 Gray 250 (existence of a criminal prosecution against a witness on the charge of doing that which he now denies he did, admitted); 1880, *State v. Reavis*, 71 N. W. 419 (to rebut the intimation that an accomplice was testifying for the prosecution as the price of freedom, two other pending indictments against him were offered, but were excluded because the fact of the defendant being joined in them might prejudice him); 1880, *Rynn v. People*, 79 N. Y. 600 (a witness asked whether he had been indicted; held proper). Compare the use of the same evidence to show *bad moral character* (*post*, §§ 982, 987), and to show *bias* (*ante*, § 949).

³ 1898, *State v. Nelson*, 59 Kan. 776, 52 Pac. 868 (questions as to agreement not to prosecute a witness turning State's evidence, held properly rejected on the facts); 1896, *Territory v. Chavez*, 8 N. M. 528, 45 Pac. 1107 (a hope of pardon, without an express promise, is relevant); 1895, *State v. Kent*, 4 N. D. 577, 62 N. W. 631 (here the fact that the accomplice was after some time still unprosecuted was used as indicating that he was under some hope of release); 1859, *Allen v. State*, 10 Oh. St. 288, 306 ("If A. is convicted, do you expect to be prosecuted?" allowed); 1879, *Kilrow v. Com.*, 89 Pa. 480, 485, *semble* (promise of pardon).

(On the principle of Explanation (*ante*, §§ 34, 952), the fact may be shown by the prosecution, even before express impeachment (because his relation to the cause is an implied impeachment), that no such promise has been made: *Contra*: 1903, *Owens v. State*, — Miss. —, 33 So. 718 (a co-conspirator, already convicted of the murder charged against the defendant, testified for the State; the fact that he had been

offered no inducement by the authorities to testify was excluded; an astonishing ruling, as also that of *Madden v. State*, 65 Miss. 176, 3 So. 328, followed as the authority).

⁴ 1898, *Titus v. State*, 117 Ala. 16, 23 So. 77 (indictment of defendant's witness for same murder, admitted); 1897, *Shaw v. State*, 102 Ga. 660, 29 S. E. 477 (train-wrecking; indictment of defendant's witness for robbing the cars of the same railroad, admitted); 1841, *Com. v. Turner*, 3 Metc. 25 (that the witness' father was under indictment for being concerned in the same crime with the defendant in whose favor she was testifying, admitted). *Contra*: 1897, *Lewis v. Com.* — Ky. —, 42 S. W. 1127 (indictment of defendant's witness as accomplice, excluded on the theory that it involved character-impeachment; present principle ignored).

¹ 1888, *Norris v. State*, 87 Ala. 85, 88, 6 So. 371; 1900, *Haldeman v. Terr.* — Ark. —, 60 Pac. 876; 1901, *Blinir v. State*, 69 Ark. 558, 64 S. W. 948; 1896, *People v. Van Eman*, 111 Cal. 144, 43 Pac. 520; 1899, *State v. Webb*, 6 Ida. 428, 55 Pac. 892; Ill. Rev. St. c. 38, § 426; 1882, *Hirschman v. People*, 101 Ill. 576; 1884, *Rider v. People*, 110 id. 11, 13; 1897, *Kirkham v. People*, 170 id. 9, 48 N. E. 465; 1900, *Hellyer v. People*, 186 id. 550, 58 N. E. 245; 1902, *Henry v. People*, 198 id. 162, 65 N. E. 120; 1867, *Dailey v. State*, 28 Ind. 285, 287; 1876, *Greer v. State*, 53 id. 421; 1899, *Helms v. U. S.*, 2 Ind. T. 595, 52 S. W. 60; 1880, *State v. Moelchen*, 53 Ia. 310, 316, 5 N. W. 186; 1887, *State v. Sterrett*, 71 id. 388, 32 N. W. 387; 1902, *State v. Hossack*, 116 id. 194, 89 N. W. 1077; Kan. Gen. St. c. 102, § 217; 1898, *State v. Wiggins*, 50 La. An. 330, 25 So. 334; Mich. Comp. L. c. 282, § 100; 1895, *People v. Resh*, 107 Mich. 251, 65 N. W. 99; 1903, *State v. Ames*, — Minn. —, 96 N. W. 330; 1896, *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; 1898, *State v. Snmmar*, 143 id. 220, 45 S. W. 254; Mont. P. C. § 2442; Nebr. Comp. St. § 7199; 1895, *Bayse v. State*, 45 Nebr. 261, 63 N. W. 811; 1899, *Philamalee v. State*, 58 id. 320, 78 N. W. 625; Nev. Gen. St. § 3398; 1899, *Emery v. State*, 101 Wis. 627, 78 N. W. 145. It is regrettable that Courts are willing to waste time in discussing in their opinions such a self-evident proposition.

arises in this connection is whether the judge, under the unfortunate modern rule forbidding a charge to the jury upon the facts or upon the credibility of specific witnesses, is violating that rule in mentioning this proposition to the jury in a criminal case, — a question which has to do with the law of Trials, not of Evidence.

§ 969. **Bonds, Rewards, Detective-Employment, Insurance, etc., as affecting Interest.** The circumstances which give to a witness an interest in the event of the cause and may therefore be suggestive of testimonial doubt or detraction have usually a significance so apparent that it is either idle to dispute or useless to maintain their admissibility. Certainly to attempt to measure judicially the weight of a circumstance which the jury can equally well estimate by the unwritten and unconscious canons of experience is to encumber the law with needless rules. The abolition of the rules for interest-disqualification has left this subject practically untrammelled. Only a few situations have called for rulings, and these are plain enough in their reasoning: (1) One who as a *spy* obtains information of a crime is not necessarily open to discredit thereby;¹ but a person who for that purpose has employed trickery, or who has worked for hire in his investigations, or who by his function as a police or prosecuting officer has committed himself in a partisan manner, may under the circumstances be open to the suspicion of bias or interest.² (2) That a witness is as surety or *bondsman* interested in the fate of one of the parties may also affect his credibility.³ (3) That he will receive a *reward* in case of conviction may affect the credibility of a witness for the prosecution.⁴ (4) That the party is *insured* against accidents does not indicate any additional partiality for a defendant-witness in an action for personal injuries;⁵ though it may otherwise have a bearing.⁶ (5) That a witness,

¹ 1848, *R. v. Mullins*, 7 State Tr. n. s. 1110, 3 Cox Cr. 756.

² Besides the following cases, compare those cited under §§ 2060, 2066, *post* (corroboration of accomplices): 1894, *People v. Rice*, 103 Mich. 350, 61 N. W. 540 (that the witness was a hired detective in the case, admitted); 1897, *Davis v. State*, 51 Nebr. 301, 70 N. W. 984; 1899, *Kastner v. State*, 58 id. 767, 79 N. W. 713; 1901, *Watson v. Cowles*, 61 id. 216, 85 N. W. 35; 1897, *State v. Black*, 121 N. C. 578, 28 S. E. 518.

³ 1898, *McAlpine v. State*, 117 Ala. 93, 23 So. 130 (being surety on bond of G. indicted for a similar crime, excluded); 1893, *People v. Chin Haue*, 108 Cal. 597, 41 Pac. 697 (that the deceased was on the bail bond of a third person charged with assaulting the defendant, admissible); 1903, *People v. Glennon*, 175 N. Y. 45, 67 N. E. 125 (that the bail of a witness for the prosecution had been raised, so as to make it desirable for him to favor the prosecution and thus be released, admitted); 1897, *Braden v. McCleary*, 183 Pa. 192, 38 Atl. 623 (that the witness' mother-in-law had given a bond to protect the defendant, a sheriff, admitted).

Compare the cases cited *ante*, § 949 (*employees of a party*).

⁴ 1890, *Hollingsworth v. State*, 53 Ark. 387,

388, 14 S. W. 41 (the mere fact that a reward was offered, excluded); 1896, *Myers v. State*, 97 Ga. 76, 25 S. E. 252 (the fact of a reward for the apprehension of the accused, admissible against an apprehending officer, whether or not it appears to have influenced his action).

⁵ Here the real objection is that the jury might improperly be reckless in their award of damages: 1898, *McQuillan v. El. Light Co.*, 70 Conn. 715, 40 Atl. 928 (whether defendant was protected by employers' liability insurance; not admissible to show that defendant had no motive to testify falsely); 1898, *Demars v. Mfg. Co.*, 67 N. H. 404, 40 Atl. 902 (whether an accident insurance company was defending the case; improper, but here not material); 1898, *Day v. Donohue*, 62 N. J. L. 380, 41 Atl. 934 (defendant, testifying to his due care as an employer, allowed to be asked whether he was insured against such losses, in trial Court's discretion); 1902, *Shoemaker v. Bryant L. & S. M. Co.*, 27 Wash. 637, 68 Pac. 380 (that defendant is insured, excluded; but here an officer of the defendant company was allowed, on the facts, to be asked about such insurance to contradict his prior statement and exhibit his interest).

⁶ Compare the citations *ante*, §§ 282, 393.

not a party, is the *injured person* in a prosecution for a crime may indicate a bias in the cause.⁷ These and such other instances as daily present themselves in trials are solvable without difficulty by the ordinary judgments of experience. Commonly, a ruling of exclusion is unnecessary, because the circumstance, if really worthless, would do no harm if admitted.

⁷ 1897, *Doyle v. State*, 39 Fla. 155, 22 So. 272 (woman in rape); 1898, *State v. Nestaval*, 72 Minn. 415, 75 N. W. 725 (woman in bastardy).

SUB-TITLE II (continued): TESTIMONIAL IMPEACHMENT.

TOPIC III: EVIDENCING MORAL CHARACTER, SKILL, MEMORY, KNOWLEDGE, ETC. (BY PARTICULAR INSTANCES OF CONDUCT).

CHAPTER XXXII

A. MORAL CHARACTER, AS EVIDENCED BY PARTICULAR ACTS.

§ 977. General Principle.

§ 978. Same: Relevancy and Auxiliary Policy, distinguished.

§ 979. Particular Acts of Misconduct, not provable by Extrinsic Testimony from Other Witnesses.

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§ 985. Summary of the Preceding Topics.

§ 986. Same: History and State of the Law in England and Canada.

§ 987. Same: State of the Law in the various Jurisdictions of the United States.

§ 988. Rumors of Particular Misconduct, on Cross-examination of a Witness to Good Character, distinguished.

B. DEFECTS OF SKILL, MEMORY, KNOWLEDGE, ETC., AS EVIDENCED BY PARTICULAR FACTS.

§ 990. General Principles; Proof by Extrinsic Testimony.

§ 991. Skilled Witness; Evidencing Incapacity by Particular Errors (Reading, Writing, Experimentation, etc.).

§ 992. Same: Grounds of an Expert Opinion.

§ 993. Knowledge; Testing the Witness' Capacity to Observe.

§ 994. Same: Grounds of Knowledge, and Opportunity to Observe.

§ 995. Memory; Testing the Capacity and the Grounds of Recollection.

§ 996. Narration; Discrediting the Form of Testimony.

A. MORAL CHARACTER, AS EVIDENCED BY PARTICULAR ACTS.

§ 977. **General Principle.** In the foregoing sections has been examined the modes of evidencing Bias, Interest, and Corruption, — a class of evidence for which there is no discrimination against extrinsic testimony as the channel of proof. In the ensuing topics, namely, the mode of evidencing Moral Character and other general qualities, is found the starting-point and peculiar hold of that discrimination against extrinsic testimony which is a feature of such great practical importance and serves to divide discrediting evidence into two contrasted classes (*ante*, § 878). The significance of this general expedient is that, while saying nothing as to the relevancy of the facts offered, it prohibits them, on grounds of auxiliary policy, from being offered through other witnesses, and leaves them to be got at solely by the cross-examination of the witness himself who is desired to be discredited thereby. This feature of our law, in its consequences, gives it in this respect a character peculiarly its own and different from that of the Continental system of evidence. On the one hand, it practically cuts off a great part of that method of investigating and discrediting the whole life of the witness which, in the latter system, impresses us as so unfair and so liable to abuse.

On the other hand, it elevates into prominence the expedient of cross-examination, already so much more common and useful an expedient in our practice than in theirs, and it thus contributes additionally to the emphasis and the potency of that instrument in our system of trials.

The influence of the present doctrine, while essentially and peculiarly applicable to evidence of particular conduct as evidencing moral character, extends itself naturally to the use of particular facts to prove other defective qualities, such as skill, memory, knowledge, and the like. The reasons, in these other kinds of evidence, differ in some respects, and accordingly also the resulting rules; but the considerations of policy and the object in view are in general not different. A common treatment is therefore necessary for the various classes of evidence which thus share in common their subjection to this general exclusionary doctrine. Its scope is so broad that, wherever the line is difficult to draw, it is always possible to assume the applicability of the doctrine. On this account, the reasons that support it deserve to be examined with especial care, in order that its true scope may not be misunderstood.

§ 978. **Same: Relevancy and Auxiliary Policy, distinguished.** The exclusionary doctrine in question is purely one of auxiliary policy (*post*, §§ 1849, 1863), *i. e.* it excludes certain relevant facts, when offered by outside testimony, because of the objections of policy to that mode of presentation. Furthermore, there are in some jurisdictions similar objections, of a narrower scope, even to the extraction of such evidence on cross-examination. In this class of evidence, then, questions of relevancy, or logical probative value (*ante*, § 42), can arise in only two ways: (1) where by exception (*e. g.* for prior convictions of felony) the use of extrinsic testimony to the fact is allowed; (2) where the fact is obtained by cross-examination. The convenient order of treatment will be to examine at the outset the underlying principles, — first, those of Auxiliary Policy which exclude extrinsic testimony to particular acts, then those of Relevancy which affect particular acts exceptionally thus admitted, then the principles of both sorts which affect facts admissible on cross-examination; and, finally, to examine in detail the state of the decisions and statutes, in the separate jurisdictions, on all of the foregoing doctrines.

§ 979. **Particular Acts of Misconduct, not provable by Extrinsic Testimony.** Down to the 1700s no settled principle or rule of this sort was recognized; the witness' character might always be attacked by the testimony of others detailing the events of his past life and misconduct.¹ It must be remembered that under the orthodox rule then prevailing, as to proof of general character (*post*, § 1982), the witness could give his personal judgment of the impeached witness' character, based on the former's acquaintance and dealings with him; it was thus an easy concession to allow the impeaching witness to describe among his reasons such specific conduct, good

¹ See *post*, § 986, for a detailed list of the English precedents of that century.

or bad, as might have become known to him. For example, a sustaining witness would say, "I have had J. S. in my employ for ten years, and he is as honest a man as ever lived; I have trusted him with large sums of money, and he has never betrayed my trust";² while an impeaching witness would say, "I have had many dealings with J. S., and I know him to be corrupt and lying; he stole a sum of money from me when he was my servant, and he is known in the neighborhood as a false swearer and a cheat." It was natural enough to make no discrimination in such testimony.³

But the production of such evidence by witnesses who spoke merely to specific acts of misconduct led gradually to a canvassing of the objections against such a mode of proof. Towards the end of the 1600s appears a tendency to exclude it; and though the rule of exclusion did not become completely settled until the end of the next century, and though there are instances enough of its being ignored down to that time, nevertheless, it was always treated, from the beginning of the 1700s, as a rule that might be invoked. The reasons that were then advanced and accepted in its support have ever since been maintained and conceded as the correct and valid ones. These reasons, in their varying phrasings, are illustrated by the following passages:

1696, *Rookwood's Trial*, 13 How. St. Tr. 209; Sir B. Shower (for the defendant): "We will call some other witnesses to Mr. Porter's [the chief witness for the Crown] reputation and behavior; we think they will prove things as bad as an attainder." . . . L. C. J. Holt: "You must tell us what you call them to." Sir B. Shower: "Why, then, my lord, if robbing upon the highway, if clipping, if conversing with clippers, if fornication, if buggery, if any of these irregularities will take off the credit of a man, I have instructions in my brief of evidence of crimes of this nature and to this purpose against Mr. Porter; and we hope that by law a prisoner standing for his life is at liberty to give an account of the actions and behavior of the witnesses against him. I know the objection that Mr. Attorney [General] makes, — that a witness does not come prepared to vindicate and give an account of every action of his life, and it is not commonly allowed to give evidence of particular actions. But if those actions be repeated, and a man lives in the practice of them, and this practice is continued for several years, and this be made out by evidence, we hope that no jury that have any conscience will upon their oaths give any credit to the evidence of a person against whom such a testimony is given." . . . Mr. Attorney-General Trevor: "My lord, they themselves know that this sort of evidence never was admitted in any case, nor can be, for it must tend to the overthrow of all justice and legal proceedings; for, instead of trying the prisoner at the bar, they would try Mr. Porter. It has been always denied, where it comes to a particular crime that a man may be prosecuted for; and this, it seems, is not one crime or two, but so many and so long continued, as they say, and so often practised, that here are the whole actions of a

² See the examples quoted *post*, § 1982.

³ The effect of this tradition was long in disappearing; but the law to-day will not allow particular acts to be given even as grounds for an opinion of character; and the last sentence in the following passage is therefore not law: 1817, *Sharp v. Scogio*, Holt N. P. 511 (question whether the witness had been tried for perjury; Gibbs, C. J.: "You cannot ask them as to particular acts of criminality or parts of conduct, because the question is as to general

credit. . . . But as no man is to be permitted to destroy a witness' character without having grounds to state why he thinks him unworthy of belief, you may ask him his means of knowledge and his reasons of disbelief"). Sir J. Stephen says (1883, *Hist. of the Criminal Law*, I, 436), referring to a trial of the late 1700s: "Most of the witnesses . . . gave their reasons on cross-examination. This is the modern practice." But this probably does not mean a practice of the sort above stated.

man's life to be ripped up; which they can never show any precedent when it was permitted, because a man has no opportunity to defend himself. Any man in the world may by this means be wounded in his reputation, and crimes laid to his charge that he never thought of, and he can have no opportunity of giving an answer to it, because he never imagined there would be any such objection. It is killing a man in his good name by a side-wound, against which he has no protection or defence. My lord, this must tend to the preventing all manner of justice; it is against all common sense or reason; and it never was offered at by any lawyer before, as I believe, — at least, never so openly; and therefore I wonder that these gentlemen should do it, who acknowledge — at least one of them did — that as often as it has been now offered it has been overruled; and I know not for what end it is offered but to make a noise in the Court." . . . Sir B. Shower: "My lord, . . . we conceive, with submission, we may be admitted in this case to offer what we have offered. Suppose a man be a common, lewd, disorderly fellow, one that frequently swears to falsehood for his life. We know it is a common rule in point of evidence that against a witness you shall only give an account of his character at large, of his general conversation. But that general conversation arises from particular actions; and if the witnesses give you an account of such disorderly actions repeated, we hope that will go to his discredit; which is that we are now laboring for." L. C. J. Holt: "Look ye, you may bring witnesses to give an account of the general tenor of his conversation; but you do not think sure that we will try now at this time whether he be guilty of robbery or buggery."

1722, *Laver's Trial*, 16 id. 246, 256; Mr. Hungerford: "If my brief be true, the whole Ten Commandments have been broken by him." L. C. J. Pratt: "Very well, and so you charge him with the breach of the Ten Commandments, and he must let it go for fact, because he cannot have an opportunity of defending himself . . . [Later, forbidding a similar offer] you have been so often admonished by the Court, but it signifies nothing. You are charging Mrs. Mason with being a hawd, when you ought only to inquire as to her general character. . . . At this rate the most innocent persons may be branded as the most infamous villains, and it is impossible for them to defend themselves."

1817, *R. v. Watson*, 2 Stark. 149; evidence of bigamy was offered against the prosecuting witness; *Wetherell* and *Copley*, for defendant, argued "that a man might be able to prove that a witness was not to be believed upon oath, by showing that he had been guilty of a number of criminal acts, although he could not produce a single record of conviction; that since it might be proved indirectly that the witness is not credible upon oath, it was too strong a proposition to say that the same conclusion might not be proved directly by actual proof of accumulated crimes which demonstrated the infamy of the witness; . . . that the consequences would be enormous and alarming to the administration of justice, if such evidence were to be shut out; a witness who had committed a multitude of crimes, but who had not been convicted of one, would stand as a fair and credible witness in a court of justice." *Ellenborough*, L. C. J.: "This is so clear a point and so entirely without a precedent that it would be a waste of time to call for a reply. . . . The Court does not sit for the purpose of examining into collateral crimes. It would be unjust to permit it, for it would be impossible that the party should be ready to exculpate himself by bringing forward evidence in answer to the charge; there would be no possibility of a fair and competent trial upon the subject, and therefore it is never done." *Bayley*, J.: "If this evidence were admissible, it would be impossible to proceed in the administration of justice, because on every trial the Court would have to try one hundred different issues, and juries, instead of having one issue to try, would have their attention withdrawn from one single point to look into an indefinite number of crimes. The rule is that a party against whom a witness is called may examine witnesses as to his general character, but he is not allowed to prove particular facts in order to discredit him. . . . for although every man may be supposed to be capable of defending his general character, he cannot come prepared to defend himself against particular charges without notice. . . . If the witness were apprised of the charges, he might come pre-

pared with evidence to show that, although there was *prima facie* evidence against him, they were in reality unfounded."

1847, *Alderson, B.*, in *Attorney-General v. Hückcock*, 1 Exch. 103: "Perhaps it ought to be received, but for the inconvenience that would arise from the witness' being called upon to answer particular acts of his life, which he might have been able to explain if he had had reasonable notice to do so, and to have shown that all the acts of his life had been perfectly correct and pure although other witnesses were called to prove the contrary. The reason why the party is obliged to take the answer of a witness is that if he were permitted to go into it, it is only justice to allow the witness to call other evidence in support of the testimony he has given, and as those witnesses might be cross-examined as to their conduct, such a course would be productive of endless collateral issues. Suppose for instance witness A is accused of having committed some offence; witness B is called to prove it, when on B's cross-examination he is asked whether he has not made some statement, to prove which witness C is called; so that it would be necessary to try all those issues before one step could be obtained towards the adjudication of the particular case before the court. On the contrary, if the answer be taken as given, if the witness speaks falsely he may be indicted for perjury."

1817, *Duncan, J.*, in *Kimmel v. Kimmel*, 3 S. & R. 336: "Miserable indeed would be the situation of a witness if every transaction of his life was open to inquiry. No man could be prepared to repel every possible charge that might be made against him, or refute the imputation of every crime that any man might be disposed to make."

1830, *Henderson, C. J.*, in *Barton v. Morples*, 2 Dev. 520: "Two reasons are given for the rule, either of which, I think, is sufficient to sustain it. The first is, the number of issues such evidence is calculated to create, thereby consuming the time of the Court and abstracting the mind from the main issue. The other is that both the party and witness would almost always be wholly unprepared to meet and repel the charges."

1857, *Strong, J.*, in *People v. Jackson*, 3 Park. Cr. 395: "Generally the conduct of a witness in matters disconnected from the subject of the trial, being irrelevant, cannot be given in evidence. The objections to admitting such evidence are that it raises collateral issues, and that the party against whom it may be offered would generally be taken by surprise and not be prepared to meet it. It is very desirable that the inquiries upon a trial should be confined to the issues actually joined between the parties. They attend to try those only; the attention of the jury is or should be exclusively directed to them, and not diverted to other and irrelevant matters which have a tendency to confuse their minds, and an investigation into collateral matters would protract issues into inconvenient and intolerable length. . . . There can be no doubt but that, in ordinary cases, an inquiry, addressed to any but the assailed witness, as to any particular act derogatory to his character or as to any specific blemish in his reputation, should be excluded. . . . [However, a fact derogatory to a witness' character] may be proved provided it does not raise or tender a collateral issue. . . . A witness may be asked if he has not perpetrated some offence, or been guilty of some moral obliquity, which would if true impair the weight of his evidence. . . . That would not, however, raise any issue for trial, as, whatsoever his answer might be, the party asking the question could not controvert it."

1896, *Lewis, J.*, in *Ozier v. U. S.*, 1 Ind. T. 85, 38 S. W. 331: "There is a clear distinction, recognized by the authorities cited above, between impeaching a witness by proof of facts which discredit him, made independently of his examination, and by proof of the same facts elicited in his cross-examination. Proof of particular facts tending to impair his credibility, made independently of his own examination, is excluded for the reason that its admission would engender a multiplicity of collateral issues, and would frequently surprise a witness with matter which he could not be prepared to disprove. But these reasons do not apply to his cross-examination as to the same facts, because the witness, better than any one else, can explain the impeaching matter, and protect himself to the extent that explanation will protect him; the cross-examining party being bound by his replies."

(1) These reasons of auxiliary policy are, upon analysis, reducible to two.

(a) The reason of Confusion of Issues (*post*, §§ 1863, 1904). This involves several considerations usually operating together and attending the production of additional testimony upon minor points. There are two chief considerations; first, each additional witness introduces the entire group of questions as to his qualifications and his impeachment, and the amount of new evidence thus made possible may increase in far greater than geometrical proportion to the number of new witnesses, so that the trial may become in length extremely protracted, and with relatively little profit; secondly, this additional mass of testimony on minor points tends to overwhelm the material issues of the case and to confuse the tribunal in its efforts to disentangle the truth upon those material points. (b) The reason of Unfair Surprise (*post*, §§ 1845, 1849). Surprise, in itself, is ordinarily no ground of objection to any kind of evidence. But the novelty of evidence may become unfair when there is no possible way of anticipating the nature of false evidence which could be refuted. This unfairness here lies in the fact that the opponent who desired by other witnesses to impeach by particular instances of misconduct might allege them as of any time and place that he pleased, and that, in spite of the utter falsity of the allegations, it would be practically impossible for the witness to have ready at the trial competent persons who would demonstrate the falsity of allegations that might range over the whole scope of his life. For example, the witness may have lived in three towns, Millville, Riverside, and Sierra Madre; in order to be perfectly prepared it would be necessary for him to come to trial with persons who had known him at every stage of his life in all three towns and could instantly prove the falsity of charges of any kind of misconduct, which might be alleged as of any time and place, — conduct, events, times, and places, entirely impossible to divine beforehand, because known only to the opposing false witness himself; indeed, this body of witnesses would perhaps have to come, in strictness, from every known habitable part of the globe, because the opponent might falsely place the misconduct in Kamschatka, and it would then be desirable to show that the witness had never even been in Kamschatka. This possibility of unfair surprise makes it necessary to concede the propriety of the rule based upon it.

(2) It must be noticed that a judicial opinion sometimes misleadingly states the latter reason in this form, that the witness "cannot be expected to come prepared to defend every act of his past life," *i. e.* it implies that the charges are *true*, though not to be anticipated. Now on this assumption, obviously, there would be no reason for excluding the impeaching testimony; for, if the charges were true, there would be nothing more to be said, and all the defensive testimony conceivable could not alter this fact and would therefore be useless. But, on the contrary, the real notion behind the reason is that the charges are *false*, and that there is no practicable way of showing their falsity. Instead of the form, "A witness cannot be expected to be prepared to *defend* every act of his life," the accurate statement is, "A witness cannot be expected to be prepared to *disprove* every *alleged* act of his life."

(3) From the reasons unanimously conceded as the rule's foundation, it is plain that no consideration of Relevancy is the source of the exclusion. The reasons are solely of Auxiliary Policy (*ante*, § 42). Questions of Relevancy do not arise, in so far as the reasons of Auxiliary Policy exclude the offered facts at the very threshold.⁴

(4) When these reasons cease, the rule ceases. If there are situations in which the above reasons have no force, then the prohibition ceases to apply. There are two such situations: (1) Proof of a Particular Crime, by Record of Conviction, and (2) Proof of Particular Instances of Misconduct in general, by Cross-examination of the witness himself. These have now to be considered, in so far as they are further limited by principles of Relevancy.

§ 980. *Record of Judgment of Conviction for Crime.* (1) When the extrinsic testimony is in the shape of a record of a judgment of conviction for crime, both the above reasons cease to operate. (a) There is no risk of Confusion of Issues, first, because the number of acts of misconduct provable in this way is practically small, and, next, because the judgment cannot be reopened and no new issues (other than the occasional ones occurring in the process of authentication of the record) are raised thereby; (b) there is no danger of Unfair Surprise — not, however, because (as is sometimes said) the witness well knows whether he was ever convicted; this assumes the very thing in controversy, namely, that he is guilty; but because the judgment is conclusive and cannot be attacked, and therefore the witness could not use his supporting witnesses to prove his innocence, even if he had them in court.¹ It has therefore been universally acknowledged that proof of a crime by *record of a judgment of conviction* may be made, not because an exception is carved out of the rule, but because the reason of the rule does not apply:

1857, *Strong, J.*, in *People v. Jackson*, 3 Park. Cr. 396: "[Conduct derogatory to the witness' character] may be proved provided it does not raise or tender a collateral issue. Thus, it may be proved that a proposed witness has been convicted of an infamous offence, by producing the record. That raises no collateral issue of fact, as the record is conclusive, and there can be no further inquiry. But it is not competent to prove that the witness has in fact committed a crime, if he has not been convicted, although the actual perpetration of the crime is what renders him unworthy of belief. That, if permitted, might raise a collateral issue for trial."

(2) The reasons of Auxiliary Policy not barring out such evidence, the question of Relevancy may properly be raised. *What crimes are relevant to indicate bad character as to credibility?* There are here three answers possible on principle. (a) Whatever offences were formerly treated as disqualifying one entirely as a witness (*ante*, § 520) shall now be treated as available

⁴ 1833, Cowen, J., in *People v. Rector*, 19 Wend. 569, 586 ("Counsel misconceive the reason for the cases going against an inquiry to [particular] facts. It is not because they do not impeach character, but because the inquiry in a particular form might unjustly ruin the character of any witness past redemption. The evil is held not to exist when his own account is

appealed to, and received as conclusive if in his favor").

¹ Some courts go so far, to be sure, as to allow the *witness himself* to allege and explain his innocence; but in general even this much of an issue is not allowed to be made; see *post*, § 1116, under Rehabilitation of Witnesses.

for impeachment. This is the commonest solution, and has come about usually by express proviso in the statutory abolition of the former disqualification. (b) If in a given jurisdiction general bad character is allowable for impeachment (*ante*, § 923), then *any offence* will serve to indicate such bad character. (c) If character for veracity only is allowable for impeachment (*ante*, § 923), then only such specific offences may be used as *indicate a lack of veracity-character*. The following passages illustrate this long-standing difference of views:

1680, *Scruggs*, L. C. J., in *Lord Castlemaine's Trial*, 7 How. St. Tr. 1067, 1084: "You may give in the evidence of every record of the conviction of any sort of crimes he has been guilty of, and they shall be read. They said last day there were sixteen; if there were a hundred, they should be read against him, and they shall go all to invalidate any credit that is to be given to anything he may swear."

1690, *Holt*, L. C. J., in *R. v. Warden of the Fleet*, 12 Mod. 337, 341: "In respect to a person who had been burnt in the hand, if it were for manslaughter, and afterwards pardoned, it were no objection to his credit; for it was an accident which did not denote an ill habit of mind; but *secus* if it were for stealing, for that would be a great objection to his credit, even after pardon."

(3) A *pardon* does not remove the admissibility of the original judgment for purposes of impeachment; for (unless otherwise expressly declared therein) a pardon does not imply a finding of the innocence of the person convicted:

1695, Mr. *Winnington* (arguing) in *Crosby's Trial*, 12 How. St. Tr. 1296: "Though the offence was taken away by the pardon, yet the credit of the party must be diminished thereby, and no pardon nor oblivion can so far take away the consequences of a crime (though it may pardon the punishment) as to make a man a new creature; as long as the old lump and the presumption of the old malicious spirit still remains."

1870, *Doe, J.*, in *Curtis v. Cochran*, 50 N. H. 242: "A pardon is not presumed to be granted on the ground of innocence or total reformation. It removes the disability, but does not change the common-law principle that the conviction of an infamous offence is evidence of bad character for truth. The general character of a person for truth, bad enough to destroy his competency as a witness, must be bad enough to affect his credibility when his competency is restored by the executive or legislative branch of the government."

(4) A judgment of conviction in another jurisdiction ought equally to be admissible; for it equally evidences guilt of the crime, and the crime is the discrediting fact, wherever it may have been committed.⁴

(5) On cross-examination of the witness to be impeached, may not the judgment of conviction be inquired about and answered orally instead of producing a copy of the record of the judgment? This involves a different principle, namely, the mode of evidencing the contents of the judicial record. At common law, it was generally held that a written copy, and not oral recollection

⁴ The extent to which these different rules prevail may be seen in examining the state of the law in the various jurisdictions (*post*, § 987).

⁵ The authorities are collected under the various jurisdictions (*post*, § 987). Compare the

same question arising for convictions disqualifying a witness (*ante*, § 523).

⁶ The authorities are collected under the various jurisdictions, *post*, § 987. Compare the same question arising for a conviction disqualifying a witness (*ante*, § 522).

tion, was the only proper mode; but this has almost everywhere been altered by statute.⁶

(6) An *arrest* or *indictment* stands of course on a wholly different footing from a judgment of conviction.⁶

§ 981. *Cross-Examination not Forbidden.* The reasons already examined (*ante*, § 979) appear plainly to have no effect in forbidding the extraction of the facts of misconduct from the witness himself upon cross-examination. (a) There is no danger of Confusion of Issues, because the matter stops with question and answer; (b) There is no danger of Unfair Surprise, because the impeached witness is not obliged to be ready with other witnesses to answer the extrinsic testimony of the opponent, for there is none to be answered, and because, so far as the witness himself is concerned, he may not unfairly be expected to be ready to know and to answer as to his own deeds.¹ Thus, neither of the reasons has any application, and hence, so far as they are concerned, the opponent is at liberty to bring out the desired facts by cross-examination and answer of the witness himself to be impeached.

One or two not uncommon inaccuracies in expressing this result must be noticed. (1) It is sometimes said that the above objection of Confusion of Issues is obviated because the witness' answer, if in the negative, "must be taken for true," or "is *conclusive in his favor.*" This is obviously not correct. The jury is not obliged to take any witness' word as true; and they may or may not choose to believe this witness on this point. All that can be said, and all that is meant, is that the opponent cannot proceed to prove the alleged fact by extrinsic testimony, and that, if he chooses to ask for testimony on this point from the witness himself, he must accept the chances of the jury believing a negative answer.

(2) It is sometimes said that a witness *cannot be contradicted* (*i. e.* shown to be in error) on facts affecting his character, because they are *collateral*. This is merely a confusion of the present rule with the rule forbidding a Contradiction on Collateral Matters (*post*, § 1003). This fact, to be sure, happens to be a collateral one, and therefore a contradiction on this point would not be allowable by that rule; but it simply confuses separate principles, having a separate purpose and history, to invoke that rule in the present case. That it has no essential bearing can easily be demonstrated. Suppose that rule (forbidding Contradiction on Collateral Matters) were abolished; it would still be unlawful to impeach a witness' character by extrinsic testimony of particular misconduct, for the reasons already explained, which would still be in force. Again, suppose that the witness is not asked beforehand

⁶ The authorities are collected under the appropriate principle, *post*, § 1270.

⁶ *Post*, § 982.

For the question whether a witness' *self-confessed crime*, without a conviction for it, *disqualifies* him, on the principle of *nemo turpitudinem suam*, see *ante*, § 526.

¹ See the passage quoted *ante*, § 979; and the following: 1862, Allen, J., in *Newcomb v. Griswold*, 24 N. Y. 299 (after mentioning the

reasons of unfair surprise and confusion of issues: "These reasons are not controlling when the inquiry is made of the witness [himself] as to his own acts or offences, which he may well be supposed able to explain at any time, and when his answers are conclusive and preclude further inquiry, as is the case as to all collateral matters affecting his general credit, so that side issues cannot be made to embarrass the trial of the principal issue").

whether he did this act, so that the proof of it by extrinsic testimony does not involve a contradiction of him and is therefore not obnoxious to that rule; nevertheless, the testimony would be excluded, because it is extrinsic testimony of particular misconduct impeaching character. Historically, the rule forbidding impeachment of character by extrinsic testimony of particular misconduct existed a century before the rule forbidding contradiction on collateral matters was settled; so that in tradition as well as in principle they are entirely independent. It is thus clear that the invocation of the latter rule in the present connection is not only unsound but useless. Moreover, it is misleading. The confusion is apparent in some of the *nisi prius* rulings of the present century (*post*, § 1005), when the rule as to Contradiction was in the process of settlement; but there is no longer any excuse for the perpetuation of the confusion.²

§ 982. **Same: Relevancy of Acts, on Cross-examination; Kinds of Misconduct; Arrest and Indictment.** Since the reasons of Confusion of Issues and of Unfair Surprise do not operate to forbid cross-examination, questions of Relevancy immediately arise. Now there is no doubt that conduct is relevant to indicate character (*ante*, § 193). An assault is relevant to indicate a violent character; a fraud is relevant to indicate a dishonest character. This is conceded with reference to proof of a defendant's character from his acts; it is universally accepted with reference to a witness' character:

1853, *Common Law Practice Commission* (Jervis, Cockburn, Martin, Walton, Bramwell, and Willes), Second Report, 21: "Another test of the veracity of the witness is to be found in his general character. If he has been guilty of offences which imply turpitude and want of probity, and more especially absence of veracity — as, for instance, perjury, forgery, obtaining money or goods under false pretences, and the like —, there can be no doubt that this is a matter very proper to be taken into consideration in forming a due estimate of the value of his evidence, particularly if such evidence should be in conflict with that of another witness of unquestioned integrity."

1874, *Cockburn, C. J.*, in *R. v. Castro* (*Tichborne*), Charge to the Jury, II, 720, 722: "Lord B. has committed a wofully sad sin; . . . another man's wife left her husband and joined him, and they have lived together; . . . [Counsel] asks you deliberately to come to the conclusion that because of this offence Lord B. is not to be believed upon his oath, — nay, more, that you must assume him to be perjured. Is that, do you think, a view that you can properly adopt? Is it because a man has committed a breach of morality, however flagrant, that those to whom his testimony may be important in a court of justice are to be deprived of it? . . . There are crimes and offences which savor so much of falsehood and fraud that they do go legitimately to the credit of witnesses. There are offences of a different character, and grievous offences if you will, but which do not touch that particular part of a man's moral organization — if I may use the phrase — which involves truth; and there is an essential distinction between this species of fault and those things which go to the very root of honesty, integrity, and truth, and so do unfortunately disentitle witnesses to belief."

But in determining the limitations of Relevancy, two distinct attitudes are found on the part of the Courts. (1) One is that *any kind of misconduct*,

² For a further examination of the matter, in connection with the treatment of that rule, see *post*, § 1005.

as indicating bad general character, is admissible; thus, a robbery or an assault or an adultery may be used, although none of these directly indicates an impairment of the trait of veracity. This is conceded even by many Courts which, when admitting character in the abstract, confine it to the quality of veracity (*ante*, § 922). In such Courts, the use of these facts can have no justification whatever. In those Courts, however, which allow the use of general bad character (*ante*, § 923) there is an apparent logical propriety; yet it is apparent only, for a robbery or a seduction may show a lack respectively of peaceableness or of chastity, but may not show that totally abandoned disposition which is understood to be involved in general bad character.

(2) The other attitude is entirely logical, and admits only *such misconduct as indicates a lack of veracity*,—fraud, forgery, perjury, and the like. A minority of Courts are inclined to observe this limitation,—at least now and then.

(3) In Courts adopting either of the above attitudes, attention is sometimes given to distinguish misconduct itself from a mere *accusation of misconduct*. Where this is done, it follows that a mere *arrest* or *indictment* will not be allowed to be inquired after; since the fact of arrest or indictment is quite consistent with innocence, and since the reception of such evidence is merely the reception of somebody's hearsay assertion as to the witness' guilt. To admit this would involve a violation both of the Hearsay rule and of the rule forbidding extrinsic testimony of misconduct. The only possible ground for allowing the extraction of such facts is that the merely having been arrested or charged is a disgraceful situation which indicates something lacking in the witness' respectability of character. Such a notion is quite consonant with social ideas in England, at least in a former generation;¹ accordingly we find the fact of arrest on indictment is there treated (and indeed assumed without question) as relevant, in the rulings of the early 1800s. But this notion has no sound justification, and it carries the injustice of subjecting the witness to suspicion without giving him an opportunity to clear it away. It should be understood by all Courts that the only relevant circumstance is actual conduct—*i. e.* the fact, not the charge, of having misbehaved. If it is improper to prove this by extrinsic testimony on the stand, it is doubly improper to attempt to prove it by hearsay, and trebly improper when accompanied by a prohibition of any rebuttal of the hearsay by the witness or by others on his behalf:²

1898, *Doster, C. J.*, in *State v. Greenburg*, 59 Kan. 404, 53 Pac. 61: "An arrest is nothing more than an accusation of crime or other act of turpitude. That it is made in

¹ This was accepted by one of the most liberal thinkers of his time: *Life of Sir S. Romilly*, 3d ed., II, 85 (1808); "to have been tried is, in general, alone sufficient to destroy a man's character; . . . that a man comes out of jail is a fact which is plain and notorious". See also (in *Campbell's Life*, II, 83) the Letter of Lord Melbourne to Mr. Attorney-General Campbell, June 19, 1836, relating to Melbourne's trial for crim. con.

² A judgment of conviction is of course on a different footing from an arrest or indictment: *ante*, § 980.

Distinguish proof of an indictment (by cross-examination or extrinsic testimony) as evidence of bias or interest for or against one of the parties: *ante*, §§ 949, 967.

the form of a forcible restraint of the person, based upon a sworn complaint, makes it, for purposes of disgrace or discredit, no stronger evidence of the truth of the accusation than an oral statement by the accuser would be. No one would contend that a witness could be asked whether another person had not orally accused him of crime. Why should the rule be different when the accusation has been written out and sworn to? It is but an accusation in each case. Why should it be different when the sworn accusation is followed by an arrest? The arrest is but a reassertion of the accusation in another form. It is quite different, however, when the accusation has been proved. When the proceeding has passed from accusation to conviction, evidence of the turpitude of the witness exists, — not what somebody said of him, but what the judicial tribunals sitting in judgment upon the accusation have found against him."

Such are the questions of Relevancy that arise in asking on cross-examination for particular acts of misconduct.

(4) It must be added that some of the Courts that adopt the *rule of discretion* (described in the next section) virtually thereby ignore all questions of Relevancy. In leaving the whole scope of cross-examination on this subject to the discretion of the trial Court, they in effect leave it to rule as it pleases upon Relevancy, or to ignore Relevancy entirely. This may not be their clear intention, but it is the apparent result. Occasionally, however, a Court is found³ insisting that while the trial Court's discretion is to control upon the considerations of fairness and policy, yet that discretion will not be allowed to admit a fact (for example, an arrest) which is clearly irrelevant.

§ 983. **Same: Relevant Questions excluded on grounds of Policy; Three Types of Rule; Cross-examination of an Accused Party.** Suppose that the questions on cross-examination deal with acts of misconduct that are relevant (by whichever of the above tests) to indicate bad character; may there be any other objection to them on the score of Auxiliary Policy? Most Courts recognize that the allowance of a course of examination into particular misconduct places in the hands of cross-examining counsel an instrument which he may use not wisely but too well. Among the many circumstances that contribute to form that general complex of impressions which we choose to call a verdict upon the issue, experience shows that the moral obliquity of a witness tends abundantly to smirch the cause for which he testifies. Too many counsel give to this canon of experience so much weight that they devote themselves excessively (and sometimes with no great profit to their cause) to this process of besmirching the opposing witnesses. With unscrupulous counsel, the traditional direction (in paraphrased form) is observed, "No case; abuse the opponent's witnesses." It is possibly not the most important duty of the counsel to remember that (in the words of a considerate Court¹) "witnesses have rights as well as parties; it is too often the case that they are set up as marks to be shot at." But it certainly is the duty of the law and of the judges to see that due regard is paid to these rights, and that the witness-box does not unnecessarily become, in the words of an old

³ As in some of the New York rulings.

¹ 1850, Rogers, J., in *Morse v. Palmer*, 15 Pa. 65.

Southern judge, "the slaughterhouse of reputations." There are two sufficient reasons for such restriction:

The *first* reason, to be sure, is a purely emotional one. The ordinary instincts of decency, not to say courtesy, are violated by such examinations, and every new instance makes us more sodden to the spectacle and tends to bring us towards the same level of degradation. It is the difference between the hunt and the slaughterhouse. One may well enough find sport in stalking the lion in the desert or beating the bush for the tiger, because there is a risk for the hunter which dignifies his sport, and there is a rapacity and a destructiveness in the hunted which leaves no room for sympathy; but the process of cutting the throat or knocking the head of a sheep or an ox penned in the shambles is both safe and brutal, and is to be justified only on the ground of its absolute necessity. The hunting down of a fleeing desperado, or the ensnaring of a chief of counterfeiters by the craft of detectives, is a process which does not violate instincts of fairness or principles of justice. But the ruthless flaying of personal character in the witness-box is not only cowardly — because there is no escape for the victim — and brutal — because it inflicts the pain of public exposure of misdeeds to idle bystanders —, but it has often not the slightest justification of necessity. Severe limits must be put to such conduct. As Lord Ellenborough said, "I will put it to your own feelings, your own good sense." Some weight must be allowed to the instincts of manly fairness and good sense.

The *second* reason is a politic one, *i. e.* that, with the prospect of such an examination as a possibility, the public is certain to dread the witness-box. From time to time those whose knowledge would have been valuable will seek to evade disclosing it; the ascertainment of the truth will be hampered and perhaps prevented. That such a feeling exists to-day, in a greater or less degree, can hardly be doubted.

These reasons seem to demand some limitation for the scope of examination. The Courts are found taking three different attitudes:

(1) By one extreme type of rule, *no limitations at all* are put upon the examination from the present point of view. Whatever is relevant to character may be asked about. This was the orthodox rule; but it is to-day rarely found, except in England. It is exemplified and defended in the following passages:

1831, Mr. Daniel O'Connell, cross-examining a witness for the prosecution; the witness was a police-constable, and the charge was murder during a riot: "Have you a brother in the police?" "I have." . . . "You had an uncle in the police?" "I have not." "I said you had an uncle in the police?" "I had." "What is become of him?" "He is transported." "To Botany Bay?" "I dare say." "Can you even guess where he went to?" "I cannot." "By virtue of your oath, can you guess where your own dear uncle the policeman went to?" "I cannot." "You swear to that? Have you not sworn that you cannot guess?" "I can guess." "Now where do you guess he was transported to?" "I cannot tell what part he was transported to." "Where did you grow?" "In the Queen's County." "Are you anything to those Harveys that they said had a cave for stolen sheep?" "Yes." "What relation are you to the sheep-stealers?" "Brother."

"Was it not in your own house that the stolen mutton was found?" "No." "Was it in your father's house that the key was found, that made them suspect it was in your father's house?" "I believe it was." "Was it for his good behavior that your uncle was transported?" "I cannot say." "For heaven's sake, who got your family into the police?" "A gentleman." "Has he a name?" "Yes." "What is his name?" "Mr. Steele. There were George and William Steele." "Where do they live?" "I cannot say."

1873, *R. v. Castro (Tichborne)*, 32d day, Kenealy's ed., I, 306: Lord B., who had testified to the tattoo-marks on Roger Tichborne, was cross-examined: Dr. Kenealy, for defendant: "Did you play a practical joke [on Captain H.]?" . . . L. C. J. Cockburn: "It may be a practical joke of such a nature that the jury would disbelieve the evidence on his oath, on its being made known to them. We must leave that to the discretion of Dr. Kenealy." . . . Dr. Kenealy: "It was not a practical joke. Did you take away his wife?" Lord B.: "I cannot answer that question." . . . Dr. Kenealy: "Did you seduce his wife and make her elope from her husband? . . . I am sorry to have to ask my lord to tell you you must answer it." L. C. J. Cockburn: "I certainly shall not." Dr. Kenealy: "Indeed you must, my lord! It goes to the witness' credit. I must have it answered, my lord." . . . L. C. J. Cockburn: "I am afraid, if the question is pressed, you [the witness] must answer it. It is one of the consequences of being brought into a court of justice as a witness that whatever he has done may be brought up against him."

1873, *Blackburn, J.*, in *Stocks v. Ellis*, L. R. 8 Q. B. 454, 457 (excluding cross-interrogatories, to a deponent in America, as to his desertion of his family and elopement with another man's wife): "It is clearly laid down that questions going to the credit of a witness, the answers to which will reasonably 'cad the tribunal to say, 'When the witness has admitted these facts, we distrust his testimony,' may be asked of him. The limit to this kind of questioning is in practice that the presiding judge appeals, *ad verecundiam*, to the counsel to regard the pain caused to the witness and not to annoy him unnecessarily. And that prevents any great abuse of the freedom of cross-examination. . . . I do not think we can positively say that these interrogatories would be inadmissible questions, because the answers thereto would go more or less to the credit of the witness. . . . [But for interrogatories in a proposed deposition] the Court has power to exercise control over the matter and to see that no interrogatories shall be asked which the Court at the trial might refuse to allow to be put to the witness."

1883, Sir James Stephen, *History of the Criminal Law*, I, 433: "The most difficult point as to cross-examination is the question how far a witness may be cross-examined to his credit by being asked about transactions irrelevant to the matter at issue, except so far as they tend to show that the witness is not to be believed upon his oath. No doubt such questions may be oppressive and odious. They may constitute a means of gratifying personal malice of the basest kind, and of deterring witnesses from coming forward to discharge a duty to the public. At the same time it is impossible to devise any rule for restricting the latitude which at present exists upon the subject, without doing cruel injustice. I have frequently known cases in which evidence of decisive importance was procured by asking people of apparent respectability questions which, when first put, appeared to be offensive and insulting in the highest degree. I remember a case in which a solicitor's clerk was indicted for embezzlement. His defence was that his employer had brought a false charge against him to conceal (I think) forgery committed by himself. The employer seemed so respectable and the prisoner so discreditable that the prisoner's counsel returned his brief rather than ask the questions suggested by his client. The prisoner thereupon asked the questions himself, and in a very few minutes satisfied every person in court that what he had suggested was true. . . . It is also to be remembered that cross-examination to credit may be conducted in very different ways. It is one thing to throw an insulting question coarsely and roughly in the face of a witness. It is quite another thing to follow up a point by questions justified by the circumstances. . . . The most difficult cases of all are those in which the imputation is

well founded, but is so slightly connected with the matter in issue that its truth ought not to affect the credibility of the witness in reference to the matter on which he testifies. The fact that a woman had an illegitimate child at eighteen is hardly a reason for not believing her at forty, when she swears that she locked up her house safely when she went to bed at night, and found the kitchen window broken open and her husband's boots gone when she got up in the morning. Cases, however, may be imagined in which a real connection may be traced between acts of profligacy and a man's credibility on matters in no apparent way connected with them. Seduction and adultery usually involve as gross a breach of faith as perjury, and if a man claimed credit on any subject of importance, the fact that he had been convicted of perjury would tend to discredit him. No general rule can be laid down in matters of this sort. All that can be said is that whilst the power of cross-examining to a witness's credit is essential to the administration of justice, it is of the highest importance that both judges and counsel should bear in mind the abuse to which it is liable, and should do their best not to ask, or permit to be asked, questions conveying reproaches upon character, except in cases in which there is a reasonable ground to believe that they are necessary."³

(2) By the rule obtaining in most jurisdictions of the United States, the repression of possible abuses is left in the *discretion of the trial judge*; questions upon facts relevant to character may still be forbidden by him where he believes that under the circumstances it is unnecessary and undesirable. The grounds for this restriction have never been more correctly or more eloquently set forth than in the following noteworthy opinion:

1865, *Porter, J.*, in *Third Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127, 132 (the trial Court had excluded, as immaterial to the main issue, questions attacking the witness' character, no privilege having been claimed; the question of law was whether this could be done "in the sound discretion" of that Court; on intermediate appeal the answer was negative, but the trial Court's ruling was on further appeal sustained): "If the judgment of the Court below be upheld by the sanction of this tribunal, it will embody in our system of jurisprudence a rule fraught with infinite mischief. It will subject every witness who, in obedience to the mandate of the law, enters a court of justice to testify on an issue in which he has no concern, to irresponsible accusation and inquisition in respect to every transaction of his life affecting his honor as a man or his character as a citizen. It has heretofore been understood that the range of irrelevant inquiry for the purpose of degrading a witness was subject to the control of the presiding judge, who was bound to permit such inquiry when it seemed to him in the exercise of a sound discretion that it would promote the ends of justice, and to exclude it when it seemed unjust to the witness and uncalled for by the circumstances of the case. The judgment now under review was rendered on the assumption that it is the absolute legal right of a litigant to assail the character of every adverse witness, to subject him to degrading inquiries, to make inquisition into his life, and drive him to take shelter under his privilege or to self-vindication from unworthy imputations wholly foreign to the issue on which he is called to testify. The practical effect of such a rule would be to make every witness dependent on the forbearance of adverse counsel for that protection from personal indignity which has been hitherto secured from our courts, unless the circumstances of the particular case made collateral inquiries inappropriate. This rule . . . would perhaps operate most oppressively in trials before inferior magistrates, where the parties appear in person, or are represented by those who are free from a sense of personal responsibility. . . . The practice which has heretofore prevailed in this respect has been satisfactory to the com-

³ Compare also the same author's reports on the Revised Indian Code, quoted in *Syed Ali and Woodruff's Evidence*, 1898, p. 1027; Lord Cockburn's article, cited *post*, § 986; and Mr. Evans' Notes to Pothier, II, 223.

munity, the bench, and the bar. Questions of this nature can be determined nowhere more safely or more justly than in the tribunal before which the examination is conducted. Justice to the witness demands that the Court to which he appeals for present protection shall have the power to shield him from indignity, unless the circumstances are such that he cannot fairly invoke that protection. . . . [The opposite view] ignores the indignity of a degrading imputation when there is nothing in the circumstances of the case to justify it. It ignores, too, the humiliation of public arraignment by an irresponsible accuser, misled by an angry client, and shielded by professional privilege. Few men of character or women of honor could suppress, even on the witness-stand, the spirit of just resentment which such an examination, on points alien to the case, would naturally tend to arouse. The indignation with which sudden and unworthy imputations are repelled often leads to injurious misconstruction. A question which it is alike degrading to answer or to decline to answer should never be put, unless in the judgment of the Court it is likely to promote the ends of justice. A rule which would license indiscriminate assaults on private character, under the forms of law, would contribute little to the development of truth and still less to the furtherance of justice. . . . Unless there be a plain abuse of discretion, decisions of this nature are not subject to review on appeal."

The discretion here predicated limits the process of probing even into misconduct strictly relevant to veracity-character. But this rule of discretion may conceivably cover both the relevancy of such misconduct and the policy of its use though relevant; or it may cover only the former subject, and in effect not the latter, or *vice versa* (*i. e.* the trial Court's discretion will be accepted either as to the relevancy, or as to the policy, but not as to both). Courts do not always carefully state which of these three ranges they intend to allow to the discretion of the trial Court; they usually predicate the discretion, without discriminating between relevancy and policy. The following passages illustrate the various types of modern opinion which lay down this rule:

1896, *Bantz, J., in Territory v. Chavez*, 8 N. M. 523, 45 Pac. 1107: "The extent to which cross-examination will be permitted is no doubt, in a large measure, in the discretion of the trial Court; and it is difficult to draw the line as to where the legal discretion as to the admission or the exclusion of such testimony commences, and where it ends. The truth is the thing to be sought. Assaults upon a witness by cross-examination into collateral matters cannot be allowed to gratify the caprice or the displeasure of those against whom he testifies; and intrusive into private affairs, which are calculated merely to wound the feelings, humiliate, or embarrass the witness, will not be permitted. . . . But a clear distinction is to be taken between those matters called for on cross-examination which merely excite prejudice against the witness, or tend to humiliate him or wound his feelings, and those matters, on the other hand, which are calculated, in an important and material respect, to influence the credit to be given to his testimony. As to the latter class, the witness cannot be shielded from disclosing his own character on cross-examination, and for this purpose he may be interrogated upon specific acts and transactions of his past life; and if they are not too remote in time, and clearly relate to the credit of the witness, in an important and material respect, it would be error to exclude them. How far justice may require such examinations to go, how much time should be spent upon them, what should be excluded for remoteness of time, and what for being trivial or unimportant, must depend in some measure upon the circumstances of each case; and these are questions addressed primarily to the discretion of the trial Court; but the discretion should be liberally exercised."

1899, *Hooker, J., in People v. McArron*, 121 Mich. 1, 79 N. W. 944: "Counsel complain that they were not permitted to show, by the cross-examination of M. C., that she

was a woman of low character and habits, and that they had a right to interrogate the daughter in relation to her father and mother. This cross-examination was merciless; and it is impossible to read it without regretting that the exigencies of modern trials may be thought to justify such, and wondering that counsel cannot see that they are fraught with more danger to the accused than possible benefit. Witnesses have rights as well as the accused; and, while the Courts allow an investigation of the character of a witness through cross-examination, there is a broad discretion lodged in the trial Court in such matters."

1890, *Marshall, J.*, in *Buel v. State*, 104 Wis. 132, 80 N. W. 78 (excluding questions to a defendant charged with murder of one Nelson, as to killing another man in Nebraska, burning a house to get the insurance-money, etc.): "There is no rule by which the exercise of that discretionary power of the Court can be guarded with exactness. The range is necessarily broad in order to fit the facts of particular cases, but there is a limit beyond which it cannot go. That limit is clearly reached and passed when questions are asked, manifestly, for the mere purpose of creating prejudice in the minds of the jurors, or the examination is carried on to such an extent and in such a manner as to become oppressive, and is not warranted by anything in the case. Questions as to previous convictions of criminal offences, or serving terms in prison or in jail from which convictions will be presumed, are uniformly permitted when the instances are not too remote, upon the theory that a person of that character will not be as likely to testify truthfully as a man whose life has not been thus blackened. . . . Questions relating to mere criminal charges, or acts which might be the foundation for criminal prosecutions, are usually rejected. They should not be permitted unless there are circumstances in the case suggesting that justice will or may be promoted thereby. It would be a clear abuse of judicial discretion to permit such questions where the indications are plain that the purpose is not to bring out the truth in regard to the witness' life and character, and to thereby discredit his testimony, but for the purpose of discrediting the witness, regardless of whether there is any warrant for the questions or not, and if he be a party, in that way to influence the minds of the jurors into a verdict against him. . . . A reading of the questions under consideration leads to the irresistible conclusion that no idea was entertained by the cross-examiner that proof would be elicited of the matters implied by them. We say 'implied' because the asking of the direct questions, in the manner in which they were asked, implied to some degree that the examiner was possessed of information upon which the questions were based, and although the answers were in the negative, the bad effect of the insinuations thrown out by the questions, was not and could not have been removed entirely from the minds of the jurors. . . . The trouble here is that the cross-examination was allowed to be carried on manifestly without any reason except to create prejudice against the accused in the minds of the jurors."

1902, *Brannon, J.*, in *State v. Hill*, 52 W. Va. 296, 43 S. E. 160: "It may be a question merely intended to embarrass the witness, worry the witness, exposing indecent things in court, tending to corrupt morals, and answering no fairly useful purpose on the trial. It almost invariably wounds the feelings of the witness and his family. It removes the mantle of oblivion and forgiveness, by reopening the pages of years past, and exposing acts done in the infirmity of human nature amid the temptations that beset life. If this door is open wide, the witness stand will be a terror; men will suppress evidence from fear of it, to the injury of public justice; and it will threaten both the worthy and unworthy witness, and be a cross upon which attorneys too zealous in their cause will crucify witnesses to suit their own ends. It would tend to disorder in courts. Rarely, very rarely, should it be tolerated."

(3) The third type of rule *prohibits entirely* such a cross-examination. If the discretion allowed by the preceding rule were properly exercised, if there

² For the impropriety of *insinuating by question* a fact which the cross-examiner does not believe to be true or capable of proof, see *ante*, § 780.

existed among the judiciary a desire to check excesses of cross-examination and to err if at all on the side of repression, and if the judiciary were accustomed to exercise their powers fully and freely, there could be no better solution than to vest the control in that discretion. But the judiciary to-day are not always inclined to show to the abuses of cross-examination the disfavor which those abuses deserve. The typical tendency of the modern American judiciary is to abdicate that power of control over the trial which tradition and the due course of justice demand that they shall have, and to become more and more mere umpires, who rule upon errors and make no attempt otherwise to check the misconduct of counsel.⁴ For this reason, as well as because of the usual unprofitableness of cross-examination to character, there is much to be said in favor of the rule that now obtains in several jurisdictions,⁵ by which such misconduct is forbidden to be inquired into at all. In some of these jurisdictions, to be sure, this rule has come about by a statutory enactment forbidding the proof into "particular acts"; the statute being probably framed on a misunderstanding of the rule against extrinsic testimony (*ante*, § 979) without perceiving that only extrinsic testimony was by that rule at common law intended to be excluded. But, whatever the accident of origin of those laws, the rule of total prohibition of cross-examination, as well as of extrinsic testimony, on these matters, has thus received sanction, and may be said to be the one most consonant with our best sentiments and with the needs of the time:

1857, *Lowrie, J.*, in *Elliott v. Boyles*, 31 Pa. 67 (excluding the question whether the witness had not committed perjury on a certain trial): "The question is entirely illegitimate as a mode of attacking the credibility of a witness. If a man is received among his neighbors as fully entitled to credit for veracity, a Court and jury can have no grounds for discrediting him, except such as may arise from his want of intelligence or candor, from his contradictions or partisanship in testifying before them. The fact that those who are well acquainted with his home reputation know it to be now undoubted is not set aside by any single crime, or even many of them, that he may long ago have committed. If his reputation still rises above that, he is credible still, for the taint of criminality is not entirely indelible. Hence the most proper test of character, before human tribunals, is reputation, and not single acts. . . . It would be absolutely intolerable that a man, by being brought into court as a witness, should be bound to submit all the acts of his life to the exposure of malice, under the pretence of testing his credibility. If such were the test, courts would often present, in language and temper, scenes of unmitigated ruffianism, and the means of enforcing law and order in society would be denounced as scenes of corruption and disorder."

(4) Rarely a Court is found to discriminate, on the present principle solely, between the cross-examination of an ordinary witness and that of an *accused party*. The latter may well be in a different position respecting the extent to which he has *waived his privilege* against self-crimination, by voluntarily taking the stand; and upon this point there is much diversity of opinion. But even assuming the privilege to be waived or not claimed, it is still pos-

⁴ *Ante*, § 21.

⁵ In Massachusetts, Pennsylvania, California, and the States following the California Code.

able to discriminate in his favor from the present point of view, in order to prevent that unfair prejudice which might accrue against him as the accused, by means of a cross-examination to misconduct which would be legitimate enough for an ordinary witness. This discrimination, however, as independent of the question of privilege, is rarely taken.⁶

§ 984. **Privilege against Answers involving Disgrace or Crime.** Supposing that the questions deal with facts of character relevant to be admitted, and not obnoxious to exclusion because of the foregoing principle, the witness may still be able to invoke a privilege of not disclosing the desired fact. The privilege usually available under these circumstances is the privilege against Self-Crimination (*post*, §§ 2250-2282). But is there no other? A privilege against disclosing facts of mere Disgrace — not Criminality — was up to the last century also available for the witness, and is in some jurisdictions still maintained. Its treatment should not belong here, and so far as it is necessary to distinguish it clearly from the Self-Crimination privilege, the two must be again compared (*post*, §§ 2216, 2255). But historically it is difficult to separate the English precedents which deal with this subject and that of the Scope of Cross-examination (*ante*, § 983). In those rulings, the evidence being excluded, it is often impossible to determine whether it is because the fact was regarded as irrelevant to credit, or because, though it was relevant and admissible, yet there was a privilege not to answer. The nature of the discussion, however, was usually indicated by the mode of stating the question at issue. If the fact itself was discussed as either irrelevant or undesirable to ask, the inquiry would be, "May the question be put?"; but if the existence of the privilege was debated, the inquiry would be, "Must the question be answered, if put?" The general view of the profession, towards the middle of the 1800s, was expressed in the conclusion that "the question may be put, but need not be answered."

Now it is obvious that the mere discussion assumes that, upon the subject of the preceding section, either the first or the second of those attitudes has already been taken, *i. e.* facts of misconduct may be asked after by counsel, either without limitation, or subject to the discretion of the trial Court in a given case (and in England the second of these had prevailed up to that time). Then, and then only, the present problem arises, *i. e.* whether it is desirable to extend to the witness at least so much protection as to allow him to refuse to disclose the truth. Thus, it will be seen, the considerations of policy that apply to the matter are much the same as those that apply in the preceding section (Scope of Cross-Examination); the main difference lies in the expedient adopted. In the one case, the policy that disapproved such an examination operated by *forbidding the questions* entirely, while in the present case the same policy, without resorting to such stern measures, allows the question but *permits the refusal* to answer.

⁶ Perhaps in New York only. The rulings which expressly and intelligibly take it are noted *post*, § 987, under each jurisdiction. But the great mass of the rulings, which consider only the question of waiver of privilege, are collected under that head, *post*, § 2276.

The practice in England, down to the middle of the 1800s, had definitely taken the view (on the subject of § 983, *ante*) that misconduct was relevant to character and that questions upon such matters could be put (*ante*, § 983; *post*, § 987). But it had also, down to the 1800s, given a moderate operation to the above considerations of policy by allowing the witness not to answer as to disgracing (or "infamous") matters. Even this much allowance, however, came to be disputed; and a strong opinion arose that advocated the abolition of this privilege. The best statement of this view is that of Mr. Starkie, and, of the opposing view (defending the privilege), that of the Commissioners of 1853:

1814, Mr. *Thomas Starkie*, *Evidence*, I, 193: "The question whether a witness may be asked questions which tend to disgrace him is, like many other difficult questions on the subject of evidence, one of policy and convenience. On the one hand, it is highly desirable that the jury should thoroughly understand the character of the person on whose credit they are to decide upon the property and lives of others; and neither life nor property ought to be placed in competition with a doubtful and contingent injury to the feelings of individual witnesses. On the other hand, it may be said that it is hard that a witness should be obliged upon oath to accuse himself of a crime, or even to disgrace himself in the eyes of the public; that it is a harsh alternative to compel a man to destroy his own character or to commit perjury; and that it must operate as a great discouragement to witnesses to oblige them to give account of the most secret transactions of their lives before a public tribunal; that a collateral fact tending merely to disgrace the witness is not one which is properly relevant to the issue, since it could not be proved by any other witness; and that there would be perhaps some inconsistency in protecting a witness against any question the answer to which would subject him to a pecuniary penalty, and yet leave his character exposed. . . . [After examining the rulings.] The great question, therefore, whether a witness is bound to answer a question to his own disgrace has not yet undergone any direct and solemn decision, and appears to be still open for consideration. The truth or falsehood of testimony frequently cannot be ascertained by mere analysis of the evidence itself; the investigation requires collateral and extrinsic aids, the principal of which consists in a knowledge of the source or depository from which such testimony is derived. The whole question resolves itself into one of policy and convenience, — that is, whether it would be a greater evil that an important test of truth should be sacrificed, or that, by subjecting witnesses to the operation of this test, their feelings should be wounded and their attendance for the purposes of justice discouraged? The latter point seems to deserve the more serious consideration, since the mere offence to the private feelings of a witness who has misconducted himself cannot well be put in competition with the mischief which might otherwise result to the liberties and lives of others. No great injustice is done to any individual, upon whose oath the property or personal security of others is to depend, in exhibiting him to the jury such as he is. As to the other consideration, it does not seem to be very clear that by permitting such examinations any serious evil would result; the law possesses ample means for compelling the attendance of witnesses, however unwilling they may be. The evil on this side of the question is at all events doubtful and contingent; on the other side it is plain and certain. The principle on which such evidence is admissible is clear and obvious; the reason for excluding it is extrinsic and artificial."

1853, *Common Law Practice Commission*, Jervis (later C. J.), Cockburn (later C. J.), Martin (later B.), Walton, Bramwell (later B.), and Willes (later J.), Second Report, 22: "With regard to questions which do not tend to expose the witness to prosecution or punishment, but which tend to degrade his character by imputing to him misconduct not amounting to legal criminality or the having been convicted of a crime the punish-

ment of which has been undergone, the law of England, according to the better authorities) in like manner protects the witness from answering, unless the misconduct imputed has reference to the cause itself. Should this rule be maintained? On the one hand, the witness may have been recently convicted of perjury or some other form of the *crimen falsi*; he may have become infamous by his offences against the law or against society; he may have, to his own knowledge, acquired a bad repute for habitual mendacity; and it may be highly important that the jury who are to weigh his testimony should be made aware of the drawbacks which thus attach to it. On the other hand, it cannot be denied that it would be an extreme grievance to a witness to be obliged to disclose past transactions of life which may have been long forgotten, and to expose his character afresh to evil report and obloquy when by subsequent conduct he may have recovered the good opinion of the world. As the law now stands, the question may be put, but the witness is not bound to answer; but if he does answer and denies the imputation, his denial is conclusive and cannot be controverted. It has been proposed to take away the privilege of the witness and to compel him to answer. We cannot bring ourselves entirely to concur in this view. We have already pointed out the effect which the dread of an inquiry of this nature may have in deterring a witness from appearing in court. To this may be added that, while under the present system the refusal to answer has practically the effect of an admission, the consequence of compelling the witness to answer would not improbably be to induce him to give an absolute denial, which would not be open to contradiction. On the balance, then, of these opposing considerations, we recommend that the existing law should be maintained, except that where the question relates to the conviction of the witness of perjury or any other form of the *crimen falsi* and the witness either denies the fact or refuses to answer, the conviction should be allowed to be proved."¹

As to the propriety of recognizing this privilege, two things may be said: (1) It is a compromise. From the point of view, therefore, of those who believe in the propriety of a total prohibition, this privilege is not adequate, but it is to be welcomed as entirely desirable and indispensable, in the absence of such prohibition. (2) It is much less effective than in theory it seems to be. Witnesses are seldom in a position to repudiate these questions with such dignity of manner and sincerity of principle as to convince the hearer that they are merely vindicating their rights and not evading a direct confession of the disgraceful fact. In practically every case the witness' refusal to reply answers all the purposes of the inquiring counsel, and is as good as an affirmative in effecting the desired discredit. It is mere hypocrisy to defend such a privilege on the ground that it gives the witness any real protection against the disclosure of his disgrace; he does not form the words of self-betrayal with his lips, to be sure, but he is saved from nothing more. Indeed, there have been some who have frankly accepted this as the inevitable result,² and have deprecated any attempt to abolish the privilege, on the ground that the failure to answer attained practically all that the abolition of the privilege could effect. It should better be abandoned altogether. We may be content with the simple rule (*ante*, § 983) that the scope of cross-examination shall be allowed to include such questions and answers as the trial Court may in discretion permit and compel. In point of practice and ten-

¹ Compare also (1827) Bentham, "Rationale of Judicial Evidence," b. IX, pt. IV, c. III, Bowring's ed., vol. VII, p. 484.

² Best, Evidence, 7th ed., § 130.

dency, the privilege against disgracing answers has, in the last generation or two, been more and more repudiated or ignored.³

§ 985. **Summary of the Preceding Topics.** For the purpose of ascertaining the state of the law in each jurisdiction upon the preceding closely-related topics, it will be necessary, leaving for their proper places the subjects of the Self-Crimination privilege (*post*, § 2250) and the rule for Copies of Records of Conviction (*post*, § 1270), to group the statutes and rulings under four separate heads; in each of them is sought the answer to a separate inquiry, the principles of which have now been examined:

1. *Extrinsic Testimony* (*ante*, § 979): May particular acts of misconduct be shown by extrinsic testimony?

2. *Scope of Cross-Examination* (*ante*, §§ 982, 983): What limits are set, if any, by the principles of Relevancy, to the use of particular acts of misconduct on cross-examination? What other limits are set, if any, by considerations of policy, to such use?

3. *Privilege against Disgracing Answers* (*ante*, § 984): Where such cross-examination is allowed at all, how far is recognized a privilege not to answer?

4. *Prior Conviction of Crime* (*ante*, § 980): Where, by record copy of judgment or by cross-examination, the conviction of a crime is allowed to be used, what kinds of offences and judgments are treated as admissible?

§ 986. **Same: History and State of the Law in England and Canada.**

(1) *Extrinsic Testimony.* The rule excluding proof by extrinsic testimony was not fairly announced as settled until the opening of the 1700s, although it had been forecasted and occasionally invoked in the practice of the latter part of the prior century.¹ The turning-point seems to have been marked by the trial of Rookwood, in 1696; and within a generation thereafter the rule was accepted, beyond any question, in common-law trials.² But in Chau-

³ The cases are collected *post*, § 987.

¹ 1653, *Faulconer's Trial*, 5 How. St. Tr. 323, 354 (the charge being perjury, it was testified that F. "hath been as wicked a man as any in England"; "that being at Petersfield, he drunk an health to the devil in the middle of the street"; that he had said "our Saviour Christ was a bastard, and a carpenter's son"); 1679, *Whitebread's Trial*, 7 id. 311, 392 (offer to prove a case of cheating, allowed); 1679, *Turberville v. Savage*, Vin. Abr. XII, 39 (outside testimony to particular acts, excluded); 1680, *Earl of Stafford's Trial*, 7 How. St. Tr. 1293, 1394, 1457 (similar testimony, admitted); 1686, *Lord Delamere's Trial*, 11 id. 509, 570 (similar); 1692, *Harrison's Trial*, 12 How. St. Tr. 863, 869 (keeping a house of ill-fame; no objection made; the Court refers to the evidence in the charge); 1696, *Rookwood's Trial*, 13 id. 209 (excluded; see quotation *ante*, § 979); 1696, *Cranhurne's Trial*, ib. 284 (misconduct of the same witness as in the preceding trial was here allowed to be shown); 1696, *Vaughan's Trial*, ib. 513, 519 (L. C. J. Holt told the witness to keep to the matter of reputation, but afterwards allowed him to state that he knew the attacked witness had stolen money

from him, and had threatened to swear falsely against him, his own brother); 1706, *Feikling's Trial*, ib. 1355, 1357 (that the woman-witness had had two bastard children, admitted); 1710, *Willis's Trial*, 15 id. 636, *semble* (admitted); 1716, *Francis's Trial*, ib. 936 (counsel alludes to the exclusion of such testimony as a rule); 1753, *Barbot's Trial*, 18 id. 1288 (similar); 1798, *Bond's Trial*, *Ire.*, 27 id. 584 (rule conceded).

² The following later authorities recognize it: *Ire.*: 1802, *McNally*, *Evidence*, 324 (with precedents); *Eng.*: 1812, *R. v. Hodgson*, R. & R. 211, by all the Judges (rape; particular acts of intercourse by the prosecutrix with others, excluded; but it does not appear that ordinary impeachment was intended); 1817, *R. v. Clarke*, 2 Stark. 241, 243, *Holroyd, J.* (same); 1817, *Sharp v. Scoging*, Holt N. P. 541 (*Gibbs, C. J.*: "You cannot ask them as to particular acts of criminality or parts of conduct"); 1824, *May v. Brown*, 3 B. & C. 126, *Bayley, J.* ("a particular crime"); 1848, *R. v. Duffey*, 7 State Tr. N. S. 795, 896 (that the witness had been discharged for fraud, excluded); 1853, *Second Report of Common Law Practice Commission*, p. 22; *Can.*: 1876, *McCreary v. Grundy*, 39 U. C. Q. B.

cery practice the rule was from the outset deliberately rejected. One of the reasons given by Lord Hardwicke was this:

"Though at law you can examine only to the general credit, yet it is otherwise in equity; for at law the witness cannot be prepared to defend every particular action of his life, as he does not at all know to what they intend to examine him; but upon an examination in this court he may be able to answer any particular charge, as he has time enough to recollect it."³

This reason, however, was erroneously understood by the learned Chancellor; for the unfair surprise that was feared did not consist in the difficulty of the witness' own recollection, but in the difficulty of having other witnesses ready. Another reason⁴ was that as the examination by deposition, customary in Chancery, had to be prepared beforehand in the form of questions, it was practically difficult to cross-examine as to character in that way, and therefore extrinsic testimony was the sole practicable method.⁵ But the real reason probably was merely that the common-law practice had received a development of its own, at the time when cross-examination was becoming a powerful instrument,⁶ and that the rule had never happened to obtain a footing on the Chancery side.⁷ The Chancery rule, then, as varying from the common-law rule (yet even this was doubted, to be sure, by the learned reporter Atkyns), was thus administered down into the 1800s, though its wisdom was questioned by such eminent Chancellors as Eldon and Kent.⁸

2. *Scope of Cross-examination.* It has been maintained by Sir J. Stephen that in the earlier practice no cross-examination to misconduct was allowed.⁹ If this were so, it was natural enough in criminal cases, where (until the end of the 1600s) no witnesses were sworn for the accused, and the Crown's witnesses were favored by various protections. But by the 1700s, with cross-examination fully developed, this could not last; and during that century it

316. The following ruling is anomalous: 1834, *R. v. Noel*, 10 C. & P. 336, *semble* (that the witness was called on a charge of keeping a gaming-house, admitted).

³ 1747, *Gill v. Watson*, 3 Atk. 522.

⁴ Counsel arguing in *Anon.*, 3 Ves. & B. 93.

⁵ For the inefficiency of cross-examination in Chancery, see *post*, § 1846.

⁶ For the history of cross-examination, see *post*, § 1364.

⁷ The Chancery rule, it may be added, after publication of the depositions, did not allow examination to particular misconduct where it was also relevant to the main issue, because, after the depositions in the cause were once published, no further examination on material points was usually allowable: 1803, *Wood v. Hammerton*, 9 Ves. Jr. 145; 1812, *White v. Fussell*, 1 Ves. & B. 152 ("facts affecting credit and character only"); 1837, *Gass v. Stinson*, 2 Sumner 609. Story, J. ("such particular facts only as are not material to what is already in issue in the cause, . . . which case seems allowed only to impugn the witness' statements as to collateral facts").

⁸ 1814, *Anon.*, 3 Ves. & B. 93 (an affidavit discrediting a petitioner stated that "he had

been discharged from his employment by one attorney for fraud, and by another for communicating a brief to the hostile solicitor"; Eldon, L. C., ordered it taken off the file: "You may ask, whether the witness is to be believed upon his oath; which is the course at law, not going to particular facts. If the proceedings in this court are open to the defect that has been mentioned [*i. e.* no cross-examination to discredit], that does not make it fit to introduce all the scandal"); 1818, *Troup v. Sherwood*, 3 Johns. Ch. 558, 562, Kent, C. (regretting that the rule was not the same as at law).

⁹ 1883, *History of the Criminal Law*, I, 436. Perhaps the learned historian had in mind the rulings on the privilege against disgracing answers (*post*). At any rate, the only plain authority seems to be the following: 1842, *Onble's Case*, March, pt. 136 ("in examining of a witness, counsel cannot question the whole life of the witness, as that he is a whoremaster, etc.; but if he hath done such a notorious fact which is a just exception against him, then they may except against him. That was Onble's case, of Gray's Inn; and by all the judges it was agreed as before").

is plain that the exploiting of the witness' life and associations, however discreditable, was freely allowed. The orthodox rule came to be that "any question tending to discredit" might be asked; and only rarely was there any interference from the Court.¹⁰ Occasionally there was an intimation that the misconduct should have some relevance to the trait of veracity; and occasionally there was an exercise of discretion on grounds of policy. But it seems to have been thought that the witness' privilege against disgracing answers was the only protection needed. Whatever judicial interference took place was usually by way of an appeal to the counsel's own discretion and sense of propriety, and not to any settled rule of law:

1817, *Watson's Trial*, 32 *id.* 205, 207; that his friends were felons; that he was a bigamist; that he had been employed in a house of ill-fame, etc., were allowed to be the subjects of questioning. But limits were drawn: Mr. *Wetherell*, cross-examining: "Did you [being married] ever make proposals of marriage to any person within these three or four years?" L. C. J. *Ellenborough*: "How can that question be asked? I will put it to your own feelings, your own good sense." Mr. *Wetherell*: "I will not carry it further." Another witness admitted one *Dickins* to have been his companion. Mr. *Wetherell*, cross-examining: "Do you not know that it is the same *Dickins* that was discharged at the Old Bailey as the associate of a man of the name of *Vaughan* in hatching up those conspiracies?" A. "I do not know." L. C. J. *Ellenborough*: "How can he know this?" Mr. *Wetherell*: "My object is, to show that this man's associates are all felons or the most base of mankind." L. C. J. *Ellenborough*: "This is really very irregular. . . . It is really corrupting all justice when such prejudices are introduced. The Court are of opinion that the question should not be put."

The more modern practice seems to have maintained this theoretically unlimited license of cross-examination, even after the middle of the 1800s, when the privilege against disgracing answers was no longer recognized.¹¹

¹⁰ 1746, *Lord Lovat's Trial*, 18 *How. St. Tr.* 651 (L. C. *Hardwicke*: "The other party is at liberty to cross-examine him either to the matter of fact concerning which he has been examined, or any other matter whatsoever that shall tend to impeach his credit or weaken his testimony; provided the questions that are asked him are such as the law allows"); 1780, *Mackall's Trial*, 21 *id.* 687 (cross-examination to be on bad terms with his wife was stopped by the Court); 1794, *Rowan's Trial*, 22 *id.* 1115 (on cross-examination, that the witness had attested a bond alleged to have been forged, that he had taken a note from an alleged insane person, etc., allowed); 1798, *O'Coigly's Trial*, 26 *id.* 1351, *semble* (that the witness was a common informer, allowed); 1795-1799, *McNally, Evidence*, 258 (citing several cases of cross-examination to arrests and accusations); 1820, *R. v. Hunt*, 1 *State Tr. N. S.* 171, 220, 234 (whether he had been discharged from his regiment, allowed; that he had been dismissed from a situation for taking his employer's money, allowed). The cases in par. 3, *infra*, also illustrate this free use of such questions; but these rulings must be only cautiously used as precedents; the main question in most of them was that of privilege against disgracing answers; moreover, most rulings are upon ques-

tions to the prosecutrix on a rape charge, and pains were then seldom taken to distinguish mere misconduct as affecting credibility from former intercourse as affecting the likelihood of present consent (*ante*, § 200); the latter inference was probably chiefly in the minds of the judges, though the true discrimination seems not to have been finally made until 1843, in *R. v. Martin*, 2 *M. & Rob.* 512, by *Coleridge* and *Erskine, JJ.* There can hardly be any doubt, however, that throughout all the period of these cases the free use of inquiries into misconduct on cross-examination was generally recognized.

¹¹ To the quotations *ante*, § 983, add the following authorities: *England*: 1846, *Smith v. Earl Ferrers*, *Cherier's Rep.* 46 ff. (breach of marriage promise; the plaintiff relied on a long series of letters; the defendant denied their genuineness and claimed that the plaintiff had written them herself; a chief witness to the handwriting for the plaintiff was a Reverend Mr. Arden, formerly chaplain to the defendant; his cross-examination, by Sir F. Theaiger, Attorney-General, was a masterly piece of work, and is one of the best illustrations of the accepted English method of discrediting a witness by the freest and fullest exposure of a discreditable past, significant as a whole if trivial in detail); 1848, *R. v. Duffey*, 7

3. *Privilege against Disgracing Answers.* This privilege clearly existed in the early 1700s, at a time when the limits of the privilege against Self-Crimination (*post*, § 2250) had not become clearly fixed:

1696, *L. C. J. Treby*, in *Cook's Trial*, 13 *How. St. Tr.* 334: "That you can ask a juror or a witness every question that will not make him criminous, — that is too large. Men have been asked whether they have been convicted and pardoned for felony, or whether they have been whipped for petty larceny; but they have not been obliged to answer; for though their answer in the affirmative will not make them criminal or subject them to a punishment, yet they are matters of infamy; and if it be an infamous thing, that is enough to preserve a man from being bound to answer. A pardoned man is not guilty, his crime is purged; but merely for the reproach of it, it shall not be put upon him to answer a question whereon he will be forced to forswear or disgrace himself. . . . The like has been observed in other cases of odious and infamous matters which were not crimes indictable."

But, in some obscure way, the privilege fell into disuse;¹² and its exercise was not revived again till the beginning of the 1800s. During the first half of the century numerous conflicting rulings were made.¹³

State Tr. N. S. 795, 892 (question put as to having been charged with embezzlement); 1862, *Henniman v. Lester*, 12 *C. B. N. S.* 778 (whether a witness had not lost a suit based on similar fraudulent representations; allowed); 1881 (?), *L. C. J. Cockburn*, article in 15 *Ir. Law Times* 348, quoted from *Australian Law Times* (opposes the unlicensed extreme); 1883, *Rules of Court, Ord. 36, rule 33* ("The judge may in all cases disallow any question put in the cross-examination of any party or other witness, which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter"); 1891, *Nov. and Dec.*, *Russell v. Russell* (divorce), *Osborne v. Hargreaves* (theft of jewels), *London* (here the cross-examination was so unlicensed as to lead to much public correspondence, by barristers and others, as to the law and its propriety; see *Law Times*, vol. 92, pp. 89, 104, 138; *Law Journal*, vol. 26, pp. 767, 768, 783, vol. 27, pp. 15, 56; *Lord Bramwell*, "Cross-examination," *Nineteenth Century*, Feb. 1892; letters in the *London Times*, Jan. 4-9, 1892, and before that date); *Canada: Dom.*, 1877, *Laliberté v. R.*, 1 *Can. Sup.* 117, 120, 139, 141 (rape; question to the prosecutrix as to intercourse with other men; held by *Richards, C. J.*, that the question might be put, but the witness could decline to answer; by *Ritchie, J.*, and *Strong, J.*, that the trial Court had discretion to compel an answer; the three remaining judges not expressing an opinion); *B. C.*: *St.* 1902, c. 22, § 6 (the examination shall be confined to "questions relevant to the issues"; and "no irrelevant question shall be asked merely for testing the credibility of the witness"); *N. W.*: *Cons. St.* 1892, c. 50, *Rules of Court* 32, par. 17 (like *Eng. Ord. 36, supra*); *N. S.*: *Rules of Court*, 1900, *Ord. 34, R. 31* (like *Eng. Ord. 36, supra*); *N. W. Terr.*: *Cons. Ord.* 1898, c. 21, *Rule 260* (like *Eng. Ord. 36, supra*); *Ont.*: *Rev. St.* 1897, c. 73, § 7 (adultery; quoted *ante*, § 488); 1877, *Hickey v. Fitzgerald*, 41 *U. C. Q. B.*

303 (trial Court's discretion controls as to matters "irrelevant to the issue").

¹² *Mr. Peake*, writing in 1801 (*Evidence*, 2d ed., p. 130 ff.), speaks of the non-recognition of such a privilege as having "so long continued without objection that no one at the bar thought of questioning the legality of it"; it was "the established and invariable practice for a considerable space of time"; and the questioning of his own day was merely a novelty of "some of the judges."

¹³ Of the following rulings, those which exclude the evidence do not always make it clear whether they go upon the ground of privilege or upon some other rule: 1791, *R. v. Edwards*, 4 *T. R.* 440 (whether he had not stood in the pillory for perjury, allowed); 1797, *Franco v. Bolton*, 3 *Ves. Jr.* 368 (discovery against a woman suing on a bond; defence, that plaintiff lived in adultery with defendant; discovery refused, as involving "not only the reproach, but the consequence" of adultery); 1802, *McNally*, *Evidence*, 258 (privilege applies to answers involving "his own turpitude or infamy"); 1803, *R. v. Lewis*, 4 *Esp.* 225 ("Whether he had not been in the House of Correction?"; privileged; *L. C. J. Ellenborough*: "It would be an injury to the administration of justice if persons who came to do their duty to the public might be subjected to improper investigation," *i. e.* "the object of which was to degrade or to render infamous"; referring to it as a settled rule); 1803, *Macbride v. Macbride*, *ib.* 242 ("Whether the witness lived in a state of concubinage with the plaintiff?"; privileged; *Lord Alvanley*: "I will not say that a witness shall not be asked to what may tend to disparage him; . . . I think those questions only should not be asked which have a direct and immediate effect to disgrace or disparage the witness"); 1803, *Millman v. Tucker*, *Peake Add. Cas.* 222, *L. C. J. Ellenborough* (whether he had been imprisoned on conviction of forgery, privileged); 1809, *R. v. Teal*, 11

So far, however, as the privilege was conceded at all, it had always two limitations: (1) It applied only to *collateral facts*, *i. e.* to facts not material to the issue in the case, — in short, only to facts affecting character, bias, corruption, and the like; (2) it applied only to facts *directly* involving disgrace, and not to facts merely *tending* to disgrace indirectly.

The Common Law Procedure Commission, in their report of 1853, treated the privilege as still a part of the law "by the better authorities," and recommended its preservation.¹⁴ But the Act of 1854 provided nothing about the privilege, except to authorize questions about former convictions.¹⁵ Since that time, however, the general understanding of the profession has been that it no longer exists.¹⁶

4. *Prior Conviction of Crime.* This was of course used chiefly, up to the middle of the 1800s, to affect the witness with incompetency, and exclude him altogether. But if for any reason it was unavailable for that purpose it could still be used in discredit.¹⁷ When in the 1800s the disqualification

East 311, *L. C. J. Ellenborough* (a woman-witness; bastardy; criminal intimacy with several other persons, admitted, without objection on this ground); 1811, *Yewin's Case*, 2 Camp. 638, *Lawrence, J.* (whether he had been charged with robbing his master, privileged); 1812, *R. v. Hodgson, R. & R. 211*, all the Judges except four being present (rape; whether the prosecutrix had before had connection with any one or with a named person, privileged, because not bound "to criminate and disgrace herself"); 1814, *Dodd v. Norris*, 3 Camp. 519 (seduction; whether the daughter, testifying, had been criminally intimate with others, privileged; all the Judges approved); 1817, *R. v. Clarke*, 2 Stark. 241, 243, *Holroyd, J.* (rape; cross-examination of the prosecutrix as to committal to the House of Correction, allowed; also as to her past conduct with reference to chastity); 1823, *R. v. Pitcher*, 1 C. & P. 85, *Hullock, B.* (larceny by a woman; whether the prosecutor had behaved improperly with her at the time, privileged); 1823, *R. v. Barnard*, *ib. note*, *Hullock, B.* (whether he had ever been charged with felony, etc., allowed); 1823, *R. v. James*, *ib. Bouanquet, Serj.* (whether he had been turned out of office as constable for misconduct, privileged); 1823, *Bate v. Hill*, *ib. 100*, *Park, J.* (seduction; whether the daughter, testifying, had kept improper company, allowed); 1829, *R. v. Barker*, 3 *id.* 589 (rape; that the prosecutrix, testifying, had on one occasion acted the prostitute, excluded at first by *Park, J.*, on authority of *R. v. Hodgson*, "though you may certainly give evidence of general lightness of character, and general evidence of her being a street-walker"; but on conferring with *Parke, J.*, the question was allowed); 1827, *Cundell v. Pratt, Moo. & M. 108* (*Best, C. J.*: "I do not forbid the question on the ground that it tends to degrade. I for one will never go that length; until I am told by the House of Lords that I am wrong, the rule I shall always act on is to protect witnesses from questions the answers to which may expose them

to punishment. If they are protected beyond this, from questions that tend to degrade them, many an innocent man would suffer"); 1830, *R. v. Jenkin*, 1 *Lew. Cr. C.* 326, *Parke, J.* (whether his house was a gambling-house, privileged); 1834, *R. v. Martin*, 6 C. & P. 562, *Williams, J.* (evidence as in *R. v. Hodgson*, thought admissible); 1844, *R. v. Parker*, 1 *Cox Cr.* 76 (whether the witness had served a two-years' sentence in prison; *Creaswell, J.*, recognized the right to put the question and the privilege to decline to answer it, because "of infamous nature," adding: "Some uniform rule of practice should be laid down by the Judges on this point, since there are so many contradictory dicta respecting it").

¹⁴ Quoted *ante*, § 984.

¹⁵ St. 17 & 18 Vict. c. 125, §§ 25, 103; applied to criminal cases in 1865, by St. 28 Vict. c. 18, § 6.

¹⁶ *Eng.*: 1872, *Day*, *Common Law Procedure Act*, 4th ed., 278; 1877, *Stephen*, *Digest of Evidence*, 3d *Eng. ed.*, Art. 129, Note XLVI; 1882, *Best*, *Evidence*, 7th ed., § 130; 1873, *R. v. Castro* (*Tichborne*), quoted *ante*, § 983; *Can.*: 1877, *Laliberté v. R.*, *Can. Sup.* (see citation *supra*); *Ont.*: 1876, *McCreary v. Grundy*, 39 *U. C. Q. B.* 316, 324 (seduction; questions to witnesses called for the defence, whether they had had intercourse with the woman, held not privileged); 1897, *Gross v. Brodrecht*, 24 *Ont. App.* 687 (approving *Laliberté v. R.*, *supra*).

¹⁷ 1692, *Harrison's Trial*, 12 *How. St. Tr.* 861, 869 (cheating); 1696, *Cook's Trial*, 13 *id.* 359, 388 (attempt to murder by poison). This was true even where the offence had been pardoned: 1680, *Hale*, *Pleas of the Crown*, II, 278; 1695, *Crosby's Trial*, 12 *How. St. Tr.* 1296 (quoted *ante*, § 980); 1696, *Rookwood's Trial*, 13 *id.* 139, 185. *Contra*: 1679, *Reading's Trial*, 7 *id.* 259, 296 ("It is a scandal to reproach a man for that which he is thereby pardoned for").

was abolished, the statute sanctioned the use of convictions for all kinds of crimes by way of impeachment.¹⁸ The subsequent statute, however, which made accused persons competent, expressly protected them from this,¹⁹—varying on this point from the general rule in the United States.

§ 987. **Same: State of the Law in the various Jurisdictions of the United States.** The state of the law upon the foregoing topics¹ illustrates the truth

¹⁸ *Eng.*: 1844, St. 6 & 7 Vict. c. 85; 1854, St. 17 & 18 Vict. c. 125, § 103 ("A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor; and, upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction"); applied to criminal cases, in 1865, by St. 23 Vict. c. 18, § 6; *Can.*: *Crim. Code* 1892, § 695 (like *Eng. St.* 1854, c. 125, § 25, substituting "any offence"); *B. C.*: *Rev. St.* 1897, c. 71, § 32 (like *Eng. St.* 1854, c. 125, § 25, substituting "any offence, indictable or not"); *N. Br.*: *Cons. St.* 1877, c. 46, § 22 (like *Eng. St.* 1854, c. 125, § 25); *Newf.*: *Cons. St.* 1892, c. 57, § 20 (like *Eng. St.* 1854, c. 125, § 25); *N. Sc.*: *Rev. St.* 1900, c. 163, § 45 (like *Eng. St.* 1854, c. 125, § 25, substituting "any crime"); *Ont.*: *Rev. St.* 1897, c. 73, § 19 (like *Eng. St.* 1854, c. 125, § 25, substituting "crime" for "felony or misdemeanor"); *P. E. I.*: *St.* 1889, c. 9, § 18 (like *Eng. St.* 1854, c. 125, § 25).

¹⁹ 1898, St. 61 & 62 Vict. c. 36, § 1 (accused testifying shall not be asked as to former conviction of an offence); 1900, *Charnock v. Merchant*, 82 L. T. R. N. s. 89 (statute applied).

¹ The statutes and decisions are as follows; cross-references to related topics have been placed *ante*, under §§ 979-984:

ALABAMA. 1. *Extrinsic Testimony* is excluded: 1846, *Sorrelle v. Craig*, 9 Ala. 539; 1850, *Nugent v. State*, 18 id. 521, 526 (acts of unchastity); 1880, *Moore v. State*, 68 id. 362 (whether he had fled from a charge of burglary); 1896, *Feibelman v. Assur. Co.*, 108 id. 180, 19 So. 540 (witness for a policy-holder; evidence of two or three fires on his premises in one year, excluded); 1896, *Crawford v. State*, 112 id. 1, 21 So. 214 (illicit relations); 1897, *Lord v. Mobile*, 113 id. 360, 21 So. 366 (immorality). 2. *Scope of Cross-examination*: 1871, *Boles v. State*, 46 Ala. 206 ("whether she was of such ill-fame as to be excluded from society"; excluded, for though an ill-fame "such as impeaches her veracity" could be asked about, it did not appear what kind of ill-fame was here meant); 1901, *Louisville & N. R. Co. v. Bizzell*, 131 id. 429, 30 So. 777 (cross-examination to habits of profanity and drinking, allowed). 3. *Privilege against Disgracing Answers*: 1871, *Boles v. State*, *supra* (whether the witness was of ill-fame; privilege repudiated). 4. *Conviction of Crime*: *Code* 1897, § 1795 (quoted *ante*, § 485); 1853, *Campbell v. State*, 23 Ala. 44, 73 (conviction for libel, excluded, as not affecting veracity); 1892, *Prior v. State*, 99 id. 196, 13 So. 681 (petit larceny, admitted); 1901, *Smith v. State*, *ib.* 89, 29 So. 699 (under C. § 1795, an "infamous

crime" retains its common-law definition; conviction for carrying a concealed weapon, excluded); 1901, *Boline v. State*, 129 id. 106, 29 So. 926 (the judgment must be in a court having jurisdiction); 1902, *Wells v. State*, 131 id. 48, 31 So. 572 (theft, admitted); 1903, *Castleberry v. State*, 135 id. 24, 33 So. 431 (conviction for some crimes, but not of any crime, is admissible); 1903, *Vilberg v. State*, — id. —, 35 So. 53 (petit larceny, admitted; suspension of a judgment's execution pending an appeal does not prevent its use to impeach).

ALASKA. 1. *Extrinsic Testimony*: *C. C. P.* 1900, § 669 (like *Or. Annot. C.* 1892, § 840). 2. *Scope of Cross-examination*. 3. *Privilege against Disgracing Answers*: *C. C. P.* 1900, § 675 (like *Or. Annot. C.* 1892, § 847). 4. *Conviction of Crime*: *C. C. P.* 1900, § 669 (like *Or. Annot. C.* 1892, § 840); § 1033 (like *ib.* § 710).

ARIZONA. 4. *Conviction of Crime*: *Rev. St.* 1887, § 2037 (quoted *ante*, § 488).

ARKANSAS. 1. *Extrinsic Testimony*: *Stats.* 1894, § 2959 (a witness may not be impeached "by evidence of particular wrongful acts, except that it may be shown by the examination of a witness or record of a judgment that he has been convicted of a felony"); 1879, *Anderson v. State*, 34 Ark. 257 (indictment for larceny, excluded); 1890, *Hollingsworth v. State*, 53 id. 387, 390, 393, 14 S. W. 41 (outside testimony to specific acts, inadmissible). 2. *Scope of Cross-examination*: 1853, *Pleasant v. State*, 13 Ark. 360, 377 (the trial Court's discretion predicated; here, a question as to compounding the prosecution, allowed); 1855, *Pleasant v. State*, 15 id. 624, 649 (compounding a felony; admissible, though covered by privilege; the trial Court apparently given some discretion); 1884, *Carr v. State*, 43 id. 99, 102 (whether he had been under indictment for the same murder, excluded); 1890, *Hollingsworth v. State*, *supra* (declining to lay down specific limits, but admitting answers disclosing gaming, fighting, and unlawful cohabitation, brought out by the ordinary questions as to residence and occupation; the preceding cases not cited); 1894, *Holder v. State*, 58 id. 478, 25 S. W. 279 (whether he had left other places because he had committed certain crimes, held improper; but the ruling is useless, because it confuses the privilege rule with the present one); 1895, *Bates v. State*, 60 id. 450, 30 S. W. 890 (question as to a prior indictment, excluded; "it raises no legal presumption of guilt"); 1899, *Lee v. State*, 66 id. 286, 50 S. W. 516 (whether a witness was not the mother of certain criminals, excluded); 1902, *Stanley v. Ins. Co.*, 70 id. 107, 66 S. W. 432 (fire-insurance policy; cross-examination of the

(not as often judicially appreciated as it ought to be) that there are half a hundred independent jurisdictions within our boundaries, and that it is im-

plaintiff to a former burning of an insured house, held improper, as not affecting credibility; so also questions as to being under indictment for the burning in issue); 1902, *Bergstrand v. Townsend*, ib. 600, 70 S. W. 307 (questions as to witness' occupation at a remote prior time, held properly excluded in the trial Court's discretion). *Privilege against Disgracing Answers*: 1853, *Pleasant v. State*, *supra* (question as to attempt to atfisa prosecution; refusal merely because of tendency to degrade, improper); 1855, *Pleasant v. State*, *supra* (recognizing it for questions to the prosecutrix in rape as to intercourse with third persons, but not as to intercourse with the defendant); 1883, *Pulk v. State*, 40 Ark. 482, 487 (complainant in seduction; whether she had had intercourse with other men; privilege recognized); 1890, *Hollingsworth v. State*, *supra* (apparently ignoring any privilege). 4. *Conviction of Crime*: *Stata*. 1894, § 2959 (quoted *supra*).

CALIFORNIA. 1. *Extrinsic Testimony*: 1867, *People v. Jones*, 31 Cal. 565, 571 (excluded, in the principle of non-contradiction on collateral matters); 1872, *Code Civ. Pr. § 2051* (a witness is not impeachable "by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony"); applied in the following cases: 1875, *People v. Amanacus*, 50 Cal. 233, 235; 1885, *People v. Hamblin*, 68 id. 101, 103, 8 Pac. 687; 1889, *Sharon v. Sharon*, 79 id. 637, 673, 22 Pac. 26, 131; 1890, *Davis v. Powder Works*, 84 id. 617, 627, 24 Pac. 387; *Jonea v. Duchow*, 87 id. 109, 114, 23 Pac. 371, 25 Pac. 256; 1899, *James' Estate*, 124 id. 653, 57 Pac. 579, 1008; 1901, *Steen v. Santa Clara V. M. & L. Co.*, 134 id. 355, 66 Pac. 321. 2. *Scope of Cross-examination*: 1863, *Clark v. Reese*, 35 Cal. 89, 96 (personal liberties with the plaintiff, in a breach of promise suit, *semble*, allowable); 1872, *People v. Sualie*, cited 48 id. 338 (whether he had been arrested for vagrancy, allowed); 1872, *Code Civ. Pr. § 2051* (quoted *supra*); 1873, *Reed v. Clark*, 47 id. 194, 201 (trial Court's discretion sanctioned; but here character of the witness as party was in issue); 1874, *People v. Manning*, 48 id. 335, 338 (whether he had ever been arrested for vagrancy; not decided); 1880, *Hinkle v. R. Co.*, 55 id. 627, 628, 632 (excluding inquiries as to particular acts, without distinguishing between cross-examination and outside testimony; here, whether the witness had taken a bribe in another matter); 1885, *People v. Hamblin*, 68 id. 101, 103, 8 Pac. 687 (whether he had been arrested; excluded, because an arrest alone does not show guilt; whether he had been doorkeeper at a gambling house, knowing it to be an unlawful business, excluded, on the particular-act doctrine); 1886, *People v. Carolan*, 71 id. 195, 12 Pac. 52 ("whether he had been arrested" and convicted; excluded, not noticing the arrest-question); 1888, *Cockrill v. Hull*, 76 id. 192, 196, 18 Pac. 318 (whether he had not been impeached at another trial, excluded); 1889, *Sharon v. Sharon*, 79 id. 633, 673, 22 Pac. 26, 131 (whether she had lunched, with other men than her husband, at a disreputable house; whether she had falsely asserted the sanity of her husband as testator; excluded, on the particular-act doctrine); 1890, *Davis v. Powder Works*, 84 id. 617, 627, 24 Pac. 387 (fraudulent official acts, excluded, on the same doctrine); *People v. Tiley*, ib. 651, 652, 24 Pac. 290 (whether a married man spent the night at a house of ill-fame, excluded); *Jonea v. Duchow*, 87 id. 109, 114, 23 Pac. 371, 25 Pac. 256 (whether he had been arrested and had pleaded guilty, on a charge of beating a prostitute, excluded); 1893, *People v. Wells*, 100 id. 459, 462, 34 Pac. 1078 (questions as to forgery, marital improprieties, etc., excluded); 1895, *People v. Un Dong*, 106 id. 88, 39 Pac. 12 (whether he lived in a house of ill-fame, and whether he was connected with a gambling-house, excluded); 1895, *People v. Chin Hane*, 108 id. 597, 41 Pac. 697 (that she had been a prostitute, excluded); 1896, *People v. Ross*, 115 id. 233, 46 Pac. 1059 (of a woman-witness, as to prostitution, admitted); 1898, *People v. Silva*, 121 id. 668, 54 Pac. 146 (that he had been in prison charged with stealing, excluded); 1898, *Pyle v. Tiercy*, 122 id. 383, 55 Pac. 141 (that she had lived with her husband before marriage, not allowed); 1899, *James' Estate*, 124 id. 653, 57 Pac. 579, 1008 (the writing of a "highly immoral" book, or unlawful intercourse, not admissible, even on cross-examination); 1899, *People v. Crandall*, — id. —, 57 Pac. 785 (questions to witness' prostitution, etc., not allowed; *Temple, J.*, diss., and holding that the trial Court has discretion); 1900, *Kasson's Est.*, 127 id. 496, 59 Pac. 950 ("whether the house you were keeping in M. was a house of prostitution?"; excluded); 1900, *People v. Clarke*, 130 id. 642, 63 Pac. 138 (cross-examination to misconduct, excluded); 1901, *People v. Owens*, 132 id. 469, 64 Pac. 770 (same); 1901, *People v. Harlan*, 133 id. 16, 65 Pac. 9 (same); 1901, *People v. Warren*, 134 id. 202, 66 Pac. 212 (cross-examination to being indicted, excluded); 1903, *People v. Derbert*, 138 id. 467, 71 Pac. 564 (questions to a defendant as to various aliases, held improper). 3. *Privilege against Disgracing Answers*: 1857, *Ex parte Rowe*, 7 Cal. 184 (privilege applies "when the answer is not to any matter pertinent to the issue and the answer would disgrace him"); 1868, *Clark v. Reese*, 35 id. 89, 96 (personal liberties with a woman; undecided); 1870, *People v. Reinhart*, 39 id. 449 (former conviction, excluded); C. C. P. 1872, § 2065 (privilege not to give "an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony"; this last clause was added to the section as adopted from the prior Practice Act, § 408, and apparently an-

possible to make use of all the rulings as though they were valid precedents for every jurisdiction. The shuttlecock citation of decisions, backward and

nulled *People v. Reinhart, supra*; P. C. § 89 (privilege denied for witness on a charge of obtaining money to influence legislative vote); Pol. C. § 304 (same for witness before legislature or its committee). 4. *Conviction of Crime*: C. C. P. 1872, § 2051 (quoted *supra*); 1870, *People v. Reinhart, supra* (admitted); 1875, *People v. Amanacus*, 50 id. 233, 235 (admitted); 1886, *People v. Carolan*, 71 id. 195, 12 Pac. 52 (misemeanor, excluded; unless, *semble*, involving "moral turpitude and infamy"); 1895, *People v. Chin Hane*, 108 id. 597, 607, 41 Pac. 697 (kind of felony may be stated); 1900, *People v. Putuam*, 129 id. 258, 61 Pac. 961 (same); 1901, *People v. Ward*, 134 id. 301, 66 Pac. 372 (verdict, lacking sentence, suffices).

COLORADO. 4. *Conviction of Crime*: Annot. St. 1891, § 4822 (quoted *ante*, § 483).

COLUMBIA (DISTRICT). 2. *Scope of Cross-examination*: 1881, *Guiteau's Trial*, I, 743 (medical man allowed to be asked whether he was dismissed from a post in an asylum); 1892, *U. S. v. Cross*, 20 D. C. 373 (a question as to place of residence was disallowed, in discretion, because it was directed merely to obtain clues to further evidence). 4. *Conviction of Crime*: 1880, *U. S. v. Neverson*, 1 Mackie 152, 172 (larceny, admitted); Code 1901, § 1067 (quoted *ante*, § 488).

CONNECTICUT. 1. *Extrinsic Testimony* is excluded: 1856, *State v. Randolph*, 24 Conn. 363, 366; 1877, *State v. Shields*, 45 id. 256, 257, 260, 263 (specific instances of intoxication excluded, but former prostitution admitted, apparently only as against the prosecutrix in a rape case, according to § 62, *ante*); 1899, *Spiro v. Nitkin*, 72 id. 202, 44 Atl. 13 (that the witness swore falsely at another trial). 2. *Scope of Cross-examination*: 1881, *State v. Ward*, 49 id. 433, 442 (whether he lived with a woman who kept a house of ill-fame, allowed); 1898, *State v. Ferguson*, 71 id. 227, 41 Atl. 769 (whether he had committed adultery; discretion of the trial Court to control); 1902, *Dore v. Babcock*, 74 id. 425, 50 Atl. 1016 (questions as to divorce for desertion, held improper, the subject not tending to "affect the veracity of a witness"); 1903, *State v. Nussenholtz*, — id. —, 55 Atl. 589 (question to an accused as to his prior arrest, excluded). 3. *Privilege against Disgracing Answers*: 1827, *Northrop v. Hatch*, 6 id. 361, 365 (the privilege does not the less apply because the crime asked about has been pardoned); 1881, *State v. Ward*, 49 id. 433, 442, *semble* (whether he lived with a woman who kept a house of ill-fame, privilege recognized); St. 1893, June 14, c. 198 (no privilege shall be recognized, in legislative investigations, for facts which "may tend to disgrace him or otherwise render him infamous"). 4. *Conviction of Crime*: 1856, *State v. Randolph*, 24 id. 363, 365 (such crimea are provable as disqualified at common law); Gen. St. 1889, § 1098 (quoted *ante*, § 488).

DELAWARE. 1. *Extrinsic Testimony*: 1851, *Robinson v. Burton*, 5 Harringt. 335, 339

("particular acts," excluded). 4. *Conviction of Crime*: Laws 1859, c. 598, § 3 (quoted *ante*, § 488); 1899, *State v. Burton*, 2 Marv. 446, 43 Atl. 254 (pointing a pistol; cross-examination of defendant as to conviction for a similar act excluded, as not relevant to credibility).

FLORIDA. 2. *Scope of Cross-examination*: 1898, *Roberson v. State*, 40 Fla. 509, 24 So. 474 (that the witness at a trial for assault had claimed to be feeble-minded, etc., excluded); 1899, *Wallace v. State*, 41 id. 547, 26 So. 713 (question as to "criminal charges pending against you," left to trial Court's discretion; so also other questions relating to "past life and history," etc.; but matters which do not affect credit should not be brought in). 3. *Privilege against Disgracing Answers*: 1899, *Wallace v. State*, 41 Fla. 547, 26 So. 713 (privilege not recognized). 4. *Conviction of Crime*: Rev. St. 1892, § 1096 (quoted *ante*, § 488); St. 1901, c. 4966 (conviction of "any crime except perjury" is not to disqualify; but "such conviction may be given to affect the credibility of the said witness").

GEORGIA. 1. *Extrinsic Testimony* is excluded: 1860, *Weathers v. Barkdale*, 30 Ga. 888 (that the witness had borne a bastard child); 1878, *Johnson v. State*, 61 id. 305, 307 (adultery); 1886, *Pulliam v. Cantrell*, 77 id. 563, 565, 3 S. E. 280; 1887, *Ratteree v. Chapman*, 79 id. 577, 4 S. E. 684 (adultery); 1896, *Killian v. R. Co.*, 97 id. 727, 25 S. E. 384 (that he had been charged with selling liquor illegally). 2. *Scope of Cross-examination*: Code 1895, § 5293 ("particular transactions . . . cannot be inquired of on either side," except in testing the knowledge of an impeaching witness, on the principle of § 989, *post*). 3. *Privilege against Disgracing Answers*: Code 1895, §§ 3957, 5288 (privilege covers matters "which shall tend to bring infamy or disgrace or public contempt upon himself or any member of his family"). 4. *Conviction of Crime*: 1884, *Georgia R. Co. v. Homer*, 73 Ga. 251 (larceny, admitted, as a *crimen falsi*); 1888, *Doggett v. Simms*, 79 id. 257, 4 S. E. 909 (same); 1893, *Ford v. State*, 92 id. 459, 17 S. E. 667 (an unspecified "crime involving moral turpitude," held admissible); 1894, *Coleman v. State*, 94 id. 85, 21 S. E. 124 (larceny, admitted); 1896, *Killian v. R. Co.*, 97 id. 727, 25 S. E. 384, *semble* (illegally selling liquor, admitted); 1897, *Shaw v. State*, 102 id. 660, 29 S. E. 477 (conviction, for the same crime, of a joint inditee, testifying for the defendant, received); 1903, *Andrews v. State*, 118 id. 1, 43 S. E. 852 (misemeanor not involving moral turpitude, excluded).

HAWAII. 1. *Extrinsic Testimony*: 1901, *Lyman v. Hilo Tribune P. Co.*, 13 Haw. 453, 457 (extrinsic testimony to specific acts, excluded). 2. *Scope of Cross-examination*: 1894, *Republic v. Tokaji*, 9 Haw. 548, 552 (whether he lived under another name elsewhere, held properly excluded); 1897, *Colbarn v. Spitz*, 11 id. 104 (cross-examination to "particular acts

forward, in and out of their proper jurisdictions, has done much to unsettle and to confuse the law. The greatest judicial service that can be ren-

of misconduct," — here, fraudulent bankruptcy —, not allowed); 1898, *Republic v. Luuug*, ib. 890 (questions as to habitual thievery and other crimes, held proper; "he may be questioned as to specific acts"; "the Court has large discretion"; preceding case not cited); 1900, *Merricourt v. Norwalk F. I. Co.*, 13 id. 218, 220 (trial Court has large discretion). 3. *Privilege against Disgracing Answers*: Civil Laws 1897, § 1419 (no claim of privilege against a question which is relevant and material to the matter in issue" on the ground that the answer may "disgrace or criminate himself" shall be allowed unless the Court is of opinion that the answer "will tend to subject such witness to punishment for treason, felony, or misdemeanor"). 4. *Conviction of Crime*: (Civil Laws 1897, § 1420 (conviction of "any indictable or other offence" may be proved); 1894, *Govt. v. Aloiau*, 9 Haw. 399 ("any offence," allowable).

IDAHO. 1. *Extrinsic Testimony*: Rev. St. 1887, § 6082 (like Cal. C. C. P. § 2051). 2. *Scope of Cross-examination*: Rev. St. 1887, § 6082 (like Cal. C. C. P. § 2051); 1899, *State v. Anthony*, 6 Ida. 383, 55 Pac. 884 (statute applied); 1903, *State v. Irwin*, — id. —, 71 Pac. 608 (questions to an accused, held improper on the facts). 3. *Privilege against Disgracing Answers*: Rev. St. 1887, § 6091 (like Cal. C. C. P. § 2065), § 149 (privilege denied for testimony before Legislature or committee thereof). 4. *Conviction of Crime*: Rev. St. 1887, § 6082 ("felony," admissible).

ILLINOIS. 1. *Extrinsic Testimony* is excluded: 1858, *Sheahan v. Collins*, 20 Ill. 329; 1876, *Dimick v. Downs*, 82 id. 573 (adultery, illegal sale of liquor); 1898, *Rippetoe v. People*, 172 id. 173, 50 N. E. 166. 2. *Scope of Cross-examination*: 1896, *Goon Bow v. People*, 160 Ill. 438, 43 N. E. 593, *semble* (question whether the witness kept an opium joint, allowed). 3. *Privilege against Disgracing Answers*: Rev. St. 1874, c. 38, § 3 (privilege not to obtain for witness testifying before Legislature or a committee thereof); 1899, *Halloway v. People*, 181 Ill. 544, 54 N. E. 1030, *semble* (privilege not recognized). 4. *Conviction of Crime*: Rev. St. 1874, c. 38, § 426, c. 51, § 1 (quoted *ante*, § 483); 1892, *Bartholomew v. People*, 104 Ill. 601, 607 ("infamous offence" is provable; the same rule as at common law for disqualification); 1902, *Matzenbaugh v. People*, 194 id. 108, 62 N. E. 546 (the crimes are to be defined by the common-law rule as to incompetency; here a conviction for fraud in scheduling property for taxation was held not to be "of the class of offences denominated 'crimen falsi'"; of this ruling it may be said, first, that the Courts should be the last ones to minimize the civic evil of such a form of lying, and, secondly, that in the present case, where the assessor sought to charge the appellant with taxes, it was absurd to hold that he could not be discredited by a conviction for falsifying in just such a transaction).

INDIANA. 1. *Extrinsic Testimony*: The prin-

ciple has been always recognized, except in an early case (1853, *Hill v. State*, 4 Ind. 112; bastardy, other intercourse before gestation-time, allowed); but the distinction between conduct impeaching character and conduct showing consent in rape cases (*ante*, § 200), and conduct showing other parentage in bastardy cases (*ante*, § 133), has not always been observed: 1841, *Walker v. State*, 6 Blackf. 4 (falshood); 1859, *Townsend v. State*, 13 id. 358, *semble* (bastardy; other intercourse before gestation-time, excluded); 1859, *Shattuck v. Myers*, ib. 50, *semble* (unchaste conduct of the daughter in a seduction case); *Bersch v. State*, ib. 436 (passing a counterfeit bill); 1860, *Long v. Morrison*, 14 id. 599 ("a single act of immorality"); 1861, *Wilson v. State*, 16 id. 393 (rape; the prosecutrix' credibility as a witness not allowed to be impeached by "a particular act of immorality"); 1879, *Cunningham v. State*, 65 id. 879, 381 (unchaste conduct); *Meyucke v. State*, 68 id. 403, *semble* (unchaste conduct); 1884, *South Bend v. Hardy*, 98 id. 580 (in general); 1888, *Bedgood v. State*, 115 id. 275, 281, 17 N. E. 621 (rape; intercourse with a third person admitted; reasoning obscure); 1895, *Griffith v. State*, 140 id. 163, 39 N. E. 440 (excluded). 2. *Scope of Cross-examination*: 1841, *Walker v. State*, 6 Blackf. 3, *semble* (bastardy; intercourse of the complainant with others, excluded as "irrelevant"); 1853, *Hill v. State*, 4 Ind. 112 (bastardy; other intercourse before gestation-time allowed); 1859, *Townsend v. State*, 13 id. 358 (like *Walker v. State*); 1861, *Bersch v. State*, ib. 436 (passing a counterfeit bill, excluded, as a "particular act"); 1877, *Farley v. State*, 57 id. 331, 338 (excluding even on cross-examination a question as to "an isolated act"); 1884, *South Bend v. Hardy*, 98 id. 579, 584 (the trial Court has discretion to permit, "if by affecting the credibility of the witness, it will subserve justice"; matters of sexual incontinence, *semble*, do not so affect credibility; here a former fraud of the plaintiff was held not improperly excluded); 1884, *Bessette v. State*, 101 id. 85, 88 ("It is proper, within the bounds of propriety, to be controlled by the trial Court, that the character and antecedents of a witness may be subjected to a test on cross-examination"; here, a rape on a minor; the prosecutrix' indecent conduct with her stepfather allowed to be inquired into); 1886, *Spencer v. Robbins*, 106 id. 580, 586, 5 N. E. 726 (action for partition of estate; cross-examination to adulterous pregnancy, held properly excluded; "it may be proper, however, under extraordinary circumstances," to ask as to character and antecedents, but "this is a matter within the sound discretion of the nisi prius Court"); 1888, *Bedgood v. State*, 115 id. 279, 17 N. E. 621 (rape; intercourse with a third person admitted; reasoning obscure); 1894, *Parker v. State*, 136 id. 284, 35 N. E. 1105 (of a defendant-witness, whether he had not been arrested and prosecuted, held proper in discretion); 1895, *Blough v. Parry*,

dered to-day is to keep the line of precedents clear and inflexible in each jurisdiction.

144 id. 463, 481, 40 N. E. 70, 43 id. 560 (cross-examination to particular misconduct, allowable in trial Court's discretion); 1897, *Shears v. State*, 147 id. 51, 46 N. E. 331 (like *Blough v. Parry*; here, questions as to former larceny); 1898, *Miller v. Dill*, 149 id. 326, 49 N. E. 272, *semble* (cross-examination of a female witness as to acts of dishonesty or immorality, not improperly allowed in trial Court's discretion); 1898, *Vanceave v. State*, 150 id. 273, 49 N. E. 1040 (whether a defendant-witness had been convicted of larceny and was under indictment for robbery, allowed); 1898, *Ellis v. State*, 152 id. 324, 52 N. E. 82 (questions "as to certain prosecutions against him for criminal offences," allowed); 1900, *Whitney v. State*, 154 id. 573, 57 N. E. 398 (whether the witness, with a "gang," committed frequent assaults, excluded). 3. *Privilege against Disgracing Answers*: 1841, *Walker v. State*, 6 Blackf. 1 (obscure); 1853, *Hill v. State*, 4 Ind. 112 (bastardy; other intercourse by the complainant; privilege repudiated); 1859, *Townsend v. State*, 13 Ind. 358 (same evidence; obscure ruling); 1859, *Shattuck v. Myers*, ib. 50 (unchaste conduct by the daughter in a seduction case; privilege recognized); 1880, *Smith v. Yaryan*, 69 id. 447 (same; but allowing the question for determining paternity, and thus apparently abandoning the privilege ground); 1884, *South Bend v. Harty*, 98 id. 583 (privilege repudiated for all matters relevant to the issue or affecting credibility); 1888, *Beigood v. State*, 115 id. 275, 280, 17 N. E. 621, *semble* (rape; question as to intercourse with others; privilege not recognized). 4. *Conviction of Crime*: Rev. St. 1897, § 519 (any fact formerly rendering incompetent may be shown to affect credibility).

INDIAN TERRITORY. 1. *Extrinsic Testimony*: 1896, *Oxier v. U. S.*, 1 Ind. T. 93, 38 S. W. 331 (excluded, under the Arkansas statute quoted *supra*). 2. *Scope of Cross-examination*: 1896, *Oxier v. U. S.*, 1 Ind. T. 93, 38 S. W. 331 (pointing out that the Arkansas statute *supra* is to be treated as excluding extrinsic testimony only; allowing such a cross-examination as will disclose "something of their character, antecedents, and credibility"; subject to the trial Court's power to prevent "an unreasonable or abusive cross-examination"; here admitting a question as to an arrest for larceny); 1897, *Oats v. U. S.*, 1 id. 52, 33 S. W. 673 (same); 1902, *Williams v. U. S.*, — id. —, 69 S. W. 871 (*Oxier v. U. S.*, approved); 3. *Privilege against Disgracing Answers*: 1896, *Oxier v. U. S.*, 1 Ind. T. 93, 38 S. W. 331 (recognized; here for a question as to former arrest).

IOWA. 1. *Extrinsic Testimony* is excluded: 1843, *Carter v. Cavanaugh*, 1 Greene, 171, 175 (in general); 1859, *State v. Sater*, 8 Ia. 420, 424 (reputation and arrest as a horse-thief). 2. *Scope of Cross-examination*: 1879, *Madden v. Kwanter*, 52 id. 693 (fraudulent transactions, *semble*, in this case excluded because used as a mere pretence for attacking character of the defendant, not the witness); 1888, *State v. Pugsley*, 75 id. 743, 38 N. W. 498 (question as to being in jail at the time, held proper, since "it is competent to ask a witness what is his occupation and where he resides"; this is a quibble; here the witness was only under indictment and not yet tried); 1895, *State v. Osborne*, 96 id. 281, 65 N. W. 159 (the witness' occupation, admitted); 1897, *State v. Watson*, 102 id. 651, 72 N. W. 283 (to a defendant, as to using an assumed name, etc., allowed in discretion); 1898, *State v. Chingren*, 105 id. 169, 74 N. W. 946 (questions as to occupation, allowed, in trial Court's discretion); 1899, *State v. Abley*, 109 id. 61, 80 N. W. 225 (question as to some unspecified crime, held improper); 1900, *Myers' Estate*, 111 id. 584, 82 N. W. 961 (whether the witness had not "stoien" his own buggy, held improper); 1902, *State v. Hogan*, 115 id. 455, 88 N. W. 1074 (whether he had ever been in a reform school, not allowed); 1903, *Germinder v. Machinery M. I. Ass'n*, — id. —, 94 N. W. 1108 (whether he had been accused of burning a barn, excluded); 1903, *Livingston v. Ileck*, — id. —, 94 N. W. 1098 (mortgage claim; whether the witness had not been arrested on the charge of selling the mortgaged property in controversy "might properly have been received as affecting his credibility"). 3. *Privilege against Disgracing Answers*: 1874, *Brown v. Kingsley*, 38 id. 220, 221 (seduction; illicit intercourse with other men, held privileged under the statute); 1888, *Mahanke v. Cleveland*, 76 id. 405, 41 N. W. 53 (question as to fraud in a deed, held not to appear privileged on the facts; "no rule applicable to all cases is possible"); Code 1897, §§ 4612, 4613 (answer tending "to expose him to public ignominy," privileged, except as to conviction for felony; and in prosecutions for gaming and liquor offences). 4. *Conviction of Crime*: Code 1897, § 4602 (quoted *ante*, § 488; facts formerly disqualifying may now be used to discredit); § 4613 (witness may be asked as to "conviction of a felony"); 1887, *Hanners v. McClelland*, 74 Ia. 318, 322, 37 N. W. 389 (not of any crime); 1890, *State v. O'Brien*, 81 id. 96, 46 N. W. 752 (felony in general); 1901, *Palmer v. R. Co.*, 113 id. 442, 85 N. W. 756 (under § 4602, a conviction for selling liquor without paying the Federal tax was excluded, as not receivable at common law; in general, a Federal conviction is not admissible under § 4602; whether under § 4613, not decided); 1903, *State v. Carter*, — id. —, 96 N. W. 710 (cheating by false pretences, a felony; admitted).

KANSAS. 1. *Extrinsic Testimony* is excluded: 1888, *State v. Johnson*, 40 Kan. 266, 269, 19 Pac. 749. 2. *Scope of Cross-examination*: 1886, *State v. Pfefferle*, 36 id. 90, 92, 12 Pac. 406 (the limits held reat largely in the trial Court's discretion; here admitting questions as to former convictions for illegal liquor-selling); 1890, *State v. Romain*, 44 id. 719, 25

In general, the state of the various laws on the foregoing topics may be thus summarized: (1) *Extrinsic testimony* to particular acts is universally

Pac. 225 (questions to an accused as to other crimes, held not in excess of discretion, or at any rate not prejudicial error); 1894, *State v. Reed*, 53 Id. 767, 37 Pac. 174 (questions as to previous adultery, etc., held improperly allowed on the facts); 1894, *State v. Wells*, 54 Id. 161, 37 Pac. 1005 (questions to an accused as to prior acts of violence, held properly allowed in discretion); 1898, *State v. Greenburg*, 59 Id. 404, 53 Pac. 61 (questions as to previous civil arrests, allowed; the trial Court to prevent unreasonable use of such cross-examination to specific facts; *Doster, C. J.*, diss., because a mere arrest does not involve the fact of guilt); 1902, *State v. Abbott*, 65 Id. 139, 69 Pac. 160 (rape); questions as to the prior conduct of the chief witness of the prosecution, held proper). 3. *Privilege against Disgracing Answers*: 1886, *State v. Pfefferle*, supra (not recognized). 4. *Conviction of Crime*: Gen. St. 1897, c. 95, § 330 (quoted ante, § 488); 1886, *State v. Pfefferle* (cited supra); 1891, *State v. Probasco*, 46 Kan. 310, 26 Pac. 749 (larceny, admitted); 1896, *State v. Park*, 57 Id. 431, 46 Pac. 713 (larceny, held admissible).

KENTUCKY. 1. *Extrinsic Testimony* is excluded: C. C. P. 1895, § 597 (impeachment "by evidence of particular wrongful acts," except conviction of felony, is to be excluded); 1821, *Hume v. Scott*, 3 A. K. Marsh. 261 (in general); 1857, *Thurman v. Virgin*, 18 B. Mour. 792 (hog-stealer; prostitute); 1859, *Henderson v. Haynes*, 2 Metc. 348, *semble* (in general); 1868, *Taylor v. Com.*, 3 Bush 511 (membership in a clique "banded to swear out negroes"); 1869, *Young v. Com.*, 6 Id. 315 (hog-stealer); 1880, *Campbell v. Bannister*, 79 Ky. 205, 208; 1901, *Welch v. Com.*, — Ky. —, 60 S. W. 185, 948, 1118 (sheriff's testimony to a pending warrant for arrest of witness, excluded); 1901, *Roberts v. Johnson*, — Ky. —, 64 S. W. 526. 2. 3. 4. *Scope of Cross-examination, Privilege against Disgracing Answers, and Conviction of Crime*; these three topics have in the last two decades become hopelessly confused and uncertain in the decisions of this State; nothing but a new expanding statute, recurring to first principles, can avail to clarify the law; one of the sources of confusion has been the injudicious practice of excluding certain formal opinions from official publication: C. C. P. 1895, § 597 (cited supra; compare the interpretation of the similar California statute, supra); 1831, *Sodnsky v. McGee*, 5 J. J. Marsh. 621 (privilege applied to a fact "reflecting on his character, unless it be pertinent to the issue independently of its tendency to affect character"; here, a question as to playing cards with a negro before or during the affray was held to embody facts partly material and partly immaterial, and therefore objectionable); 1870, *Pence v. Dozier*, 7 Bush 133 (seduction; whether the witness had had intercourse with the plaintiff's daughter, held privileged); 1890, *Mitchell v. Com.*, — Ky. —, 14 S. W. 489 (whether he had been in a

State prison, held not privileged; questions which "only tend to disgrace a witness, he may be compelled to answer"; no authority cited); 1892, *Burdette v. Com.*, 93 Id. 77, 18 S. W. 1011 (questions whether he had been convicted of stealing or sent to the workhouse for breaking and stealing; admitted, such tests to be applied "in a proper and pertinent manner and under control of the Court"; privilege as to disgracing answers, recognized); 1892, *Roberts v. Com.*, — Id. —, 20 S. W. 267 (allowing questions as to indictments for robbery, for conspiracy, etc.; the opinion erroneously assuming this question to have been settled in *Burdette v. Com.*); 1895, *Saylor v. Com.*, 97 Id. 190, 30 S. W. 390 (question to an accused as to other crimes; present question not raised); 1895, *Com. v. Wilson*, — Id. —, 32 S. W. 166 (detaining a woman for carnal knowledge; questions to the prosecutrix as to her adultery excluded, because "particular instances of moral turpitude" are inadmissible, reputation alone being admissible; no citations); 1896, *Warren v. Com.*, 99 Id. 370, 35 S. W. 1028 (whether the defendant-witness had recently been at work, whether a witness had not made it a business to bleed election-candidates, how often he had been in jail, etc.; admitted as within the trial Court's discretion; though "we are not to be understood as holding that counsel are to be allowed unrestricted liberty in cross-examination of this character, or that a witness is to be compelled to submit to an exploration of the most remote passages of his past life, by means of fishing questions in regard to scandalous or discreditable acts"); 1897, *Leslie v. Com.*, — Id. —, 42 S. W. 1095 (whether he was not a gambler, frequented a house of ill-fame, etc., allowed; but not whether he had not been arrested for certain offenses); 1898, *McCampbell v. McCampbell*, 103 Id. 745, 46 S. W. 18 (privilege applies to collateral matters only); 1899, *Baker v. Com.*, 106 Id. 212, 50 S. W. 64 (inquiry as to indictments, etc., at a time long previous, held improper on the facts); 1899, *Williams v. Com.*, — Id. —, 50 S. W. 240 (that defendant had just come from the penitentiary, held inadmissible, until defendant himself testifies); 1899, *Parker v. Com.*, — Id. —, 51 S. W. 573 (questions as to indictments for acts of violence, excluded as involving "particular wrongful acts" under the statute); *Pennington v. Com.*, — Id. —, 51 S. W. 818 (same); 1901, *Welch v. Com.*, — Id. —, 60 S. W. 948, 1118, 1131 (defendant as witness is privileged not to answer as to having been "accused of any crime, indicted for any crime, or convicted of any misdemeanor"; declaring *Burdette v. Com.*, *Roberts v. Com.*, and *Mitchell v. Com.* overruled in this respect; the opinion by *Duffy, J.*, loosely ignores the distinctions between proving particular acts by extrinsic testimony (supra, § 979), cross-examining to such acts (supra, § 981), and claiming a privilege not to answer (supra, § 984), and is useless; *Paynter, C. J.*, *Hobson* and *White, J.J.*, diss.; the opinion of *Hobson, J.*, points out this con-

conceded to be inadmissible. Sporadic rulings of admission have usually been due to some other principle misapplied. (2) For *cross-examination*, the

fusion, and justly complains of the reasoning of the majority opinion); 1901, *Ashcraft v. Com.*, — id. —, 60 S. W. 931 (questions to an accused as to other indictments against him, held improper; approving the preceding case); 1901, *Howard v. Com.*, — id. —, 61 S. W. 756 (similar; the same judges dissenting); 1901, *Johnson v. Com.*, — id. —, 61 S. W. 1005 (question as to an indictment for perjury on a former trial, excluded; following *Ashcraft v. Com.*); 1901, *Welch v. Com.*, — id. —, 63 S. W. 984 (construing § 37; reviewing the preceding cases, approving those of *Leslie*, *Baker*, *Parker*, and *Pennington*, and disapproving those of *Burdette* and *Roberts* as decided without considering the statute; now pointing out (1) that questions as to specific wrongful acts not proved by a judgment of conviction are improper as seeking evidence of character, although questions as to "his life and his associates" are proper, and questions as to wrongful acts relevant to the cause are proper; (2) that questions as to mere indictments or accusations are improper, except so far as they indicate bias, according to § 949, *ante*; (3) that an accused as a witness is in no less favorable a position than an ordinary witness; *Paynter*, *C. J.*, and *Hobson*, *J.*, *diss.*); 1902, *Trabue v. Com.*, — id. —, 66 S. W. 718 (question as to whom the witness lived with, held proper); 1902, *Ashcraft v. Com.*, — id. —, 68 S. W. 847 (question as to a prior arrest, excluded); 1903, *Hensley v. Com.*, — id. —, 74 S. W. 677 (questions as to prior indictments, excluded).

LOUISIANA. 1. *Extrinsic Testimony*: 1843, *Stanton v. Parker*, 5 Rob. 108, 109, *semble* (general principle); 1852, *State v. Parker*, 7 La. An. 83, 85 (excluding "particular acts or charges," and regarding as not thereby excluded testimony that the witness had the character of defrauding, extorting, and cheating, and that he was idle and dissolute and had lewd associations); 1892, *State v. Jackson*, 44 id. 159, 161, 10 So. 600 ("collateral facts, and particular inquiries as to any particular act or any particular associates," excluded; here, the witness' lewd and criminal associations); 1893, *State v. Taylor*, 45 id. 605, 608, 12 So. 927 (general principle); 1898, *State v. Wiggins*, 50 id. 330, 23 So. 334. 2. *Scope of Cross-examination*: 1893, *State v. Murphy*, 45 La. An. 958, 960, 961, 13 So. 229 ("Have you ever been arrested for stealing?" allowed; the trial Court's discretion controlling to prevent "unreasonable or oppressive cross-examination"; yet on re-hearing the Court shows ignorance of the distinction between cross-examination and outside testimony, and leaves the rule uncertain); 1895, *State v. Doudoussat*, 47 id. 977, 17 So. 685 (assumption of false name by prosecuting witness, excluded); 1896, *State v. Southern*, 48 id. 628, 19 So. 668 (a defendant testifying for himself; question whether he was then charged with another offence, admitted); 1901, *State v. Haab*, 105 La. 230, 29 So. 725 (trial Court's discretion

controls); 1903, *State v. Callian*, 109 id. 346, 33 So. 363 (question to a defendant, "How many times have you been before the Court?" held proper); 1903, *State v. Casey*, 110 id. 712, 34 So. 746 (to a defendant, "How many times have you been in trouble?" allowed).

MAINE. 1. *Extrinsic Testimony* is excluded: 1841, *Phillips v. Klugfield*, 19 Me. 375, 378 ("no particular acts of immorality or crime can be stated"); 1842, *Holley v. Webster*, 21 id. 461, 464 (language indicating an abandoned character); 1877, *State v. Morse*, 67 id. 428. 2. *Scope of Cross-examination*: 1876, *State v. Carson*, 66 id. 116 (whether he assaulted F. while drunk, excluded; impeachment by other crimes is not permissible on cross-examination; *Holbrook v. Dow*, *Mass.*, *infra*, followed). 3. *Privilege against Disgracing Answers*: 1831, *Tillson v. Bowley*, 8 Me. 163 (bastardy; the complainant's intercourse with another privileged, because hero criminal); 1841, *Low v. Mitchell*, 18 id. 372, 374 (same). 4. *Conviction of Crime*: *Rev. St.* 1883, c. 82, § 105 (quoted *ante*, § 488); 1873, *State v. Watson*, 63 Me. 123 (any criminal offence); 1876, *State v. Watson*, 65 id. 79; 1892, *State v. Farmer*, 84 id. 440, 24 Atl. 985 (a conviction twenty-seven years before, admitted; "time may soften the effect of such a record, but cannot destroy its applicability"; here, for illegal liquor-selling).

MARYLAND. 2. *Scope of Cross-examination*: 1885, *Smith v. State*, 64 Md. 25 ("anything which will tend to throw light upon his character" as to credibility is allowable, subject to the discretion of the trial Court to some extent; here a question as to having been in jail was allowed); 1902, *Bouaparte v. Thayer*, 95 id. 548, 52 Atl. 496 (indictment excluded; "that fact alone is not always equivalent to guilt"). 3. *Privilege against Disgracing Answers*: 1885, *Smith v. State*, *supra* (obscene); 4. *Conviction of Crime*: *Pub. Gen. L.* 1888, Art. 35, § 5 (conviction of an "infamous crime," admissible); 1894, *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603 (whether one has been "in jail, the penitentiary, or the State prison, or any other place that would tend to impair his credibility," admitted).

MASSACHUSETTS. 1. *Extrinsic Testimony* has always been excluded: 1825, *Com. v. Moore*, 3 Pick. 194, 196, *semble* (bastardy; intercourse of the prosecutrix with others, not received to impeach credit); 1857, *Garlner v. Way*, 8 Gray 189 ("particular acts of misconduct" not admissible; here, false accounts); 1859, *Holbrook v. Dow*, 12 id. 358 (quoted *infra*); 1870, *Com. v. Regan*, 105 Mass. 593, *semble* (rape; former declarations of pregnancy, etc., excluded); 1872, *Com. v. McDonald*, 110 id. 406, *semble*; 1885, *Jennings v. Machine Co.*, 133 id. 594, 598 (here, commercial dishonesty; "independent evidence of particular acts of misconduct" inadmissible). 2. *Scope of Cross-examination*: the state of the law in Massachusetts has been marked by some wavering between the two types of rules

rule of the trial Court's discretion is (in name, at least) the most widely adopted. The discretion, however, is in practice very often interfered with,

described as (2) and (3) *ante*, in § 983, — *i. e.* between the rule leaving the examination to the discretion of the trial Judge, and the rule excluding entirely an examination as to facts reflecting on character. In 1843, in *Hathaway v. Crocker*, 7 Metc. 206, in the well-known passage already quoted *ante*, § 944, Chief Justice Shaw laid down the general doctrine of the latitude of cross-examination; in which he leaves to "the sound discretion of the Court" such questions as aim "to test the purity of principle" of the witness, "his life and habits," and the like, "for the purpose of exhibiting the witness in his true light to the jury." The confusion seems then to have started with the opinion in *Com. v. Shaw*, 4 Cush. 593 (1849), where questions put to a witness for the prosecution, asking whether he had not secretly opened letters of the defendant, and having for their express object "to test the moral sense of the witness," were held properly excluded; *Bewey, J.*, for the Court, justified this on two grounds, — first, that these circumstances, as detracting from the moral credit of the witness, were not competent, and secondly, that the general discretion of the trial Court as to cross-examination (*ante*, § 944) would suffice to support the exclusion. Then in *Com. v. Savory*, 10 id. 535, 537 (1852), and *Com. v. Hills*, ib. 530, 532, questions, excluded below, as to the sexual immorality of a witness for the prosecution on a charge of receiving stolen goods, were held to have been within this same discretion of the trial Court, that discretion covering "new and entirely collateral matters." Yet, in 1854, in *Smith v. Castles*, 1 Gray 103, 112, questions to a witness, allowed below, as to having been expelled from the bar for perjury, were held improper; the trial Court's discretion was conceded, but here it was "carried too far," *i. e.* in going beyond "his ordinary pursuits in life, and the like," and allowing inquiry into "certain charges of misconduct". In *Com. v. Quin*, 5 id. 479, 480 (1855), a question why the witness had changed his name was held rightly excluded as "immaterial". In *Gardner v. Way*, 8 id. 189 (1857), the plaintiff, relying on his account-books as proof of goods sold, was not allowed to be impeached by outside evidence of former dishonest charges; and without any distinction as to extrinsic testimony, it was said that "nothing is more clear than that the character of a witness for truth and veracity is not to be impeached by proof of any particular act of misconduct" irrelevant to the case. In 1859, in *Holbrook v. Dow*, 12 id. 357, a cross-examination on facts of a similar sort, allowed below, "under the latitude of a cross-examination and to test the credibility," was held erroneously allowed; and the strict rule (3) of total exclusion was clearly laid down, by *Merrick, J.*: "It is a fixed and established rule in the law of evidence that it is not competent, for the purpose of creating a distrust of the witness' integrity and of thus disparaging his testimony, to prove particular acts of alleged misbehavior and dishonesty in relation to matters foreign to all questions which are involved in the trial." The next case, however, reverts to the discretion rule: 1865, *Prescott v. Ward*, 10 All. 204, 209 (promissory note; questions, excluded below, as to sexual misconduct and attempted blackmail, held to be within the discretion of the trial Court so far as they tended "to disparage her character"; no authorities cited). The next ruling declares a question, excluded below, to have been inadmissible, saying nothing about discretion: 1870, *Com. v. Regan*, 105 Mass. 593 (rape; former intercourse, and admissions of intercourse, by the prosecutrix; no authorities cited). In *Com. v. Mason*, ib. 163, 168, however, questions as to a former attempt to suborn a witness and as to a forgery were held to be within the discretion of the trial Court to exclude as "collateral and irrelevant." Then, in 1872, *Com. v. McDonald*, 110 id. 405 (rape; questions to the prosecutrix as to having been a common seller of liquor illegally), the discretion of the trial Court in excluding was sanctioned, the matters here having "a very remote bearing, if any at all, upon her general character for chastity." In *Jennings v. Machine Co.*, 138 id. 594, 597 (1885), facts affecting commercial honesty, coming in without objection in some unspecified way, were held proper for the jury to consider; whether there should be special limits to the relevancy of such facts, was expressly reserved; whether the facts in question could have been specifically asked for on cross-examination, was not intimated. Finally, in 1888, the matter seems to have been settled by *Com. v. Schaffner*, 146 id. 512, 515, 16 N. E. 280, where an expert testifying for the defence on a charge of milk-adulteration was asked to identify a letter from him as official assayer making a corrupt offer to one whose vinegar has been found deficient; the question and the introduction of the letter were held improper: "We are aware that in England and in some of the United States this latitude of cross-examination has sometimes been allowed, though not without protests that the practice ought to be restricted. In Massachusetts the rule has been that a witness cannot be asked on cross-examination, in order to affect his credibility, about his part in transactions irrelevant to the issue on trial. . . . We are satisfied that both witnesses and parties ought to be protected from being obliged to encounter such collateral charges." But in the same volume the discretion rule was reverted to: 1888, *Sullivan v. O'Leary*, 146 id. 322, 15 N. E. 775 (slander; cross-examination of the plaintiff to complaints of slander and foul language against the plaintiff by other persons, held improperly allowed in excess of the trial Court's discretion; *Com. v. Schaffner* not cited); and it is hard to say what the fixed rule is to be. Since the foregoing cases no settlement has been reached: 1902, *Com. v. Foster*, 182 id. 276, 65 N. E. 391 (trial Court's discretion in

to the detriment of the law's certainty. The contrast, nevertheless, is clear between this and the rule of absolute prohibition, on the one hand (which

general controls). 3. *Privilege against Disgracing Answers*: 1841, Dewey, J., in *Com. v. Turner*, 3 Metc. 25 (privilege recognized); 1852, *Com. v. Savory*, 10 Cush. 535, 537 (left undecided); St. 1895, c. 355, § 5 (in election inquiries, no person is to be excused because an answer or document may "disgrace him or otherwise render him infamous"). 4. *Conviction of Crime*: Pub. St. 1882, c. 168, § 19, *Revised Laws 1902*, c. 175, § 21 (quoted *ante*, § 488); 1867, *Com. v. Bonner*, 97 Mass. 587 (larceny, breaking and entering, rescuing a prisoner, admitted); 1869, *Com. v. Gorham*, 99 Id. 420 ("conviction" involves not merely the verdict of the jury but also the judgment of the Court); 1894, *Gertz v. Fitchburg R. Co.*, 137 Id. 77 (conviction in a Federal Court, admitted); moreover, "the statute puts all convictions of crime on the same footing," including, "it would seem, those which formerly would not have been admissible at all"; 1900, *Seannell v. R. Co.*, 176 Id. 170, 57 N. E. 341 (conviction of crime under a statute afterwards held unconstitutional, held admissible, the effect to be for the jury); 1903, *O'Connell v. Dow*, 182 Id. 541, 66 N. E. 788 (conviction as accessory to bribery).

MICHIGAN. 1. *Extrinsic Testimony* is excluded: 1867, *Wilbur v. Flood*, 16 Mich. 44 (in general); 1879, *People v. Knapp*, 42 Id. 267, 3 N. W. 927 (sexual improprieties); 1880, *People v. Whitson*, 43 Id. 420, 5 N. W. 454 (prostitution; decided on another point); 1881, *Hamilton v. People*, 46 Id. 188, 9 N. W. 247, *semble* (bastardy proceedings; intercourse with a third person at a distant period); 1882, *Driscoll v. People*, 47 Id. 416, 11 N. W. 221 (crimes); 1893, *People v. Mausannau*, 60 Id. 15, 21, 26 N. W. 797 (crimes); 1897, *Kingston v. R. Co.*, 112 Id. 40, 70 N. W. 315, 74 N. W. 230 (drunkenness, etc.). 2. *Scope of Cross-examination*: The satisfactory rule of *Wilbur v. Flood* has been adhered to with fair consistency, except in *People v. Mills*, a careless aberration which ought never to have occurred; 1867, *Wilbur v. Flood*, 16 Mich. 43 ("such collateral matters as may enable the jury to appreciate their [the witnesses'] fairness and reliability"; "a large latitude is given, where circumstances seemed to justify it, in allowing a full inquiry into the history of witnesses and into many other things tending to illustrate their true character"; so that within the trial Court's discretion, the questions may cover "all antecedents which are really significant, and which will explain his credibility"; here the fact of former confinement in the State Prison was held admissible); 1871, *Arnold v. Nye*, 23 Id. 295 (Cooley, J.: "very much ought to be left to the discretion of the circuit judge"; "when the evidence may or may not have been significant, according to circumstances, arbitrary rules of admission and exclusion . . . should not generally be allowed"; here the witness' character was being rehabilitated); 1872, *Gale v. People*, 26 Id. 157 (questions as to former arrests, etc., excluded, merely because the de-

fendant, by making a statement, did not become an ordinary witness); 1873, *Beebe v. Knapp*, 28 Id. 53, 72 (discretion-rule applied, here to admit questions as to sexual misconduct, in an action for desert); 1874, *Hamilton v. People*, 29 Id. 183 (whether he had been charged with crime, or had deserted from the army, allowed); 1875, *Blissell v. Starr*, 32 Id. 297 (examination into past life and character, held to be largely in the trial Court's discretion); 1878, *Saunders v. People*, 38 Id. 218 (former rascality of an informer, in dealing with the defendant, inquired into to test credibility); 1879, *People v. Knapp*, 42 Id. 267, 3 N. W. 927 (witness to adultery, allowed to be asked as to sexual improprieties with other persons); 1880, *People v. Whitson*, 43 Id. 420, 5 N. W. 454 (questions as to prostitution, allowed); 1880, *People v. Niles*, 44 Id. 608, 7 N. W. 192 (former charge of theft, admitted, *semble*); 1881, *Marx v. Hillweden*, 46 Id. 337, 9 N. W. 439 (arrest for pension-fraud; trial Court's exclusion in discretion, affirmed); 1881, *Hamilton v. People*, 46 Id. 188, 9 N. W. 247, *semble* (bastardy; questions as to illicit intercourse by the complainant beyond the period of gestation, admissible); 1882, *Driscoll v. People*, 47 Id. 417, 11 N. W. 221 (arrest for robbery, admitted); 1890, *Helwig v. Luscowski*, 82 Id. 621, 46 N. W. 1033 (arrest and conviction; excluding discretion affirmed); 1892, *People v. Harrison*, 93 Id. 596, 53 N. W. 725 (woman's chastity; cumulative questions rightly excluded in trial Court's discretion); 1892, *People v. Foote*, ib. 38, 52 N. W. 1036 (that he had been arrested for another crime, allowed); 1892, *People v. Kahler*, ib. 625, 630, 53 N. W. 826 (whether he was in the habit of drinking, excluded); 1893, *People v. Mills*, 94 Id. 630, 637, 54 N. W. 488 (cross-examination to chastity; "lack of chastity cannot be used to impeach the credibility of a female witness"; nothing said about the trial Court's discretion; seven decisions cited from other jurisdictions, none from Michigan); 1895, *People v. Sutherland*, 104 Id. 468, 62 N. W. 566 (how many times he had been drunk since the affair, excluded; but whether he had been arrested for being drunk, *semble*, admitted); 1897, *Kingston v. R. Co.*, 112 Id. 40, 70 N. W. 315, 74 N. W. 230 (as to "what his past life had been and what company he had kept in the past," allowed; here, as to drunkenness, keeping a low saloon, etc.); 1897, *People v. Parmelee*, 112 Id. 291, 70 N. W. 577 ("a thorough examination into his past life," held proper); 1899, *People v. McArron*, 121 Id. 1, 79 N. W. 944 (left to discretion of the trial Court; see quotation *supra*, § 983); 1900, *People v. Gotshall*, 123 Id. 474, 82 N. W. 274 (questions as to witness' attempt at suicide, wife-beating, arson, etc., excluded, where the cross-examiner had no expectation that the facts would be admitted and the attempt was merely to raise suspicion); 1900, *People v. Turney*, 124 Id. 542, 83 N. W. 273 (questions as to proposals to steal cattle, allowed); 1901,

obtains in perhaps half a dozen jurisdictions) and the rule of absolute license, on the other hand (which is in this country nowhere conceded). (3) The

Lange v. Wiegand, 125 Ill. 647, 85 N. W. 109, (how many times the witness' husband had been arrested, etc., excluded); 1901, *People v. Higgins*, 127 Ill. 291, 86 N. W. 812 (certain cross-examinations to character, held proper); 1901, *Travis v. Stevens*, 10, 687, 87 N. W. 85 (cross-examination to ill-fit relations, excluded, citing *People v. Mills*). 3. *Privilege against Disgracing Answers* is not recognized: 1867, *Wilbur v. Flood*, 16 Mich. 43, *semble*; 1869, *Clemens v. Conrad*, 19 Ill. 174, *semble*; 1871, *Strang v. People*, 24 Ill. 1, 7 (rape prosecutrix); 1870, *People v. Knapp*, 42 Ill. 267, 3 N. W. 927 (witness to adultery); 1880, *People v. Whitson*, 43 Ill. 620, 5 N. W. 454 (prostitution); 1888, *People v. McLean*, 71 Ill. 309, 38 N. W. 917, *semble* (rape prosecutrix). 4. *Conviction of Crime*: Comp. L. 1897, c. 282, § 99 (quoted *ante*, § 488); convictions were declared admissible in the following cases: 1867, *Wilbur v. Flood*, 16 Mich. 44 ("infamous crimes"); 1869, *Clemens v. Conrad*, 19 Ill. 174, *semble*; 1870, *Dickinson v. Duatin*, 21 Ill. 564 (disbarment of an attorney); 1882, *People v. Driscoll*, 47 Ill. 416, 1 N. W. 221 (in general); 1886, *People v. Mansannau*, 60 Ill. 15, 21, 26 N. W. 797 (in general); 1890, *Helwig v. Lascowski*, 82 Ill. 621, 46 N. W. 1033 ("minor offenses").

MINNESOTA. 2. *Scope of Cross-examination*: 1871, *McArdle v. McArdle*, 12 Minn. 93, 101, 107 (discretion of the trial court; here, "Have you more than one wife living?", admitted); 1871, *State v. McArthur*, 17 Ill. 76, 84, 86 (discretion of the trial court controls; here, "Did you not steal a gun since these cases have arisen?", admitted); 1901, *State v. Reuwick*; 85 Ill. 19, 88 N. W. 22 (whether the witness had been arrested, excluded); 1903, *State v. King*, 88 Ill. 175, 92 N. W. 963 (trial court's discretion). 3. *Privilege against Disgracing Answers*: 1859, *State v. Bilinsky*, 3 Minn. 246, 257 (recognizing a possible privilege for questions tending to "degrade or disgrace," repudiating any fixed distinction between collateral and material matters, adopting the rule that the privilege does not cover matters merely tending to show infamy; but within those limits leaving the whole matter to the sound discretion of the trial court; here the question tended to show fornication). 4. *Conviction of Crime*: Gen. St. 1894, §§ 5658, 6841 (quoted *ante*, § 488); 1890, *State v. Sauer*, 42 Minn. 259, 44 N. W. 115 ("crimes" is not restricted to those which at common law disqualified, because the common law on the subject did not prevail in Minnesota; "crimes" includes misdemeanors, here assault and battery); *State v. Adairson*, 43 Ill. 200, 45 N. W. 152 (same; any unspecified "crime" sufficient); 1899, *Harding v. R. Co.*, 77 Ill. 417, 80 N. W. 358 (personal injuries; question to plaintiff as to conviction for drunkenness, allowable; *Sauer* case approved).

MISSISSIPPI. 2. *Scope of Cross-examination*: Gen. St. L. 1892, § 1746 (quoted *infra*); 1859, *Anon.*, 37 Miss. 54, 58 (bastardy; a question to

the complainant, as to former lute course generally, excluded, as exceeding the "latitude of inquiry" necessary "to inform the jury of the character of the witness"); 1810, *Head v. State*, 44 Ill. 731, 735, 751 (allowing a question to a woman as to being a prostitute); 1896, *Tucker v. Tucker*, 74 Ill. 93, 19 So. 955 (that a female witness was in a brothel when arrested, excluded, unchastity being irrelevant); 1902, *McMasters v. State*, 81 Ill. 374, 33 So. 2 (murder; cross-examination of defendant's wife as to having bastard children, held improper). 3. *Privilege against Disgracing Answers*: 1870, *Head v. State*, *supra* (privilege recognized for questions tending to "bring them into disgrace or reproach"; here and of questions as to a woman's prostitution); Gen. St. L. 1892, § 2657 (privilege not to obtain for witness before Legislature); § 1746 (quoted *infra*). 4. *Conviction of Crime*: Gen. St. L. 1892, § 1746 ("any witness may be examined touching his interest in the cause or his conviction of any crime, and his answers may be contradicted, and his interest or his conviction of a crime established by other evidence; and a witness shall not be excused from answering any question, material and relevant, unless the answer would expose him to a criminal prosecution or penalty").

MISSOURI. 1. *Extrinsic Testimony* is excluded: 1883, *State v. King*, 79 Mo. 133 (yet allowing the facts of prostitution and intemperance to be shown as traits of general character, on the principle of §§ 923, 924. *ante*); 1889, *State v. Taylor*, 98 Ill. 240, 245, 11 S. W. 570; 1895, *State v. Sibley*, — Ill. —, 31 S. W. 1033 (unchastity of a woman); 1890, *State v. Vandiver*, 149 Ill. 502, 50 S. W. 692. 2. *Scope of Cross-examination*: 1878, *State v. Clinton*, 67 Mo. 380, 390 (declaring the same freedom of cross-examination for a defendant as for any other witness); 1880, *Muller v. Hospital Assoc.*, 73 Ill. 242 (affirming the opinion in 5 Mo. App. 401; admitting any facts tending to shake credibility by injuring the character; here a question to a Catholic priest whether he had broken his vows by marriage since ordination was allowed); 1890, *State v. Miller*, 100 Ill. 606, 621, 13 S. W. 832, 1051 (whether he had been in the penitentiary, admitted); 1892, *State v. Houx*, 109 Ill. 65, 19 S. W. 35 (questions as to "specific acts of alleged immorality commencing at a period twenty years previous, etc.," held improper); 1893, *State v. Hack*, 118 Ill. 92, 23 S. W. 1089 (questions whether she had "kept girls for the purpose of prostitution," held proper); 1894, *State v. Gesell*, 124 Ill. 531, 27 S. W. 1101 (the rule said (1) to exclude "specific past delinquencies," here adultery of a woman, but not "facts which go to show what the general moral character or reputation therefor are, and what the general moral character or reputation for truth"; but this seems inconsistent; (2) to prevent "raking in the ashes of long forgotten scandals", and a number of other processes of rhetorical indefiniteness); 1894,

privilege against disgracing answers has in almost all jurisdictions disappeared. Its service, so far as it was useful, is better rendered by the rule of

State v. Martin, 124 Id. 514, 28 S. W. 12 (question as to how many times he had been in jail, allowed); 1895, *Goins v. Moberly*, 137 Id. 116, 29 S. W. 985 (discretion of the trial Court); 1897, *Hancock v. Blackwell*, 139 Id. 440, 41 S. W. 205 (an inquiry into domestic troubles, excluded); 1898, *State v. Grant*, 144 Id. 56, 45 S. W. 1103 (custom as to taking whiskey home with him, excluded); 1900, *State v. Hale*, 156 Id. 102, 56 S. W. 831 (a defendant taking the stand cannot be cross-examined to other offences not throwing light on the one charged; compare § 2276, *post*); 1903, *State v. Boyd*, — Id. —, 76 S. W. 979 (cross-examination to a female witness having an illegitimate child, held allowable in discretion). 3. *Privilege against Disgracing Answers*: 1851, *Clementine v. State*, 14 Mo. 115 (recognized; but only for matters not "forming any part of the issue to be tried"; here presence in a bawdy-house was held not covered by the privilege); 1890, *Muller v. Hospital Assoc.*, 73 Id. 212, affirming 5 Mo. App. 401 (repudiating the privilege); 1891, *State v. Talbott*, Ib. 359 (assuming that the privilege applies where infamy is directly involved); Rev. St. 1899, § 4680 (witness examined as to conviction for crime "must answer any question relevant to that inquiry"). 4. *Conviction of Crime*: 1878, *State v. Ragan*, 68 Mo. 215, *semble* (admissible); 1887, *State v. Lochr*, 93 Id. 103, 5 S. W. 696 (larceny, admitted); 1889, *State v. Taylor*, 98 Id. 240, 244, 11 S. W. 570 (a mere misdemeanor or violation of local ordinance, excluded; here, frequenting a bawdy-house); 1890, *State v. Miller*, 100 Id. 622, 13 S. W. 332, 1051 (of any crime, admissible; here, that he had been "in the penitentiary"); 1893, *State v. Taylor*, 118 Id. 153, 24 S. W. 449 (that he had been in jail for larceny, allowed); 1894, *State v. Pratt*, 121 Id. 566, 26 S. W. 556 (similar); 1894, *State v. Smith*, 125 Id. 2, 28 S. W. 181 (of a felony; but "not a mere misdemeanor"); Rev. St. 1899, § 4680, Laws 1895, p. 284 (quoted *ante*, § 488; admitting conviction of a "criminal offence"); 1895, *State v. Donnelly*, 130 Id. 642, 32 S. W. 1124 (restricted to infamous crimes; excluding a conviction for gambling); 1896, *Gardner v. R. Co.*, 135 Id. 90, 36 S. W. 214 (an "infamous crime," but not a misdemeanor; here, excluding a conviction, for disturbing the peace, and another unspecified); 1897, *State v. Dyer*, 139 Id. 199, 212, 40 S. W. 768 (petit larceny, admitted); 1898, *State v. Grant*, 144 Id. 56, 45 S. W. 1103 (selling liquor illegally, excluded); 1901, *State v. Prendible*, 165 Id. 329, 65 S. W. 559 ("conviction of anything less than a felony does not impeach a witness"); 1903, *State v. Blitz*, 171 Id. 530, 71 S. W. 1027 (under Rev. St. 1899, § 4680, laws 1895, *supra*, the conviction may be of any criminal offence, including misdemeanors, for impeaching either the accused or any other witness; prior decisions repudiated; the statute held to have changed the law); 1903, *Chouteau L. & L. Co. v. Chris-*

man, 172 Id. 610, 72 S. W. 1002 (following *State v. Blitz*, *supra*); 1903, *State v. Thornhill*, 174 Id. 364, 74 S. W. 332 (conviction for gambling, a misdemeanor, admitted).

MONTANA. 1. *Extrinsic Testimony* is excluded: C. C. P. 1895, § 3379 (like Cal. C. C. P. § 2051). 2. *Scope of Cross-examination*: C. C. P. § 3379, *supra*; 1895, *State v. Gleim*, 17 Mont. 17, 41 Pac. 998 (excluding a series of questions involving all kinds of degrading matters); 1899, *State v. Yellow Hair*, 22 Id. 339, 55 Pac. 1023 (reasons for discharge from army, excluded); 1899, *State v. Shawwell*, Ib. 559, 57 Pac. 281 (to whom he paid rent, allowed on the facts). 3. *Privilege against Disgracing Answers*: C. C. P. 1895, § 3101 (like Cal. C. C. P. § 2046); Pol. C. 1895, § 264 (privilege abolished for testimony before legislative committee); Pen. C. 1895, § 172 (privilege abolished on trial for promising legislative bribery); 1895, *State v. Black*, 15 Mont. 143, 38 Pac. 674 (privilege recognized; here, a conviction of felony). 4. *Conviction of Crime*: C. C. P., § 3379 (conviction of "felony," admissible); P. C. § 1212 ("a person convicted of any offence" is competent, but "the conviction may be proved" to impeach him); 1895, *State v. Black*, *supra* (felony, admitted).

NEBRASKA. 2. *Scope of Cross-examination*: 1894, *Hill v. State*, 42 Nebr. 503, 60 N. W. 016 (the discretion of the trial Court shall control, quoting *Raul v. People*, N. Y.; here admitting questions as to former arrests for vagrancy, etc.); 1897, *Myers v. State*, 51 Id. 517, 71 N. W. 33 (rape; repeated insinuations of unchaste conduct of the complainant, *semble*, improper). 3. *Privilege against Disgracing Answers*: 1894, *Hill v. State*, *supra* (intimating that such a privilege exists); Comp. St. 1897, §§ 5911, 5912 (answer which would tend "to expose him to public ignominy," not conculable, except for conviction of felony). 4. *Conviction of Crime*: Comp. St. 1897, § 7199 (quoted *ante*, § 488); 1900, *Young Men's Ch. Ass'n v. Rawlings*, 60 Nebr. 377, 83 N. W. 175 (conviction for offences below felony, inadmissible under statute).

NEVADA. 1. *Extrinsic Testimony*: 1876, *State v. Larkin*, 11 Nev. 314, 330 ("specific acts of immorality," excluded). 2. *Scope of Cross-examination*: 1876, *State v. Huff*, 11 Nev. 17, 26 (former arrests and convictions for battery, excluded; the questions must "legitimately affect his credit for veracity; . . . no legitimate inference of the untruthfulness of a witness can be drawn from the fact that he has been convicted of frequent assaults and batteries"). 3. *Privilege against Disgracing Answers*: 1876, *State v. Huff*, *supra* (privilege recognized); Gen. St. 1885, § 3416 (like Cal. C. C. P. § 2063). 4. *Conviction of Crime*: Gen. St. §§ 3398, 3399 (quoted *ante*, § 488); *State v. Huff* (cited *supra*).

NEW HAMPSHIRE. 1. *Extrinsic Testimony* is excluded: 1850, *Hoitt v. Moulton*, 21 N. H. 586, 592 (frequent intoxication). 2. *Scope of*

judicial discretion. (4) *Convictions of crime* are everywhere conceded to be admissible. The tendency is to a simplicity of the rule defining the kinds

Cross-examination: 1842, *Clement v. Brooks*, 13 N. H. 92, 99 (left undecided); 1866, *State v. Staples*, 47 id. 113, 117 (questions as to having fairly charged innocent persons with crime; the discretion of the trial Court said to control; the rule not distinguished from that about privilege); 1877, *Guterson v. Morse*, 58 id. 165 ("necessarily regulated by a sound judicial discretion"; "a question of fact to be determined at the trial, in view of the appearance of the witness and all the circumstances of the case"); 1879, *Merrill v. Perkins*, 59 id. 343 (trespass and injury to health by being expelled from a house; whether he had not been expelled by legal force from every house he occupied within ten years, held not improperly excluded; "how far justice required the cross-examination to go in that direction was a question of fact to be determined at the trial term"); 1895, *Leaer v. New Hampshire F. Co.*, 68 id. 343, 44 Atl. 490 (discretion of trial Court; here, in an action for price of goods, questions as to defendant's financial career allowed); 1901, *Challis v. Lake*, 71 id. 90, 51 Atl. 260 (malpractice; that he did not possess a physician's license as required by law, allowed on cross-examination of the defendant). 3. *Privilege against Disgracing Answers*: 1842, *Clement v. Brooks*, 13 N. H. 92, 99, *semble* (privilege recognized); 1866, *State v. Staples* (cited *supra*). 4. *Conviction of Crime*: 1838, *Chase v. Bloodgett*, 10 N. H. 22, 24 (held altogether inadmissible, on a misunderstanding of the principle of § 979, *ante*; probably the only case of its kind in our law, except in New York); 1842, *Clement v. Brooks*, *supra* (left undecided); 1850, *Holt v. Moulton*, 21 id. 592 (approving *Chase v. Bloodgett*); this error was corrected by statute: St. July 13, 1871, now Pub. St. 1891, c. 224, § 26 (quoted *ante*, § 488).

NEW JERSEY. 1. *Extrinsic Testimony* was once admitted: 1830, *Fries v. Brugler*, 12 N. J. L. 79, *semble* (seduction; the daughter's unchaste conduct with third persons); but this would not be followed; compare § 210, *ante*.

2. *Scope of Cross-examination*: 1830, *Fries v. Brugler*, 12 N. J. L. 79 (seduction; whether the daughter had not said that a third person was the father of the child, allowed, as discrediting her); 1863, *Paul v. Paul*, 37 N. J. Eq. 25 (question as to being keepers of brothels, admitted); 1896, *Roop v. State*, 58 N. J. L. 479, 34 Atl. 749 (mere indictment, excluded); 1902, *State v. Barker*, 68 id. 19, 52 Atl. 284 (assault with intent to kill; questions to the defendant on cross-examination as to prior acts of violence, held improper). 3. *Privilege against Disgracing Answers*: 1807, *State v. Bailey*, 2 N. J. L. 396 (whether he had been convicted and punished for petit larceny; not to be answered, as a matter "which tends directly to dishonor and disgrace him"; the contrary rulings said to be "modern decisions" not in harmony with the "ancient law"; 1811, *Vanghu v. Ferrine*, lb. 534 (seduction; whether the daughter had had criminal connection with others, and whether

another witness had had connection with her or had sat up late with her; privileged, as tending to "disgrace." "Infamy," "stigmatize or dishonor"; "the doctrine laid down by Mr. Swift is not law; the distinction between what is connected with the issue, and what is not, is without foundation"); 1830, *Fries v. Brugler*, *supra* (seduction; whether the daughter had not said to a third person that he was the father of the child; privileged, as tending to "disgrace," serving to "disparage, disgrace, or discredit"); 1896, *Roop v. State*, *supra* (privilege repudiated). 4. *Conviction of Crime*: Gen. St. 1896, "Evidence," § 1 (quoted *ante*, § 488); 1896, *Roop v. State*, *supra* (keeping a disorderly house, admitted); 1901, *State v. Hanson*, 66 id. 601, 50 Atl. 465, 616 (the crime may be of any kind under § 1, Gen. St., Vol. 11., p. 1397; neither the list of crimes formerly disqualifying, nor the indefinite common-law list, was intended to limit the kind of crimes available).

NEW MEXICO. 2. *Scope of Cross-examination*: 1895, *Terr. v. De Gutman*, 8 N. M. 92, 42 Pac. 68 (adultery of a woman, admitted); 1896, *Terr. v. Chavez*, lb. 528, 45 Pac. 1107 (quoted *ante*, § 983; here an inquiry into various acts of ruffianism and outlawry, and indictments therefor, was allowed); 1896, *Borrego v. Terr.*, lb. 446, 46 Pac. 349 (discretion of trial Court; here admitting questions as to murders committed). 3. *Privilege against Disgracing Answers*: 1894, *Terr. v. De Gutman*, *supra*, 68 (not recognized); 1896, *Terr. v. Chavez*, *supra* (same); 1896, *Borrego v. Terr.*, *supra* (same). 4. *Conviction of Crime*: Comp. L. 1897, § 301d (quoted *ante*, § 488; all facts formerly disqualifying may be shown to discredit); § 3025 (conviction for "any felony or misdemeanor" is admissible); 1896, *Terr. v. Chavez*, *supra* (felony, admitted; a pardon for the crime does not exclude the conviction).

NEW YORK. 1. *Extrinsic Testimony*. The doctrine of exclusion has been rigidly enforced since the first ruling. It is worth while to note, however, that though the reasons already set forth (*ante*, § 979) were correctly understood by the Courts as affecting, not particular acts in themselves, but only extrinsic testimony thereof, yet the prohibition absolutely of "particular acts" in the California Code and similar legislation seems to have been partly due to a misreading of the New York cases, and to a failure to appreciate that it was only the extrinsic testimony that is meant by them to be excluded: 1816, *Jackson v. Lewis*, 13 Johns. 504 (that the witness was or had been a public prostitute, excluded; "the inquiry as to any particular immoral conduct is not admissible against a witness"); 1827, *Root v. King*, 7 Cow. 635, per Savage, C. J. ("never allowed"); 1829, *Jackson v. Osborn*, 2 Wend. 558 (that the witness had been indicted for perjury and forgery, excluded; "the credibility of a witness is not to be impeached by proof of a particular offence, but by evidence of general bad character"); 1835, *Bakeman v. Rose*, 14

of crime (*i. e.* either all crimes, or felonies only), instead of the common-law subtleties.

id. 105, 110, 18 id. 147 (same ruling as Jackson *v.* Lewis; "particular immoral conduct" excluded); 1838, *People v. Abbot*, 19 id. 198, per Cowen, J.; *People v. Rector*, ib. 580, per Cowen, J.; 1847, *Howard v. Ins. Co.*, 4 Den. 502, 508; 1851, *Corning v. Corning*, 3 N. Y. 104; 1851, *People v. Gay*, 1 Park. Cr. 315; 1857, *People v. Jackson*, 3 id. 395; 1859, *People v. Blakeley*, 4 id. 183; 1859, *Stephens v. People*, 19 N. Y. 570 ("particular acts not directly involved in the issue"); 1862, *Newcomb v. Griswold*, 21 id. 298; 1864, *Wehrkamp v. Willet*, 4 Abb. App. 556; 1866, *LaBeau v. People*, 34 id. 230; 1878, *People v. Brown*, 72 id. 573; 1881, *Conley v. Meeker*, 85 id. 618. 2. *Scope of Cross-examination*: There is in the following series of rulings a feature of irregular variegation which has made it almost impossible to say what the law will be after the next decision, and is due in the past chiefly to a habit of ignoring previous individual rulings. Three questions in particular call for mention. (1) The doctrine of the *trial Court's discretion*; this was clearly expounded in the cases of *Turnpike Co. v. Loomis* and *LaBeau*; was then more or less limited in the cases of *Real*, *Stokes*, *Ryan*, and others; and seems to have been ignored in that of *Giblin*. What is needed is a definite statement whether the Court will or will not leave entirely to the trial Court's discretion all matters other than those covered by the next doctrine. (2) The doctrine that a *mere arrest*, etc., is irrelevant and never admissible; this was first clearly settled in *Gay's* case, and seems to have been consistently adhered to, after *Brown's* case; though it has had to be re-argued and re-explained several times since; the bar should be plainly shown that they will not be allowed to re-open a rule once settled. (3) The doctrine that questions may be put to an ordinary witness that may not be put to a testifying *accused person*; this was started in the *Brown* and *Crapo* cases, though apparently ignored in the *Clark* and *Giblin* cases; the present fate of the doctrine seems to be uncertain; compare § 2276, *post*; 1838, *People v. Rector*, 19 Wend. 573, 581, 582 (whether he was living in adultery and frequenting drinking-houses at night, allowed); 1842, *Carter v. People*, 2 Hill 317, *semble* (whether he had been complained of and bound over on the charge of passing counterfeit money; admitted); 1847, *Howard v. Ins. Co.*, 4 Den. 504, 506 (false representations by the witness as to the business of the store that had been burned, question allowed); 1848, *Lohman v. People*, 1 N. Y. 385, *semble* (whether he had committed fornication, or had the venereal disease, allowed); 1852, *People v. Gay*, 1 Park. Cr. 312, 7 N. Y. 378, *semble* (whether he had been committed for trial on a charge of perjury; admitted below, but apparently disapproved on appeal, and *Carter v. People* similarly criticised, because the fact of a charge being made shows nothing as to guilt; but it is impossible to say whether these opinions mean merely that such answers do not

sufficiently impeach character to allow good character to be shown in rebuttal, or that the questions themselves on cross-examination would have been excluded if objected to; evidently the practice at this time was to ask such questions without objection); 1862, *Newcomb v. Griswold*, 24 N. Y. 299 (permitting questions "tending to discredit and disgrace," "if the answer relate to the conduct of the witness and legitimately affect his credit for veracity"; but "the boundary and limit of such examination is not well defined, and the cases may not be in harmony touching the principle upon which whatever of rule there may be rests, or the extent to which the rule should be carried in permitting a cross-examination as to independent collateral acts of the witness affecting his moral character or as to specific acts of criminality or crime"); 1865, *Third Great Western Turnpike Co. v. Loomis*, 32 id. 127, 132, 138 (quoted *ante*, § 983; questions affecting the witness' credit, if on matters not "bearing directly on the issue," are left entirely to the discretion of the trial Court, and may be excluded by him irrespective of whether the witness claims a privilege); 1865, *Lipe v. Eisenlerd*, 32 id. 238 (whether he was under indictment for murder; excluded, on the authority of *People v. Gay*, as irrelevant to impeach credit; *Turnpike Co. v. Loomis* ignored); 1866, *LaBeau v. People*, 34 id. 230 (questions excluded below as to sexual immorality; *Turnpike Co. v. Loomis* followed; "inquiries on irrelevant topics to discredit the witness, and to what extent a course of irrelevant inquiry may be pursued, are matters committed to the sound discretion of the trial Court"); 1867, *Shepard v. Parker*, 36 id. 617 (promissory note; defence, that it was given in settlement for a rape by A. on P.; P. being a witness, the question was allowed whether she had not secretly signalled A. to come to her house; this was held proper, within the trial Court's discretion); 1870, *Brandon v. People*, 42 id. 265, 268 (whether she had been arrested for theft; held proper, only one judge noting that it was a matter of judicial discretion); 1870, *Real v. People*, ib. 280 (whether he had ever been in the penitentiary, and how long, "or in any other place that would tend to impair his credibility," held proper; the extent of such cross-examination being "somewhat" in the trial Court's discretion); 1872, *Connors v. People*, 50 id. 260 ("How many times have you been arrested?"; allowed, as within the discretion of the trial Court); 1873, *Stokes v. People*, 53 id. 176 (whether she had not left her employer without consent or knowledge and taken things not belonging to her; held proper); 1874, *Southworth v. Bonnett*, 58 id. 859 (whether he was under indictment for usury; allowed, within the discretion of the Court); 1878, *People v. Casey*, 72 id. 393, 398 (questions as to other quarrels and other assaults; allowed, the matter to rest largely in the trial Court's discretion, and the general scope admissible covering answers "disclosing his past life and conduct and

§ 988. Rumors of Particular Misconduct, on Cross-examination of a Witness to Good Character, distinguished. The settled rule against impeach-

ment thus impairing his credibility"); 1878, *People v. Brown*, ib. 671 ("How many times have you been arrested?"; departure made from former rulings; whether the question was proper for an ordinary witness, left undecided; but for an accused taking the stand, held improper; not because irrelevant to discredit, for it must "legitimately tend to impair the credit of the witness for veracity, either directly, or by its tendency to establish a bad moral character", but because of its unfair effect, since "every humorality, vice, or crime . . . is brought out ostensibly to affect credibility, but is practically used to produce a conviction for an offence for which the accused is being tried, upon evidence which otherwise would be deemed insufficient"; but the Court does not carefully distinguish between the present rule and the privilege against degrading questions); 1879, *People v. Crapo*, 78 id. 288 ("Were you arrested on a charge of bigamy in 1869?"; held erroneously allowed against an accused, not merely on the ground of the preceding case, but as totally irrelevant to discredit, and therefore inadmissible even against an ordinary witness, since such questions "should at least be of a character which clearly go to impeach his general moral character and his credibility as witness," and the above question, dealing with a mere charge of crime, did not do this); 1880, *Ryan v. People*, 79 id. 597 (whether an ordinary witness had been indicted for an assault; held, *obiter*, improper, accepting the dictum in the preceding case, as irrelevant to affect credibility; the relation of this ruling to the doctrine of the trial Court's discretion pointed out; "a witness may be asked in the discretion of the Court as to transactions which affect his character, either for truth or veracity, or his moral character; but not as to such as do not have that effect"; two judges dissent, leaving all to the trial Court's discretion); 1881, *People v. Court*, 83 id. 436, 460 (questions of varied range; held admissible within the trial court's discretion, under the limitations of *Ryan v. People*); 1881, *Nolan v. B. Co.*, 87 id. 63, 68 (whether he had been expelled from the fire department; held improper, as irrelevant to discredit under the preceding rule); 1883, *People v. Noelke*, 94 id. 137, 143 (whether he had been engaged in the lottery business, held relevant, under the preceding rule); 1884, *People v. Irving*, 95 id. 541 (questions as to an assault upon W.; held properly admitted within the trial Court's discretion, as relevant to impair the credit of the witness by its tendency to establish a bad moral character"; the doctrine of *Ryan v. People* and *People v. Crapo* affirmed, that "mere charges or accusations or even indictments may not so be inquired into, since they are consistent with innocence and may exist without moral delinquency"); 1886, *People v. Clark*, 102 id. 736, 8 N. E. 38 (whether the accused had been charged with anything criminal or disgraceful, improper; up to those limits, the discretion of the trial Court prevails; no authorities cited); 1889, *People v. Giblin*, 115 id. 196, 199, 21 N. E. 1082 (murder; question to the defendant, whether he had been in possession of counterfeiting dies and plates; held proper, as impeaching his credibility by "connecting him with a nefarious occupation" and the doctrine of *People v. Brown* and *People v. Crapo* ignored); 1891, *Van Bokkelen v. Berdell*, 130 id. 141, 145, 29 N. E. 251 (to a defendant, whether he had been indicted for perjury, excluded, citing the cases of *Craigs*, *Ryan*, *Noelke*, and *Irving* only); 1892, *People v. Tice*, 131 id. 651, 657, 30 N. E. 494 (trial Court's discretion to control, provided only that it relates to relevant matters or matters affecting credibility; the trial judge may properly restrict the cross-examination of accused persons within narrower limits than in ordinary cases, but the latitude allowed is a matter for the trial judge); 1892, *People v. McCormick*, 135 id. 663, 32 N. E. 26 (to a defendant, as to a former act of violence, allowed); 1893, *People v. Webster*, 139 id. 73, 84, 34 N. E. 730 ("It is now an elementary rule that a witness may be specially interrogated, upon cross-examination, in regard to any vicious or criminal act of his life"; the extent being "discretionary with the trial Court"; here, questions to a defendant as to his immoral relations with a woman were allowed); 1898, *People v. Dorthy*, 156 id. 237, 50 N. E. 800 (whether he had been expelled by his church, not allowed; whether he had been removed from the bar, allowed, but not the details of the grounds therefor); 1899, *People v. Braun*, 158 id. 558, 53 N. E. 529 (inquiries as to past career, family history, held to be within the trial Court's discretion). 3. *Privilege against Disgracing Answers*: The privilege seems to be fully recognized as a part of the common law, though not always accurately distinguished from the question of the scope of cross-examination; the leading cases being those of *Mather* and *Rector*; but in latter years the partial statutory abolition of the privilege for criminal cases seems to have cast a doubt upon its validity in civil cases: 1816, *People v. Herriek*, 13 Johns. 82 (whether the witness had been convicted of petit larceny; excluded, partly as provable only by the record of conviction, partly as a fact which, producing infamy and thus disqualifying the witness, he is privileged from answering); 1826, *Southard v. Rexford*, 6 Cow. 254 (having fornication with the unmarried plaintiff; privilege allowed, but treated apparently as a matter of self-extermination); 1830, *People v. Mather*, 4 Wend. 237, 250 (whether the witness had been present at a certain house, objected to as involving disgrace, namely, a share in the abduction of William Morgan, the Mason; the privilege against answering a question of disgrace or infamy assumed by the Court without doubt to exist); 1838, *People v. Rector*, 19 id. 569 (allowed per *Cowen, J.*, at 574, 586, *Bronson, J.*, at 600, *Nelson, C. J.*, at 610, the witness having been asked as to living in adultery, frequenting drink-

ment by extrinsic testimony of particular acts of misconduct (*ante*, § 979) is to be distinguished in its application from a kind of questioning which

ing-places, etc.); 1848, *Lohman v. People*, 1 N. Y. 379 (fornication by an unmarried woman, venereal disease; excluded; the privilege not applying to facts material to the issue); 1855, *People v. Christie*, 2 Park Cr. 581. ("whether he had a bias against Roman Catholics," excluded); 1857, *Strong, J.*, in *People v. Jackson*, 3 id. 396 (privilege recognized for "any act disconnected with the main transaction which would have a tendency to degrade him"); 1859, *People v. Blakeley*, 4 id. 181 (having a venereal disease since marriage; privilege allowed); 1862, *Newcomb v. Griswold*, 21 N. Y. 299 ("tending to discredit and disgrace," used to define the privilege); 1865, *Thirl G. W. Turnpike Co. v. Loomis*, 32 id. 127, 137 ("questions tending to disgrace," may be objected to, unless "bearing directly on the issue"; as to those not "relevant to the issue," the trial Court is apparently allowed a discretion to admit them and the privilege is subject to this discretion); 1866, *Le Beau v. People*, 34 id. 230 (preceding case affirmed); 1866, *Shepard v. Parker*, 36 id. 517 (privilege recognized); 1870, *Brandon v. People*, 42 id. 269 (privilege recognized); 1873, *People v. Brown*, 72 id. 573 (privilege recognized for the accused as a witness, and as to matters not relevant to the issue, no discretion permitted in admitting them; as the witness is also a party, his counsel is allowed to make objection for him); 1879, *People v. Crapo*, 76 id. 290 (similar facts; but though the counsel here also made the objection, the Court intimate that that will not raise the question, and therefore decide the case on the ground of relevancy, not of privilege). So far as concerns conviction for crime, the privilege has been abolished: 1881, Penal Code, § 714: "[The conviction may be proved] . . . by his cross-examination, upon which he must answer any proper question relevant to that inquiry"; applied as follows: 1883, *People v. Noelke*, 94 N. Y. 144; 1889, *Spiegel v. Hays*, 118 id. 661, 22 N. E. 1105. 4. *Conviction of Crime.* The cases above cited in par. 1 show clearly that on principle a record of conviction was regarded as admissible; and this has been distinctly laid down a number of times: 1843, *Carpenter v. Nixon*, 5 Hill 200 (petit larceny; admitted); 1862, *Newcomb v. Griswold*, 24 N. Y. 298 (in general; admissible); 1877, *West v. Lynch*, 7 Daly 248 (admitted). The following rulings, excluding such evidence in civil cases, can hardly have been law; 1863, *Gardner v. Bartholomew*, 40 Barb. 327; 1878, *Sims v. Sims*, 75 N. Y. 472 (distinguishing on the erroneous theory that it "contravenes the rule that proof of particular acts or offences, except from the mouth of the witness himself," is improper). The admissibility is now settled by C. C. P. 1877, § 832, P. C. 1881, § 714 (quoted *ante*, § 488; admitting conviction of "a crime or misdemeanor"); applied as follows; 1883, *People v. Noelke*, 94 id. 137, 144; 1889, *Spiegel v. Hays*, 118 id. 660, 22 N. E. 1105.

NORTH CAROLINA. 1. *Extrinsic Testimony* is excluded: 1834, *Downey v. Murphey*, 1 Dev. & B. 84 (affirming the principle); 1830, *Bar on v. Morphey*, 2 Dev. 520 (whether he had been charged with stealing); 1886, *State v. Garland*, 95 N. C. 672 (intoxication on one occasion); 1888, *State v. Bullard*, 100 id. 488, 6 S. E. 191 (affirming the principle); 1890, *Nixon v. McKinney*, 105 id. 27, 28, 11 S. E. 154 (that the witness had forged a deed); 1899, *State v. Warren*, 124 id. 807, 32 S. E. 552 (complainant in bastardy). 2. *Scope of Cross-examination*: 1842, *State v. Patterson*, 2 Ired. 316, 353 (questions having a tendency to disparage or disgrace may be asked); 1853, *State v. Garrett*, *Busbee* 358 (allowing a question as to being indicted, convicted, and whipped, for stealing); 1854, *State v. March*, 1 Jones L. 526 (whether he had committed perjury in another State, allowed); 1868, *State v. Cherry*, 63 N. C. 32 (allowing questions whether she had not been delivered of a bastard child; whether she had not had unlawful intercourse; here the witness was the prosecutrix for an alleged rape; for the exclusion of similar facts, not asked from the point of view of credibility, by the same Court, see § 200, *ante*). 3. *Privilege against Disgracing Answers*: 1842, *State v. Patterson*, *supra*, *semble* (recognized); 1853, *State v. Garrett*, *supra* (same).

NORTH DAKOTA. 1. *Extrinsic Testimony* is excluded: 1896, *State v. Panoast*, 5 N. D. 516, 67 N. W. 1052. 2. *Scope of Cross-examination*: 1890, *Terr. v. O'Hare*, 1 N. D. 30, 44, 44 N. W. 1003 (cross-examination to character is "within the limits of a sound judicial discretion"); 1896, *State v. Panoast*, *supra* ("if such other facts tend to weaken his credibility"; repudiating the rule of the *Crapo* Case, N. Y. that the fact of the witness being also the defendant makes any difference in the scope of questioning; excluding questions as to the finding of an indictment, the making of accusations, and other circumstances not involving actual guilt; also excluding crimes committed many years before); 1899, *State v. Roznm*, 8 id. 548, 80 N. W. 480 (keeping a liquor nuisance; question as to arrest for a similar offence and resistance to an officer, allowed); 1899, *State v. Ekanger*, *ib.* 559, 80 N. W. 482 (same; question as to being a professional gambler, allowed).

OHIO. 1. *Extrinsic Testimony* is excluded: 1876, *Webb v. State*, 29 Oh. St. 351, 358. 2. *Scope of Cross-examination*: 1870, *Wroe v. State*, 20 Oh. St. 460, 469 (largely in the trial Court's discretion; to be excluded "when a disparaging course of examination seems unjust to the witness and unequal for by the circumstances of the case"; here admitting questions as to being discharged from the police force, being under indictment for murder); 1871, *Lee v. State*, 21 id. 151 (the cross-examination of an accomplice held on the facts to have been unreasonably restricted); 1876, *Coble v. State*, 31 id. 102 ("How many times have you been arrested?"; admissible); 1877, *Hamilton v. State*, 34 id. 86

rests upon the principle that the witness' grounds of knowledge (*ante*, § 655) may always be inquired into. When witness A is called to support

(Wroe's Case approved; a question as to former indictment, excluded only because it included the defendant also, who had not testified); 1877, *Bank v. Simons*, 31 id. 142, 147 (Wroe's Case followed; the Court's discretion not disturbed in excluding a question as to a violation of the banking-law); 1881, *Hanoff v. State*, 37 id. 150 (Wroe's Case approved; the trial Court's discretion given great range; examination "for the purpose merely of disgracing a witness, which neither relates to the issue nor seems to test the credibility," discountenanced; no other rule for an accused person than for an ordinary witness, the N. Y. doctrine of Crapo's Case not being accepted as a rule of evidence; here admitting questions as to previous arrests and indictments for assault and battery, etc.; Okey, J., dissenting). 3. *Privilege against Disgracing Answers*: 1870, *Wroe v. State*, *supra* (ignored); 1876, *Colde v. State*, *supra* (apparently recognized); Rev. St. 1898, § 53 (privilege declared not to apply to testimony before legislative committee). *Conviction of Crime*: 1876, *Colde v. State*, *supra* (violation of a city ordinance, excluded); Rev. St. 1898, § 7284 (quoted *ante*, § 488).

OKLAHOMA. 4. *Conviction of Crime*: Stats. 1893, c. 66, § 331 (quoted *ante*, § 488).

OREGON. 1. *Extrinsic Testimony* is excluded: Codes & Gen. L. 1892, C. C. P. § 840 (like Cal. C. C. P. § 2051 substituting "crime" for "felony"); 1879, *Steeple v. Newton*, 7 Or. 110, 114, *semble*. 2. *Scope of Cross-examination*: C. C. P. § 840, *supra*; 1879, *Steeple v. Newton*, *supra* (conduct not available through extrinsic testimony, but called out by the impeached witness' party on cross-examination, admitted); 1886, *State v. Bacon*, 13 id. 143, 147, 155, 9 Pac. 393 (cross-examination to prior misdeeds is "within the sound discretion of the Court"; but "a sound discretion will never sanction inquiries the sole purpose of which is to disgrace the witness and not to test his credibility"; here a question as to prior arrest was allowed); 1886, *State v. Saunders*, 14 id. 300, 309, 313, 12 Pac. 441 (approving the preceding case; but restricting the cross-examination of accused persons, by implication of statute, to facts involved in the issue, and excluding questions about prior misconduct as evidence of character); 1900, *State v. Savage*, 36 id. 191, 60 Pac. 610, 61 Pac. 1128 (questions excluded on the facts). 3. *Privilege against Disgracing Answers*: C. C. P. § 847 (like Cal. C. C. P. § 2065). 4. *Conviction of Crime*: C. C. P. § 710 (quoted *ante*, § 488); § 840, *supra*.

PENNSYLVANIA. 1. *Extrinsic Testimony* is excluded: 1798, *Stout v. Russell*, 2 Yeates 334, 338 (whether he had not been arrested as an accomplice of a fraudulent schemer for whom the defendant had gone surety; excluded, as "charges of particular offences of which he has not been convicted" were improper for impeachment); 1857, *Elliott v. Boyles*, 31 Pa. 65 (on the present ground and also on that of collateral

contradiction; here said of the former commission of perjury). 2. *Scope of Cross-examination*: 1857, *Elliott v. Boyles*, *supra* (excluded entirely; here the former commission of perjury; quoted *ante*, § 983). 3. *Privilege against Disgracing Answers*: 1802, *Respublica v. Gibbs*, 4 Dall. 253, 3 Yeates 429, 437 (privilege recognized as applying to one pardoned for treason; compare § 2555 *post*, as to the theory of this case); 1803, *Galbreath v. Eichelberger*, ib. 515 (declining to compel an answer to a question whether a deed had been executed in fraud of creditors, since such a transaction was "unfurlous and immoral, and would justly subject every person concerned in it to ignominy and contempt"); 1811, *Rush, Pres.*, in *Bell's Case*, 1 Browne 376 ("where the answer to a question would cover the witness with infamy or shame, I have refused to compel him to answer it"); 1857, *Elliott v. Boyles*, 31 Pa. 67 (privilege affirmed); St. 1901, June 4, Pub. L. 404, § 15 (privilege ceases for examination in insolvency proceedings by receiver).

RHODE ISLAND. 2. *Scope of Cross-examination*: 1901, *Kolb v. R. Co.*, 23 R. I. 72, 49 Atl. 392 (question as to witness' having an illegitimate child, excluded). 4. *Conviction of Crime*: Gen. L. 1896, c. 244, § 40 (quoted *ante*, § 488); 1903, *State v. Babcock*, — R. I. —, 55 Atl. 685 (question to a defendant as to prior conviction of the same offence of keeping a disorderly house, admitted).

SOUTH CAROLINA. 1. *Extrinsic Testimony* is excluded: 1833, *Anon.*, 1 Hill 257; 1890, *State v. Wyse*, 33 S. C. 592, 12 S. E. 556 (confusing the principle with that of correcting collateral errors); 1898, *Sweet v. Gilmore*, 52 id. 530, 30 S. E. 395. 2. *Scope of Cross-examination*: 1903, *State v. Williamson*, 65 S. C. 242, 43 S. E. 671 (question as to an indictment; point not decided). 3. *Privilege against Disgracing Answers*: 1906, *Miller v. Clayton*, 2 Brev. 108 (privilege recognized for "any fact which might lead to expose him to infamy"); 1820, *Torre v. Summers*, 2 Nott & M. 269, 271, *semble* (recognized). 4. *Conviction of Crime*: 1833, *Anon.*, *supra* (admitting "felony for the *crimen falsi*" only); 1890, *State v. Wyse*, *supra* (admitting conviction for petit larceny).

SOUTH DAKOTA. 2. *Scope of Cross-examination*: 1901, *Ansland v. Parker*, 14 S. D. 273, 85 N. W. 193 (questions needlessly insinuating personal vice, held improper).

TENNESSEE. 1. *Extrinsic Testimony*: 1879, *Merriman v. State*, 3 Lea 393, 395 ("particular facts," excluded; here, that a woman-witness had had bastard children); 1896, *Zanone v. State*, 97 Tenn. 101, 36 S. W. 711 (extrinsic testimony, excluded); 1896, *Ryan v. State*, ib. 206, 36 S. W. 930 (admitting indictments for other felonies and misdemeanors, except that if the record shows an acquittal or a *nolle prosequi*, the indictment should be disregarded; no reference to the opinion in *Zanone v. State*, dated a month before, but written by another judge).

the character of B (either a witness or an accused), by testifying to his good reputation, that reputation must signify the general and unqualified consensus

2. *Scope of Cross-examination*: to the earlier cases cited *infra*, under par. 3, add the following: 1892, *Hill v. State*, 91 Tenn. 521, 523, 19 S. W. 674 (whether he had not been charged with stealing; allowable, if it involves an indictment for an infamous crime, but not as implying "mere personal imputations"); 1896, *Zanone v. State*, *supra* (questions as to number of husbands living, domestic difficulties, etc., allowed; the following is a type: "Have you not recently torn the clothes off your husband, drawn a butcher-knife on him, called him a damn son of a bitch, and said you were going to kill him?"; the principle being that any question may be asked "throwing light on his or her moral character, provided they involve moral turpitude, whether they relate to domestic relations or other habits, if the tendency is to show that the witness is guilty of wanton, habitual violation and disregard of the most sacred marital relations, or of the law, or of the rules of decent society, involving the witness in moral turpitude," though *semble* the misdeeds must be of fairly recent date); 1896, *Ryan v. State*, *supra* (whether he had not been indicted for felonies and misdemeanors, allowed). 3. *Privilege against Disgracing Answers*: 1858, *Reed v. Williams*, 5 Sneed 580, 582 (question as to fornication; undecided); 1860, *Lea v. Henderson*, 1 Cold. 146, 149 (same as next case); 1873, *Love v. Masoner*, 6 Baxt. 24, 33 (fornication; privilege allowed because fornication was a crime); 1874, *Titus v. State*, 7 Baxt. 134 (privilege repudiated entirely, settling the doubt formerly expressed); 1896, *Zanone v. State*, *supra* (privilege not recognized); 1896, *Ryan v. State*, *supra* (same).

TEXAS. 1. *Extrinsic Testimony* is excluded: 1859, *Boon v. Weathered*, 23 Tex. 675, 678; 1879, *Johnson v. Brown*, 51 id. 65, 76; 1892, *Gulf C. & S. F. R. Co. v. Johnson*, 83 id. 628, 633, 19 S. W. 151 (approving *Boon v. Weathered*); 1893, *Red v. State*, 39 Tex. Cr. 414, 46 S. W. 403; 1893, *Fields v. State*, *ib.* 488, 46 S. W. 814; 1893, *Kellogg v. McCabe*, 92 Tex. 199, 47 S. W. 520 (that he had been elected mayor by carpet-baggers and scalawags, excluded). 2. *Scope of Cross-examination*: 1884, *Evansich v. R. Co.*, 61 Tex. 24, 28 (admitting questions about "relevant facts"; and "any fact which bears upon the credit of the witness would be a relevant fact"; but the opinion confounds the present question with that, § 1885, *post*, as to cross-examining on one's own case); 1893, *Carroll v. State*, 32 Tex. Cr. 431, 24 S. W. 100 (question as to indictment for theft, allowed; but such cross-examination "must be kept within bounds by the Court," and allowed only "where the ends of justice clearly require it and the inquiry relates to transactions comparatively recent," etc.); 1894, *Exon v. State*, 33 id. 461, 28 S. W. 1658 (of a woman, whether she had lived as mistress with her husband before marriage, allowed); 1899, *Crockett v. State*, 40 id. 173, 49 S. W. 392 (whether he had not been indicted for

assault with intent to murder, allowed); 1899, *Smith v. State*, — id. —, 50 S. W. 362 (inquiry of defendant as to indictment for another crime, allowable); 1899, *Barkman v. State*, 41 id. 105, 52 S. W. 73 (questions to the defendant as to a previous killing, excluded); 1899, *Preston v. State*, 41 id. 306, 53 S. W. 127, 881 (that he had sworn to a false account in a former trial of same defendant, excluded); 1900, *Dickey v. State*, — id. —, 56 S. W. 627 (illegal liquor sales; defendant allowed to be cross-examined as to other illegal sales); 1902, *De Lucenay v. State*, — id. —, 68 S. W. 796 (bigamy; questions to the alleged second wife, as to her prior incest, apparently held a *missile*); 1902, *Bowers v. State*, — id. —, 71 S. W. 284 (cross-examination to a charge of murder 18 years before, excluded, as too remote); 1903, *Carter v. State*, — id. —, 76 S. W. 439 (cross-examination of a rape-complainant as to her occupation in a disreputable winerroom, excluded on the facts; yet "a witness may be asked as to her or his vocation, environments, or associations"; "this matter is in the sound discretion of the Court"). 3. *Privilege against Disgracing Answers*: 1873, *Morris v. State*, 38 Tex. 603 (privilege recognized; charge of keeping a house of ill-fame); 1893, *Carroll v. State*, 32 Tex. Cr. 431, 24 S. W. 100 (privilege denied; good opinion by *Sinkin, J.*); 1893, *Crockett v. State*, 40 Tex. Cr. 173, 49 S. W. 392 (privilege denied). 4. *Conviction of Crime*: 1893, *Goode v. State*, 32 Tex. Cr. 505, 508, 24 S. W. 102 (fine in City Court; excluded; the crime must involve "moral and legal turpitude"); 1893, *Carroll v. State*, *ib.* 431, 24 S. W. 100 (cross-examination to being in jail or the penitentiary, allowable).

UNITED STATES. 1. *Extrinsic Testimony* is excluded: 1807, *U. S. v. Vansickle*, 2 McLean 220; 1851, *Wayne, J.* (the others not touching the point) in *Gaines v. Relf*, 12 How. 554; 1898, *Bird v. Halsy*, 87 Fed. 671, 679. 2. *Scope of Cross-examination*: 1827, *U. S. v. Craig*, 4 Wash. C. C. 732 (whether his petition for the benefit of the insolvent law had not been refused and he remanded to jail for fraud; excluded, but no principle given); 1861, *Johnston v. Jones*, 1 Black 209, 225 (rule of discretion, approved); 1895, *Thiede v. Utah*, 159 U. S. 510, 16 Sup. 62 (whether the witness had quarrelled with her husband, excluded); 1896, *Smith v. U. S.*, 161 id. 85, 16 Sup. 483 (mere arrest; left undecided); 1897, *Tha-koo-yel-lee v. U. S.*, 167 id. 274, 17 Sup. 855 (murder; a question to the wife of the defendant, testifying against him, as to her illicit relations with another witness for the prosecution, allowed); 1898, *Tingle v. U. S.*, 30 C. C. A. 666, 87 Fed. 320 (fraudulent use of mails; to the defendant, whether his partner was under a similar indictment, excluded); 1902, *Allen v. U. S.*, 52 C. C. A. 597, 115 Fed. 3, 11 (certain cross-examination, intended "simply to degrade the defendant", held improper). 3. *Privilege against Disgracing Answers*: 1827, *U. S. v. Craig*, 4 Wash. C. C. 732 (recognized); 1840,

of opinion in the community (*post*, §§ 1610-1614). Such a witness virtually asserts either (a) that he has never heard any ill spoken of him or (b) that

- F. S. v. Vansickle*, 2 McLean 325, 220, *semble* (same; a question showing "her character to be infamous", excluded); Rev. St. 1878, § 103 ("No witness is privileged to refuse to testify to any fact or to produce any paper, respecting which he shall be examined by either House of Congress or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous").
4. *Conviction of Crime*: 1893, *Baltimore & O. R. Co. v. Rambo*, 8 C. C. A. 6, 59 Fed. 75 (conviction of crime — here, burglary — held admissible in civil as well as criminal cases; here applying the rule in spite of the silence of the Ohio statute as to civil cases).
- UTAH. 2. *Scope of Cross-examination*: 1875, *Conway v. Clinton*, 1 Utah, 215, 220 ("The Court in its discretion may permit disparaging questions to be asked"). 3. *Privilege against Disgracing Answers*: Rev. St. 1898, § 3431 (like Cal. C. C. P. § 2065); § 4103 (bribery, etc., like Cal. C. C. P. § 89); 1875, *Conway v. Clinton*, 1 Utah 215, 220 (privilege conceded for facts not material to the issue; here, a conviction for crime). 4. *Conviction of Crime*: Rev. St. 1898, § 3131 (like Cal. C. C. P. § 2065).
- VERMONT. 1. *Extrinsic Testimony* is excluded: 1846, *Crane v. Thayer*, 18 Vt. 162 (that the witness was a notorious counterfeiter). 2. *Scope of Cross-examination*: 1896, *State v. Fournier*, 68 Vt. 262, 35 Atl. 178 (discretion of the trial Court); 1897, *State v. Slack*, 69 id. 436, 38 Atl. 311 (allowing the trial Court some discretion, particularly to exclude matters not affecting credibility). 3. *Privilege against Disgracing Answers*: left undecided: 1856, *State v. Johnson*, 28 Vt. 515 (whether the prosecutrix had had illicit intercourse). 4. *Conviction of Crime*: Stats. 1894, § 1245 (quoted *ante*, § 488); 1901, *State v. Shaw*, 73 Vt. 149, 50 Atl. 863 (murder; cross-examination of the defendant, as to a plea of guilty to a charge of assault, allowed); 1902, *McGovern v. Smith*, — id. —, 53 Atl. 326 (personal injuries; plaintiff allowed to be cross-examined as to conviction for illegal liquor-selling; but such proof of "an offence not involving moral turpitude" is in the trial Court's discretion).
- VIRGINIA. 1. *Extrinsic Testimony* is excluded: 1811, *Fall v. Overseers*, 3 Mumf. 495, 505 (per Roane, J.; acts of unchastity by a woman); 1833, *Rixey v. Bayse*, 4 Leigh 332. 3. *Privilege against Disgracing Answers*: 1848, *Howel v. Com.*, 5 Gratt. 664, 666 (questions to female witnesses as to their unchaste conduct, possession of stolen goods, etc., held privileged). 4. *Conviction of Crime*: 1832, *Langhorne v. Com.*, 76 Va. 1016 (must be of a crime affecting credibility; here the question did not specify the nature of the charge, and was excluded).
- WASHINGTON. 2. *Scope of Cross-examination*: 1903, *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036 (question as to arrest is "probably" not proper). 4. *Conviction of Crime*: Annot. C. & Stats. 1897, § 5992 (quoted *ante*, § 488); 1893, *State v. Payne*, 6 Wash. 563, 569, 31 Pac. 317 (petit larceny, excluded, as not infamous); 1903, *State v. Ripley*, *supra* (conviction of a felony, admissible; here, robbery).
- WEST VIRGINIA. 2. *Scope of Cross-examination*: 1880, *State v. Coukle*, 16 W. Va. 736, 742, 757, 784 (attempt to kill; a witness for the State lived in the house with the defendant and his wife; a question as to his intercourse with the latter was excluded; the reason being unascertainable from the lengthy but obscure opinion); 1902, *State v. Hill*, 52 id. 296, 43 S. E. 160 (trial Court has discretion in allowing questions to facts affecting moral character; preceding cases examined and reconciled); 1902, *State v. Prater*, *ib.* 132, 43 S. E. 230 (similar). 3. *Privilege against Disgracing Answers*: 1902, *State v. Hill*, *supra* (orthodox English rule applied); 1902, *State v. Prater*, *supra* (similar).
- WISCONSIN. 1. *Extrinsic Testimony* is excluded: 1903, *Paulson v. State*, — Wis. —, 94 N. W. 771. 2. *Scope of Cross-examination*: 1858, *Ketchingman v. State*, 6 Wis. 426, 430 (question to the woman with whom the defendant's adultery was charged to have been committed, whether an abortion had been produced upon her, not admitted to test credibility; no rule laid down; Smith, J., dissenting); 1859, *Kirschnur v. State*, 9 id. 140, 143 (the witness' residence and associates, and the fact that he had assumed an alias, allowed as casting suspicion upon his character; whether he had been convicted of a crime, excluded on grounds of privilege and of proof by record); 1879, *Ingalls v. State*, 48 id. 647, 654, 4 N. W. 785 (conviction of a crime, excluded for the same reasons); 1881, *McKesson v. Sherman*, 51 id. 303, 311, 8 N. W. 200 ("A charge of crime is not in itself impeaching evidence", excluding a question as to a former arrest; also apparently opposing the preceding ruling); 1899, *Buel v. State*, 104 id. 132, 80 N. W. 78 (questions "Did you kill a man at Orl, Nebraska?", "Did the insurance company give you any reason for not giving you the insurance money?", held beyond the proper scope, for a defendant charged with murder and testifying for himself; see quotation *ante*, § 983); 1900, *Murphy v. State*, 108 id. 111, 83 N. W. 1112 (questions as to "past life" of defendant testifying, held not improper on the facts); 1902, *Goodwin v. State*, 114 id. 318, 90 N. W. 170 (questions to a woman, as to a bastard child, held improper). 3. *Privilege against Disgracing Answers*: 1859, *Kirschnur v. State*, *supra* (conviction for larceny; privileged because it "tended to degrade"); 1879, *Ingalls v. State*, *supra* (same); 1881, *McKesson v. Sherman*, *supra*, *semble* (same); 1899, *Enevy v. State*, 101 id. 627, 78 N. W. 145 (privilege recognized); *Crawford v. Christian*, 102 id. 51, 78 N. W. 406 (same); Stats. 1898, § 126 (privilege repudiated for testimony before Legislature or a committee). 4. *Conviction of Crime*: Cases cited *supra*; Stats. 1898, § 4073 (quoted *ante*, § 488).

the sum of the expressed opinion of him is favorable. Now if it appears that this sustaining witness *knows* of bad rumors against the other, then, in the first instance, his assertion is entirely discredited, while, in the second instance, his assertion is deficient in good grounds, according to the greater or less prevalence of the rumors. On this principle, then, it is proper to probe the asserted reputation by learning whether such rumors have come to the witness' knowledge; for if they have, it is apparent that the alleged reputation is more or less a fabrication of his own mind. It is to be noted that the inquiry is always directed to the witness' hearing of the *disparaging rumor* as negating the reputation. There must be no question as to the *fact of the misconduct*, or the rule against particular facts would be violated; and it is this distinction that the Courts are constantly obliged to enforce:

1841, *Parke, B.*, in *R. v. Wood*, 5 Jur. 225 (the witness had testified that he had never heard anything against the defendant, and was on cross-examination asked whether he had not heard of the defendant being suspected of a certain robbery in the neighborhood; on objection): "The question is not whether the prisoner was guilty of that robbery, but whether he was *suspected* of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one."

1888, *McClellan, J.*, in *Moulton v. State*, 88 Ala. 119, 6 So. 758: "Opinions, therefore, and rumors, and reports, concerning the conduct or particular acts of the party under inquiry, are the source from which in most instances the witness derives whatever knowledge he may have on the subject of general reputation; and, as a test of his information, accuracy, and credibility, but not for the purpose of proving particular acts or facts, he may always be asked on cross-examination as to the opinions he has heard expressed by members of the community, and even by himself as one of them, touching the character of the defendant or deceased as the case may be, and whether he has not heard one or more persons of the neighborhood impute particular acts or the commission of particular crimes to the party under investigation, or reports and rumors to that effect."

On this principle such inquiries are almost universally admitted.¹ But the serious objection to them is that practically the above distinction —

¹ *Eng.*: 1836, *R. v. Hodgkiss*, 7 C. & P. 208 (some definite charge against the supported witness, said to be usually the sole subject of examination); 1846, *R. v. Rogan*, 1 Cox Cr. 291 (circumstances of suspicion against the accused on the same night as the alleged robbery, excluded); *Ala.*: rule acknowledged in the following cases: 1866, *Bullard v. Lambert*, 40 Ala. 204; 1880, *Ingram v. State*, 67 id. 72; 1882, *DeArman v. State*, 71 id. 361; 1884, *Tesney v. State*, 77 id. 38; 1885, *Jackson v. State*, 78 id. 472 (whether the witness had not said that the deceased was a bad man); 1889, *Holmes v. State*, 88 id. 29, 7 So. 193 (whether the accused had "worn stripes"); 1889, *Moulton v. State*, ib. 116, 120, 6 So. 758 (here excluded because the witness was asked "whether he didn't know" of the specific misconduct); 1893, *Thompson v. State*, 100 id. 70, 71, 14 So. 878; 1896, *Evans v. State*, 109 id. 11, 19 So. 535 (like the next case); 1896, *White v. State*, 111 id. 92, 21 So. 330 (excluding a question as to the witness' knowledge of such facts); 1898, *Terry v. State*, 118 id. 79, 23 So. 776; 1899, *Jones v. State*, 120

id. 303, 25 So. 204 (without going into the particulars); *Cal.*: 1896, *People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (rule applied); 1898, *People v. Burns*, 121 id. 529, 53 Pac. 1096 (question not improper on the facts); *Ga.*: Code 1895, § 5293 ("particular transactions" can only be asked about "upon cross-examination in seeking for the extent and foundation of the witness' knowledge"); 1886, *Pulliam v. Cantrell*, 77 Ga. 563, 565, 3 S. E. 280 (the principle admitted; but the question held improper because it represented a crime as a fact, not as a rumor affecting reputation); *Ill.*: 1899, *Aiken v. People*, 183 Ill. 215, 55 N. E. 695 (excluding such inquiries; misconceiving the nature of the problem and citing none of the cases pertinent; *Cartwright, C. J.*, diss.); 1901, *Jennings v. People*, 189 id. 320, 59 N. E. 515 (similar; *Carter, Cartwright, and Hand, J.J.*, diss.); *Ind.*: 1873, *Oliver v. Pate*, 43 Ind. 134 (here excluded, in trial Court's discretion, because no contrary rumor was involved); 1883, *McDonel v. State*, 90 id. 324 (allowed); 1884, *Wachstatter v. State*, 99 id. 295 (whether he had heard of the witness'

between rumors of such conduct, as affecting reputation, and the fact of it as violating the rule against particular facts — cannot be maintained before the jury. The rumor of the misconduct, when admitted, goes far, in spite of all theory and of the judge's charge, towards fixing the misconduct as a fact upon the other person, and thus does three improper things, — (1) it violates the fundamental rule of fairness that prohibits the use of such facts, (2) it gets at them by hearsay only, and not by trustworthy testimony, and (3) it leaves the other person no means of defending himself by denial or explanation, such as he would otherwise have had if the rule had allowed that conduct to be made the subject of an issue.² Moreover, these are not occurrences

being arrested for larceny, being in the station-house, etc., admitted); 1892, *Randall v. State*, 132 id. 542, 32 N. E. 305 (whether he had heard of the witness' arrest for peace-breaking, house-breaking, etc., admitted); 1895, *Griffith v. State*, 140 id. 163, 39 N. E. 440 (rule applied); 1897, *Sbears v. State*, 147 id. 51, 46 N. E. 331 (rule applied); *Id.*: 1856, *Gordon v. State*, 3 Ia. 415, *semble* (excluding questions as to specific misconduct known to the witness, because the matters were treated as fact and not merely as the subject of rumor); 1861, *State v. Arnold*, 12 id. 487 (similar questions allowed, because expressly treating the misconduct as reputed only); 1877, *Barr v. Hack*, 46 id. 310 (same); 1887, *State v. Sturrett*, 71 id. 387, 32 N. W. 387 (same as Gordon's case); 1887, *Hanners v. McClelland*, 74 id. 320 (questions excluded because the witness had not testified to reputation); 1890, *State v. McGee*, 81 id. 19, 46 N. W. 764 (same as Gordon's case); 1895, *State v. Lee*, 95 id. 427, 64 N. W. 284 (whether he had not heard of defendant's having burglarized other buildings, allowed); *Kin.*: 1896, *State v. McDonald*, 57 Kan. 537, 46 Pac. 967 (rule applied); *La.*: 1893, *State v. Donelon*, 45 Ia. An. 744, 754, 12 So. 922 (the doctrine implied, but obscurely stated; here the cross-examination was as to the general bad reputation of the defendant's associates); 1896, *State v. Palm*, 48 id. 311, 19 So. 138 (whether he had not heard that the accused had whipped a woman, and had drawn a pistol on another person, admitted); 1903, *Cook v. State*, 111 Ia. —, 35 So. 665 (murder; cross-examination to the witness' bearing of facts of misconduct bearing on general character, allowed, the accused's witness not having been limited to character for peaceableness); *Miss.*: 1876, *Com. v. O'Brien*, 119 Mass. 346 ("Particular facts may be called to the witness' attention, and he may be asked if he ever heard of them; but this is allowed, not for the purpose of establishing the truth of those facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given to his testimony"); *Mich.*: 1874, *Hamilton v. People*, 29 Mich. 173, 188, *semble* (rule applied); *Miss.*: 1890, *Kearney v. State*, 68 Miss. 233, 236, 8 So. 292 (a question referring to misconduct as a fact and not as a rumor, excluded; but the principle not alluded to); *Mo.*: 1899, *State v. McLaughlin*, 149 Mo. 19, 50 S. W. 316 (rule applied); 1903, *State v. Parker*, 172 id. 191, 72 S. W. 650 (same); 1903, *State v. Boyd*, — id. —, 76 S. W. 979 (same); *Nebr.*: 1881, *Ollve v. State*, 11 Nebr. 1, 27, 7 N. W. 444 (witness to peaceable character, whether he had not heard of the defendant's drawing a revolver upon some one, excluded, on the erroneous notion that this was the offering of a particular fact); 1894, *Patterson v. State*, 41 id. 538, 59 N. W. 917 (same error); 1895, *Baye v. State*, 45 id. 261, 63 N. W. 811 (whether the witness, testifying to defendant's character for peaceableness, had heard of a specific instance of his violence, allowed, in the trial Court's discretion, distinguishing and explaining *Ollve v. State* and *Patterson v. State*); *N. Y.*: 1900, *People v. Elliott*, 163 N. Y. 11, 57 N. E. 103 (question as to a supporting witness' opinion of reputation if it should be proved that a judgment of divorce on specific grounds had been rendered, etc., excluded); *N. C.*: 1830, *Barton v. Morpheus*, 2 Dev. 520 (rule repudiated; first, "this would be doing that indirectly which the law forbids to be done directly, viz., impeaching the character of the witness in chief by specific charges," and, secondly, "if the witness in chief sustains a good general character from common reputation, the supporting witness said nothing untrue in attributing it to him"); 1861, *Luther v. Skeen*, 8 Jones L. 356 (rule applied); 1888, *State v. Bullard*, 100 N. C. 486, 6 S. E. 191 (*Barton v. Morpheus* followed); 1896, *State v. Ussery*, 118 id. 1177, 24 S. E. 414 (rule apparently violated; confused opinion); 1898, *Marcom v. Adams*, 122 id. 222, 29 S. E. 333 (whether the witness had not "heard that defendant had committed forgery," excluded); *Or.*: 1901, *State v. Ogden*, 39 Or. 195, 65 Pac. 449 (admissible; but the opinion states the principle confusedly); *S. C.*: 1897, *State v. Dill*, 48 S. C. 249, 26 S. E. 567 (character for peace and good order; cross-examination to rumors as to illegal whiskey-making, allowed); *U. S.*: 1855, *U. S. v. Whitaker*, 6 McLean 342, 344 (whether he had not been charged with passing counterfeit money, admitted); *Va.*: 1880, *Davis v. Franke*, 33 Gratt. 426 (whether he had not heard certain people say the character was bad; here excluded, while conceding the principle, because not genuinely a test of accuracy, but a subterfuge to bring in hearsay).

² On this point see *post*, § 1114 (Rehabilitation of Witnesses).

of possibility, but of daily practice. This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation. The value of the inquiry for testing purposes is often so small and the opportunities of its abuse by underhanded ways are so great that the practice may amount to little more than a mere subterfuge, and should be strictly supervised by forbidding it to counsel who do not use it in good faith.³

+ B. DEFECTS OF SKILL, MEMORY, KNOWLEDGE, ETC., AS EVIDENCED BY PARTICULAR FACTS.

§ 990. **General Principle; Proof by Extrinsic Testimony.** Besides the qualities of moral character for veracity, of bias, interest, and corruption, already examined, there are others which may discredit a witness. Their nature is indicated by the requirements for testimonial qualifications (*ante*, § 478). If a witness is required to have a minimum of experience in order to testify (*ante*, § 555), then his degree of experience and of expert capacity will affect the weight of his testimony. If he is required to have certain opportunities for observing the facts in question (*ante*, § 650), and to be able to recollect them (*ante*, § 725), and to narrate them intelligibly (*ante*, § 766), then the degree of his capacities in those respects will affect the weight of his testimony.

But these qualities, as detracting from credit, can seldom be directly testified to as general and abstract qualities (*ante*, §§ 876, 938). The demonstration of these qualities must usually be made by particular circumstances, sometimes consisting in particular acts of conduct. The question thus arises whether they may be established by extrinsic testimony (from other witnesses), or only by cross-examination of the witness himself. On this question, shall the analogy be followed of the rule for evidencing moral character (*ante*, § 979) or of the rule for evidencing bias and interest (*ante*, § 943)? This is here the chief, if not the only, question of controversy. In general, the rule may be said to be that extrinsic testimony is forbidden for evidencing specific acts of misconduct of the witness himself, but is allowed for evidencing other circumstances; for example, it would be forbidden for showing that a medical expert had blundered in a certain prior operation, but it would be allowed for showing that he had not used the proper instruments in making the experiments to which he testifies. The line of distinction is so indefinite that no settled rule or definition can anywhere be surely predicated. But the practice of exclusion may be said to be, on the whole, stricter than it ought to be.

The problem is complicated by the circumstance that the rule against contradiction on "collateral" matters (*post*, § 1000) is almost always equally

³ For the rule that an impeaching witness may be cross-examined to the names of persons who have spoken disparagingly, see *post*, § 1112.

applicable, and thus the scope of the present principle seldom comes to be defined. The witness is cross-examined to the desired fact, and then, on his denial, the subsequent proof of it is adjudged according to the rule for contradiction and not the present rule. Hence the doctrine upon the present rule remains obscure. Nevertheless, so far as proof by cross-examination is concerned, the logical use of particular instances to evidence incapacity and to lessen thereby the weight of testimony is amply illustrated in the precedents.

§ 991. *Skilled Witness; Evidencing Incapacity by Particular Errors (Reading, Writing, Valuation, Experimentation, etc.)*. Wherever a special qualification is required for testimony to a certain fact, the lack of that qualification is ascertainable logically by particular instances of the witness' failure to possess or to exercise it.

(1) On *cross-examination* there is no doubt that these particular instances may be brought out by questions to the witness himself, — subject to the trial Court's discretion in restricting an examination too trivial or too lengthy.¹ Questions relating to *prior instances* out of court are possibly less likely to be favorably treated, — for example, an inquiry to a medical witness to the presence of poison, whether he had not on two prior occasions made analyses which turned out to be erroneous; though there can be no sound objection to this frequently valuable method of exposing the possibility of error. But questions exhibiting, by the very *course of examination itself*, the witness' lack of capacity to understand the subject are common and indubitably orthodox. They are, naturally, most available on subjects requiring a certain skill which is really expertness, though not commonly so termed (*ante*, § 556) — for example, reading, writing, and the like. The method is illustrated in the following passages:

1754, *Canning's Trial*, 19 How. St. Tr. 577: The case turned chiefly on the whereabouts of a gypsy on certain days; Hannah Fensham testified to seeing her in the town on the 16th of January, her reason being that "there was a snow on the 15th at night, and the 16th it was wet; . . . my neighbors said, 'This snow is come in the right season, yesterday was the 15th'; then I said, 'This must be the 16th,' and not only that but I went to the almanack and looked that very day." The cross-examination followed: "Did you look directly to the almanack?" "No, sir, not till the 16th at night." — "Are you very well skilled in almanacks?" "Why not? I can read and write a little." — "Do you know which day of the week it is by the almanack?" "I can; I think so; my head is good enough for that." — "Look in this almanack, and tell me what day of the week it is." (She takes it in her hand; it was a common sheet-almanack, folded up into a book.) "I can't see by this, it is so small." — "Look at it again and take your time." "I cannot see without my spectacles" (she puts them on); "you shall not fool me so." — "Tell me by this the day of the week for the 14th of December." "This is not such an almanack as I look in; I look in a sheet almanack; I cannot tell by this." — "Give it me again, if you cannot tell; . . . now you have shown your skill in almanacks." Her own counsel then gives her the almanack and asks her to point out Sunday in the month of January. "She tells down from the 1st to the 7th day, and said that was Sunday which happened to be Tuesday."

1888, *Parnell Commission's Proceedings*, 48th day, Times' Rep. pt. 13, p. 102; in support of the charge, against Mr. Parnell and others, of using the Land League to commit

¹ Compare the authorities cited *ante*, § 944, *post*, §§ 1004, 1368.

crime and intimidation, the speeches to the public and the doings at the League meetings were often proved by Government constables, spies, or other prejudiced persons, and the reports were apt to be partial and misleading; every such witness was accordingly tested with reference to the correctness of his report; this testing turned out for one of them as follows: A. "Some months before Lydan's murder I was at a meeting at Mrs. Walsh's house. There were several persons assembled there. Varilly took the chair." Q. "Was anything proposed or said about any person's cattle?" A. "Yes. . . . A resolution was come to about the killing of these cattle. Some of those present left the room for the purpose of killing them." . . . On cross-examination: Q. "My learned friend has put several rather big words to you about some gentleman taking the chair. Was there a chair to take at Walsh's?" A. "I cannot understand you." Q. "Well; but you know you said that Mr. Varilly took the chair?" A. "He did." Q. "What do you mean?" A. "He was the chairman." Q. "What did he do?" A. "To attend the meetings." Q. "What did he do?" A. "He told them that there should be cattle drowned." Q. "You have been asked by my learned friend whether a resolution was passed. What is a resolution?" A. "I could not tell you." Q. "You have told us there was a resolution. Do you know what that meant?" A. "No." Q. "Was there a secretary?" A. "Yes." Q. "What is it?" A. "Not to tell anybody." Q. "Were you secretary?" A. "I was not." Q. "Was there a secretary?" A. "I do not know whether there was or not."

Circa 1875, Mobile & O. R. Co. v. Steamer New South, U. S. Distr. Ct., So. Distr. Ill.;² an action was brought by one steamboat company on the lower Mississippi against another for injuries sustained in the sinking of one of its vessels in a collision caused by the careless backing out of the Cairo harbor of a boat of the defendant company. Because of the harbor and pilot regulations, it was essential to the plaintiff's case to show that the collision had taken place in the middle of the river, and not two-thirds of the way across, as the defendant contended. Several colored deckhands of the defendant had sworn that the collision took place two-thirds of the way across. One in particular was vehement in his declarations that he *knew* it was two-thirds across, as he had noticed it definitely at the time. The counsel for the plaintiff, Mr. W. B. Gilbert, on the cross-examination, took a sheet of paper, folded it once at the centre, and said: "Now, that's half, isn't it?" "Yes, suh." Folding it over in halves again, he said, "Now, that's a third, isn't it?" "Yes, suh!" (promptly). Then opening out the sheet, thus creased, into four divisions, the lawyer said, pointing to the first, "John, here's one-third?" "Yes, suh." To the second, "Here's two-thirds." "Yes, suh." To the third, "That's three-thirds." "Yes, suh." "John, we've got four thirds. What are we going to do?" "Dunno, suh; throw away the fourth one, I reckon. But I know, suh, that the two boats struck right there at the end of the second third!"

(2) Proof of such particular instances of error by *other witnesses* is generally regarded as inadmissible, and for reasons analogous to those of the character-rule (*ante*, § 979), namely, confusion of issues, by the introduction of numerous subordinate controversies involving comparatively trivial matters, and unfair surprise, by leaving the impeached witness unable to surmise the tenor or the time of supposed conduct which might be attributed to him by false testimony. Nevertheless, such instances may often be most effective evidentially, and the possible disadvantages may not always be present. The trial Court should therefore have the discretion to permit this mode of proof when it seems useful.³

² *Ex relations* Barry Gilbert, Esq., now of Iowa State University Law School.

³ The precedents vary, and no precise rule is

acknowledged; with the following cases compare those cited *post*, § 1004: 1885, *Belt v. Lucas*, Eng.; Montague Williams' *Reminiscences*,

Whether extrinsic testimony is admissible to prove other circumstances detracting from the witness' qualifications is doubtful, as a matter of precedent, though not of principle. That a mining engineer's experience has been gained in a locality of a different sort from that of the case in hand, that a medical witness' experience has been brief and insufficient, that an interpreter has lived in a part of the country using a different dialect, — circumstances like these would seem not to be obnoxious to any rule against extrinsic testimony.⁴ But all this can safely be left to the trial Court's discretion.

§ 992. Same: Grounds of an Expert Opinion. (1) The data on which an expert rests his specific opinion (as distinguished from the facts which make him skillful to form one at all) may of course be fully inquired into upon *cross-examination*.¹ Without them, the value of the opinion cannot be established by *calling other witnesses*? This is permissible and common, without doubt, so far as it involves merely the questioning of other expert witnesses upon their opinion of the validity of the first witness' grounds; for they are usually called primarily for the sake of their own opinion in the cause, and their discrediting of the first witness' grounds of opinion may incidentally be inquired into without encumbering the issues,² — for example, when a medical witness, testifying to the cause of death as drowning, states as a ground the presence of froth on the lungs, and then other medical witnesses, testifying to the cause of death, deny that froth on the

11, 228 (issue as to the genuineness of a sculptor's work; the plaintiff-sculptor having claimed to be the author of a bust of P., of great merit, which the defendant asserted was not made by the plaintiff, because he was incapable of a work of that merit, and the plaintiff having made at the trial another bust of P. as a specimen of his skill, Sir F. Leighton, Mr. Thornycroft, and Mr. Millais, of the Royal Academy, testified that the latter bust, compared with the former, "had no artistic merit"; the plaintiff then proved the genuineness of the former by a person who had seen him working on it; "this rebutting evidence of course smashed entirely the mere hypothetical evidence of experts"); 1885, Louisville N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 423, 3 N. E. 389, 4 N. E. 908 (witness to plaintiff's age; being asked to state his opinion of X's age as a test, his error was allowed to be shown); 1854, Boston & W. R. Co. v. Dana, 1 Gray 83, 90, 104 (an error, in another matter, by a cashier-witness, to show general inaccuracy in accounts, excluded in discretion); 1843, Wood v. Trust Co., 7 How. Miss. 609, 631 (notary's certificate impeachable by evidence of his custom to certify improperly; distinction noted between such impeachment and facts affecting character); 1903, Hoag v. Wright, 174 N. Y. 36, 66 N. E. 579 (an expert witness' error in declaring genuine certain spurious signatures, not otherwise in issue, but shown to him as a test, held not collateral, and therefore allowed to be established by other testimony; prior inconsistent cases repudiated; "the competency of a witness to express an

opinion . . . is incidental to the main issue, because it attacks the foundation of the evidence"); 1814, Story, J., in *Odiorne v. Winkley*, 2 Gallis. 52 (in a suit for infringement of patent, priority of invention being pleaded, a witness to the identity of the two machines was shown a similar machine invented by a third person and was interrogated as to the points of identity and difference, in order to show by other testimony the witness' ignorance of mechanics, and thus his general incorrectness; the questions were rejected).

For the authorities upon discrediting *hand-writing experts* in this manner, see *post*, § 2015.

¹ Compare § 1004, *post*.

² 1885, Louisville N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389; 1898, *Shields v. State*, 149 id. 395, 49 N. E. 351 (a witness held to have testified as an expert, so as to be cross-examined for qualifications; extent of cross-examination in Court's discretion); 1895, *Manning v. Lowell*, 173 Mass. 100, 53 N. E. 160 (value-expert; cross-examination to other sales, allowable in discretion); 1883, *Neilson v. R. Co.*, 58 Wis. 516, 520, 17 N. W. 310 (cross-examination of witnesses to the extent of depreciation by land-condemnation, as to the elements and grounds of their estimate, allowable in discretion).

For the use of *other sales*, on cross-examination of *value-experts*, see the authorities collected *ante*, § 463.

³ That they may be inquired into on the direct examination, see *ante*, § 655.

lungs indicates death by drowning. But where the confuting of the data given requires the calling of witnesses who would not otherwise be in the cause, the propriety of this is open to doubt. Nevertheless, it may often become highly important for exposing error; and the trial Court should have discretion to permit it. The following passage illustrates its possibilities:

1733, *Bishop Atterbury's Trial*, 16 How. St. Tr. 404, 672; treasonable letters had been attributed to the defendant; but when the Crown experts who claimed to have been able to decipher them were asked by him to produce the key on which they founded their translation, the request was refused on grounds of the public necessity of keeping the methods of such skilled persons a secret (*post*, § 2375); the Duke of Wharton thus attacked the ruling: "The person who is the decipherer is not to be confuted, and what he says must be taken for granted, because this key cannot be produced with safety to the public, and consequently (if his conjectures be admitted to be evidence) our lives and fortunes must depend on the skill and honesty of decipherers, who may with safety impose on the Legislature when there are not means of contradicting them for want of seeing their key. . . . The greatest certainty human reason knows is a mathematical demonstration; and were I brought to your lordships' bar, to be tried upon a proposition of Sir Isaac Newton's, which he upon oath would swear to be true, I would appeal to your lordships whether I should not be unjustly condemned, unless he produced his demonstration that I might have the liberty of enquiring into the truth of it from men of equal skill."²

§ 993. **Knowledge; Testing the Witness' Capacity to Observe.** It is not doubtful that on *cross-examination*, so far as feasible by mere questions, the witness' physical capacity to observe (by sight, hearing, or the like) may be tested.¹ On the other hand, it is hardly less doubtful that *extrinsic testimony* to particular instances of his incapacity in those respects would not be permissible. But mere questions on cross-examination can seldom effect much; the useful thing is usually something of a mixed nature, *i. e.* *experiments made in court* to test the witness' powers. These should be freely allowed, subject to the discretion of the trial Court.³

§ 994. **Same: Grounds of Knowledge and Opportunity to Observe.** Every witness must have had some fair opportunity to observe the matters to which he testifies (*ante*, § 650). The circumstances, therefore, which indicate that his opportunities of acquiring knowledge were less full and adequate than they might have been are always relevant to diminish the weight of his testimony:

Ante 1726, *Chief Baron Gilbert*, *Evidence*, 148: "Another thing that would render his testimony doubtful is the not giving the reasons and causes of his knowledge; for if a man could give the reasons and causes of his knowledge, and doth not, he is forsworn. . . . and that a man should know anything and not [be able to] tell how he comes to know it, is incredible."

² Compare the cases cited *post*, § 1004.

¹ 1850, *Com. v. Webster*, Mass., Bemis' Rep. 264, 365 (witness to personal identity, cross-examined as to having weak eyes, using spectacles, etc.).

³ 1795, *Maguire's Trial*, 26 How. St. Tr. 294 ("I desire that the prisoner may be brought forward to the front seat and some persons, as nearly of his own condition in appearance as may be,

should be placed there along with him"; this was done); 1894, *Heath v. State*, 93 Ga. 416, 21 S. E. 77 (testing a witness' power of vision by sending him to the window, etc., held not improperly refused in discretion).

For other instances of *experiments to test sight and hearing*, see *ante*, § 460. Compare the cases cited *ante*, § 944, *post*, §§ 1004-1368.

1858, *Chilton, J.*, in *Campbell v. State*, 23 Ala. 78: "In order to ascertain the credit due to the testimony of a witness, the jury should be informed of his opportunity for observation, the accuracy with which that observation has been conducted, the fidelity of memory with which it is related, the witness' habits, pursuits, his conduct, disposition, situation in life, relation to the parties, etc."

(1) That these inquiries may be made on *cross-examination* is undoubted:

1744, *Heath's Trial*, 18 How. St. Tr. 65; Mrs. Cole had testified to the presence of Mrs. Heath, another witness, on an important occasion; cross-examined: "Madam, do you remember that Mrs. Heath came to awaken your mother?" "I do remember that she came." — "Was there a light in the room?" "There was not." — "Had Mrs. Heath a light with her?" "She might have had a candle in her hand." — "Was there light or not?" "There was not; I believe there might be a fire." — "Had she a candle in her hand?" "Indeed, I cannot tell." . . . — "The reason of the question is this: look at that woman; will you answer positively that that is the woman that came into the room to call your mother?" "Mrs. Heath was the person, and I believe that she was the same." — "How can you tell it was her when there was no light?" "I know her voice."

(2) The circumstances thus detracting from the witness' opportunities of knowledge may also be established by *extrinsic testimony*, on the same principle (*ante*, §§ 948, 966) as the circumstances indicating bias and interest. Any other rule would frequently make a false witness' testimony impregnable.²

§ 995. **Memory; Testing the Capacity and the Grounds of Recollection.**

(1) Subject to the general principle (*ante*, § 944) that the trial Court's discretion controls, the testing of a witness' capacity of recollection, by *cross-*

¹ Besides the following, compare the authorities cited *ante*, § 944, *post*, §§ 1004, 1368; 1895, *Jones v. R. Co.*, 107 Ala. 400, 18 So. 30 ("the opportunities of the witnesses for observing and knowing"); 1874, *Hamilton v. People*, 29 Mich. 17; 182 (testing as to "the force of the impression" made upon a witness at the time of hearing something); 1883, *Peter v. Thickstun*, 51 Mich. 589, 593, 17 N. W. 68 (assault on a contract to sell shingles; cross-examination to the "extent, kind, and pieces of plaintiff's business," allowed, to show "his opportunities to know the facts he had testified to"); 1892, *State v. Avery*, 113 Mo. 475, 498, 21 S. W. 193 (a witness to a shooting; a question as to whether the moon was shining, allowed, "in order that the jury might know his opportunities and facilities for observing"); 1895, *State v. Harvey*, 131 Kl. 339, 32 S. W. 1110 (asking one claiming an alibi where he really was); 1838, *Neison, C. J.*, in *People v. Rector*, 19 Wend. 610 ("The degree of credit to be given to a witness must chiefly depend upon his means of knowing the facts testified to," his intelligence, and his character); 1880, *Koons v. State*, 36 Oh. St. 189 (lack of knowledge of handwriting); 1897, *Oregon Pottery Co. v. Kern*, 30 Or. 328, 47 Pac. 917 (best opinion, by Bean, J.); 1892, *Thomas v. Miller*, 151 Pa. 486, 25 Atl. 127 (reasons for looking at an almanac to fix the date of a note); 1895; *State v. Rutten*, 13 Wash. 203, 43 Pac.

30 ("Are you testifying by guess or testifying of what you know?"; allowed). That the grounds may be inquired into on the *direct examination*, see *ante*, § 655. For testing *value-witnesses* by *other sales*, see *ante*, § 463. For testing *reputation-witnesses*, see *ante*, § 988, *post*, § 1112.

² 1881, *Albert v. R. Co.*, 98 Pa. 316, 318, 321 (a witness had testified to seeing a field fire; outside testimony that his view was obstructed by an embankment, admitted). The cases involve usually also the question of *contradicting on a collateral point*, and are therefore collected *post*, § 1004.

The principle was notably illustrated in Mr. Lincoln's celebrated scene in *Armstrong's Trial*, in 1858 (best told in *Arnold's Life*, p. 87, and also briefly recounted in *Herndon's* and other biographies), in which he proved false the chief witness' statement that he saw the defendant's pistol in the moonlight, by producing an almanac which showed that the moon had on that night not risen at that hour. This incident was made use of by Mr. Eggleston, in the trial scene of "The Graysons" (ch. 27). It may be noted that the almanac, afterwards started, and chiefly given currency by *Lamon's Life*, that Lincoln had used a spurious almanac, has been amply refuted by a competent witness (Mr. James L. King, *ex rel.* Judge Bergen, in *North American Review*, 1898, vol. 166, p. 186).

examination upon other circumstances, even unconnected with the case in hand, is a recognized and common method of measuring the weight of his testimony. Repeated instances of inability to recollect give the right to doubt the correctness of an alleged recollection of a material fact; the force of the instances depending on the greater or less probability that the one thing could be forgotten while the other is remembered. Some of the most effective exposures of false testimony in the history of trials have been achieved by this method. All the great cross-examiners have relied upon it; though in ordinary hands it is often over-used:

1670, *Langhorn's Trial*, 7 How. St. Tr. 417, 452; Oates, the informer, had testified that the Popish Plotters met in London on April 24, and that he had come over to the meeting from the Jesuit College at St. Omer in France with Sir John Warner; one of the Jesuit attendants was put on by the defence to prove that Warner had not left the College at that time: Witness: "He lived there all that while"; Mr. J. Pemberton: "Was Sir John Warner there all June?"; Witness: "My lord, I cannot tell that; I only speak to April and May"; L. C. J. *Scroggs*: "Where was Sir John Warner in June and July?" Witness: "I cannot tell"; L. C. J.: "You were gardener there then?"; Witness: "Yes, I was"; L. C. J.: "Why cannot you as well tell me, then, where he was in June and July, as in April and May?"; Witness: "I cannot be certain"; L. C. J.: "Why not so certain for those two months as you are for the other?"; Witness: "Because I did not take so much notice?"; L. C. J.: "How came you to take more notice of the one than the other?"; Witness: "Because the question that I came for, my lord, did not fall upon that time"; L. C. J.: "That, without all question, is a plain and honest answer"; Mr. J. Dolben: "Indeed, he hath forgot his lesson; you should have given him better instructions"; L. C. J.: "Now that does shake all that was said before, and looks as if he came on purpose and prepared for those months."

1704, Mr. *Thomas Erskine*, cross-examining in *Hardy's Trial*, 24 How. St. Tr. 617 (the witness had testified to the utterances at a seditious meeting): "Where did you live before you lived with this Mr. Kellerby?" "At Mr. Faulder's." — "Where before that?" "In Cheapside, with Mr. Smith." — "How long is that ago?" "That is between four and five years ago." "What did you leave Smith for?" "We had some words." — "Had some words; what might the words be, think you?" — "I do not know, I am sure, exactly now; we had some words and upon that account we parted." — "You have an amazing good memory; you have repeated a whole speech a man made at a meeting, but you cannot remember the few words that passed between you and your master. Now try; I will sit down and give you time." . . . L. C. J. *Eyre*: "Why do you not give an answer?" "I cannot recollect the words, it is so long ago."

1820, *Queen Caroline's Trial*, Linn's ed., I, 67, 91, 95, 96; among the various charges of adultery and improper intimacy between the Queen (then Princess) and her servant Bergami during her tour in Germany, Austria, Italy, and the Mediterranean, one charge was made of adultery on board a palacca during a sea-voyage to Palestine; the witness Majocchi, a servant in her suite during most of her journeys, had testified specifically to this charge under the following questions from Mr. Solicitor-General *Copley*: "Did the Princess sleep under that tent [placed on deck] generally on the voyage from Jaffa home?" *Majocchi*: "She slept always under that tent during the whole voyage from Jaffa to the time she landed"; Mr. *Sol. Gen.*: "Did anybody sleep under the same tent?" *Majocchi*: "Bartolomo Bergami"; Mr. *Sol. Gen.*: "Did this take place every night?"; *Majocchi*: "Every night." On cross-examination Mr. *Brougham* sought to test his trustworthiness by inquiring as to other details of the sleeping arrangements of the suite:¹

¹ These questions were not all put in direct sequence; a few intervening questions are here omitted.

"[On this voyage.] Where did Hieronimus sleep in general?" ; *Majocchi*: "I do not recollect [*Non mi ricordo*]" ; *Mr. Brougham*: "Where did Mr. Howman sleep?" ; *Majocchi*: "I do not recollect" ; *Mr. Brougham*: "Where did William Austin sleep?" ; *Majocchi*: "I do not remember" ; *Mr. Brougham*: "Where did the Countess Old sleep?" ; *Majocchi*: "I do not remember" ; *Mr. Brougham*: "Where did Camera sleep?" ; *Majocchi*: "I do not know where he slept" ; *Mr. Brougham*: "Where did the maids sleep?" ; *Majocchi*: "I do not know" ; *Mr. Brougham*: "Where did Captain Flynn sleep?" ; *Majocchi*: "I do not know" ; *Mr. Brougham*: "Did you not, when you were the deck?" ; *Mr. Brougham*: "Did those excellent sailors always remain below in the hold with you?" ; *Majocchi*: "This I cannot remember if they slept in the hold during the night-time or went up" ; *Mr. Brougham*: "Who slept in the place where you used to sleep down below in the hold?" ; *Majocchi*: "I know very well that I slept there, but I do not remember who else" ; *Mr. Brougham*: "Where did the livery servants of the suite sleep?" ; *Majocchi*: "This I do not remember" ; *Mr. Brougham*: "Were you not yourself a livery servant?" ; *Majocchi*: "Yes" ; *Mr. Brougham*: "Where did the Padroni of the vessel sleep?" ; *Majocchi*: "I do not know" ; *Mr. Brougham*: "When her Royal Highness was going by sea on her voyage [at another time] from Sicily to Tunis, where did she sleep?" ; *Majocchi*: "This I cannot remember" ; *Mr. Brougham*: "When she was afterwards going from Tunis to Constantinople on board the ship, where did her Royal Highness sleep?" ; *Majocchi*: "This I do not remember" ; *Mr. Brougham*: "When she was going from Constantinople to the Holy Land on board the ship, where did she sleep then?" ; *Majocchi*: "I do not remember" ; *Mr. Brougham*: "Where did Bergami sleep on those three voyages of which you have just been speaking?" ; *Majocchi*: "This I do not know." *

1900, *Hon. J. F. Daly*, in "The Brief," III, 10: "One of the neatest effects ever witnessed was produced by a single question put by one of the young leaders at our bar in the course of an inquiry on *habeas corpus* as to the sanity of an interested party. A medical expert had testified to his mental unsoundness, and had detailed with great clearness the tests he applied to his case, and the results which established to his satisfaction an advanced stage of paresis. He finished his direct examination one afternoon, and next day was cross-examined for the purpose of eliciting that many of the conditions he described could be found in every sane person. After being questioned as to the first indication of mental feebleness he had specified, he was then asked what was the second feature of the cases he had mentioned as indicating paresis. The witness was unable to recall which he had mentioned as indicating paresis. 'What, Doctor, you can't recall the second indication of progressive mental decay which you spoke of yesterday?' 'No, I cannot, I confess.' 'Well, that's funny. Your second indication was 'loss of memory of recent events' 1' The doctor admitted cheerfully that he had the symptoms himself in a marked degree."

1802, *Tillinghast, J.*, in *State v. Ellwood*, 17 R. I. 767, 24 Atl. 782 (indictment for burglary and stealing a chain): "The witness M., a manufacturing jeweller, was asked in cross-examination to give the amount, approximately, of the business of his firm in the course of the year. It had appeared in evidence that the chain in question was sold to H. by the witness seven or eight years ago, and this question was asked for the purpose of showing what recollection the witness would be likely to have of a transaction which took place so long ago. We do not think that this was a proper way to test the recollection of the witness. The extent of his business was his own private affair, and the defendant had no right to inquire into it in this way. Moreover, it appears by the subsequent ex-

* In his opening address for the defence (II, 33), *Mr. Brougham* made forcible use of these significant answers of *Majocchi*, prophesying that "as long as the words 'I don't remember' were known in the English language, the image of *Majocchi*, without the man being named, would forthwith arise to the imagination"; and his iteration of that betraying phrase "*non mi ricordo*" has indeed become an indelible episode of forensic history.

amination of the witness by the defendant, that the extent of his business in the manufacture of chains similar to the one in question was inquired into, together with the size, style, weight, and price thereof. This was all that was pertinent to the inquiry which was then being made. And while considerable latitude is allowed in the cross-examination of a witness for the purpose of testing his recollection, yet this is no reason for permitting the cross-examiner to pry into the private affairs of the witness in regard to matters wholly foreign to the investigation."*

(2) In proving the falsity of such a test-instance erroneously recollected,⁴ or the falsity of a circumstance given as the ground of recollection,⁵ it is more common to exclude *extrinsic testimony*. Nevertheless, in simple cases, where the effect might be important, this ought to be permitted. There is no propriety in a hard-and-fast rule; and the trial Court should be conceded a discretion.

§ 996. **Narration; Discrediting the Form of Testimony.** The trustworthiness of the form in which testimony is delivered (*ante*, § 766) is usually sufficiently ascertainable by the *demeanor* of the witness on the stand (*ante*, § 946).¹ But when the testimony is given in writing by *deposition*, or is a hearsay statement received by exception, it may be necessary to show by

* On the principle of § 944, *ante*, the trial Court's discretion is usually conceded to control: 1890, *Davis v. Cal. Powder Works*, 84 Cal. 629, 24 Pac. 387; 1888, *Kelsey v. Ina Co.*, 35 Conn. 225, 233 (policy on the first wife's life; question as to the date of marriage with the second wife, admissible in discretion); 1885, *Sewall v. Robbins*, 139 Mass. 165, 29 N. E. 650 (the witness' inability to remember the number of days he attended the former trial; allowed in discretion); 1899, *Willard v. Sullivan*, 69 N. H. 491, 45 Atl. 400 (rests in trial Court's discretion); 1895, *Cunningham v. R. Co.*, 88 Tex. 534, 31 S. W. 629 (testing on cross-examination by questions as to omissions of things said to have been habitually done, allowed); 1897, *State v. Shelton*, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064 (the date of a sale of liquor; questions as to the dates of other sales allowed to test memory); 1894, *Spear v. Sweeney*, 88 Wis. 545, 60 N. W. 1060 (testing a plaintiff-witness' alleged weakness of memory, as caused by disease induced by the defendant's act, allowable in discretion).

For testing memory by *repetition of questions* compare also the authorities collected *ante*, § 781.

For testing the recollection of the witness as *evidence of his identity*, see *ante*, § 270.

⁴ 1848, *R. v. M'Douall*, 6 State Tr. N. S. 1128 (seditious utterances; the informer having reported in detail a speech of the defendant's of some twenty lines, "Pollock proposed to read several sentences from a book and send the witness out of the court to make a report of them, as a means of testing his ability to report"; *Cresswell, J.*: "It has been a very common test in cases of this sort to read a sentence to a witness and ask him to repeat it; but though you have a right to the real statement of the witness, you have no right to send him out of court"; *Pollock*: "I have heard that one of the greatest

men shut up a person in a room to make a Jacquard loom"; *Cresswell, J.*: "Not during the progress of a trial"; *Pollock* then read to the witness a passage of some ten lines: "Can you give any report of the general purport and meaning of that speech?"; *Witness*: "No"; 1878, *Keunedy v. Com.*, 14 Bush 357, 360, *semble* (questions to test memory may be asked, but the answer not contradicted); 1834, *Goodhand v. Benton*, 6 G. & J. 481, 484 (title to a slave, who was said to have been held by B. as trustee for his insane daughter; a witness T., son of a tenant of B., testified to seeing the slave in B.'s possession, and was cross-examined as to the state of accounts between B. and his father, whose administrator the witness was; to "impeach the accuracy of his recollection in regard to his having settled the account for rent and as to the time expended in investigating the claim before arbitrators," the opponent offered a probate account rendered by the witness, contradicting his testimony; neither the father, nor the witness, nor the account having in themselves any connection with the title to the slave; it was held properly excluded). See further the authorities collected *post*, § 1004.

⁵ The authorities are collected *post*, § 1004, because the rule about contradiction is also always involved; the following case shows the sort of evidence involved: 1899, *Jefferson v. State*, — Tex. Cr. —, 49 S. W. 88 (perjury; a witness having testified to the defendant's being sworn and to remembering it because that trial preceded certain others, proof that the prior trial was a different one was allowed).

¹ But the following ruling is sound: 1889, *Graham v. McReynolds*, 88 Tenn. 247, 12 S. W. 547 (that a third party had threatened the witness "if she did not swear plaintiff's child to the defendant he would send her to hell in a minute," admitted).

extrinsic testimony such circumstances as detract from the trustworthiness of the form of utterance.² There is here usually no means of obtaining these facts by cross-examination of the witness himself, and hence other testimony becomes indispensable.

² 1897, *Bunzel v. Maas*, 116 Ala. 68, 22 So. 568 (that interlineations in a deposition were in the handwriting of an interested person, admitted); 1836, *People v. Moore*, 15 Wend. 421 (showing that a deposition taken by a magistrate and signed by the witness, but not required by law to have been read over to him, was in fact not read over to him; admitted); 1857, *Cook v. Brown*, 34 N. H. 463, 471 (the witness said that

the defendant had written out her deposition and she was going to sit up that night and learn it; admitted). The circumstances thus admissible in discredit are further ascertainable from the cases collected *ante*, §§ 786-788, 803-805 (depositions), §§ 753, 764 (memoranda to aid recollection), *post*, § 446 (dying declarations), § 1556 (regular entries).

SUB-TITLE II (continued): TESTIMONIAL IMPEACHMENT.

TOPIC IV: SPECIFIC ERROR (CONTRADICTION).

CHAPTER XXXIII.

- § 1000. Theory of this Mode of Impeachment.
 § 1001. Error on Collateral Matters cannot be Shown; (1) Logical Reason.
 § 1002. Same: (2) Reason of Auxiliary Polley.
 § 1003. Test of Collateralness.
 § 1004. Two Classes of Facts not Collateral; (1) Facts Relevant to the Issue.
 § 1005. Same: (2) Facts discrediting the Witness as to Bias, Corruption, Skill, Knowledge, etc.
 § 1006. Collateral Questions on Cross-examination.
 § 1007. Contradicting Answers on the Direct Examination; Supporting the Contradicted Witness.
 § 1008. *Falsus in Uno, Falsus in Omnibus*; General Principle.
- § 1009. Same: (1) First Form of Rule: The Entire Testimony must be Rejected.
 § 1010. Same: (2) Second Form of Rule: The Entire Testimony may be Rejected.
 § 1011. Same: (3) Third Form of Rule: The Entire Testimony must be Rejected, unless Corroborated.
 § 1012. Same: (4) Fourth Form of Rule: The Entire Testimony may be Rejected, unless Corroborated.
 § 1013. Same: There must be a Conscious Falsehood.
 § 1014. Same: Falsehood must be on a Material Point.
 § 1015. Same: Time of the Falsehood.

§ 1000. **Theory.** If an eye-witness to a homicide swears that the murderer bore a scar upon his cheek, and the accused is perceived by the jury to have no such scar, it is plain that on that particular point the witness is wholly in error. If the same witness should testify, among other circumstances, that the killing was done at night, by the light of the full moon, and a reference to an almanac should show that the moon did not appear in that place on that night, in a similar way his error on that point would be apparent. If his testimony should assert, among other things, that the assailant wore a white hat, and on the other side five unimpeachable eye-witnesses should attest that the assailant wore a black hat, then the same result would follow, provided the testimony of the opposing witnesses were believed. Suppose, again, that he makes the same assertion as to a white hat, and five unimpeachable witnesses swear that the accused never owned or possessed a white hat, the same result would follow, provided, first, that the testimony of the opposing witnesses were believed, and, secondly, that the impossibility also be accepted of the accused having been able to obtain temporarily a white hat. Now in all four of these instances the probative effect is the same, namely, the witness is perceived by the tribunal to be in error on a particular point; the difference between the instances consists merely in the method of making the error clear to the tribunal. In the first instance, the senses of the tribunal itself determine by inspection and without ordinary evidence; in the second instance, the error appears by means of hearsay testimony of an ordinarily incontrovertible sort; in the third instance it is necessary that faith be given to the opposing testimony before the error can be accepted; in the fourth instance, it is necessary, not only that the opposing testimony

be believed, but also that certain circumstantial facts additionally be accepted as existing and as probative before the error can be accepted. Whatever the method of proving the contrary of the witness' asserted fact, the ultimate result aimed at is the same, namely, to persuade the tribunal that the witness has completely erred on that particular point. Now the commonest instances in practice are the third and the fourth, *i. e.*, the marshalling of one or more witnesses (with or without other circumstantial evidence) who deny the fact asserted by the first witness and maintain the opposite to be the truth. Thus, the dramatic feature of the attempt to prove the error is a *contradiction* of the first witness by one or more in opposition. Yet this contradiction in itself does nothing probatively, nor unless the contradicting witness or witnesses are believed in preference to the first one, *i. e.* unless *his error* is established. It is not the contradiction, but the truth of the contradicting assertion as opposed to the first one, that constitutes the probative end. Nevertheless, the contradiction, being the usual and prominent feature of the process by which that end is aimed at, has served as the common name to designate the probative end itself. This is not wrong, provided it be clearly understood what that end is.

Such being the real probative end which the contradiction is intended to serve, what is the exact nature of that probative effect? Assume that the end is accomplished, and that the tribunal accepts as a fact that the witness is completely in error on that particular point, what is the place of this fact in the general system of discrediting or impeaching evidence?

The peculiar feature of this probative fact of Error on a particular point is its deficiency with respect to definiteness and its wide range with respect to possible significance. Looking back over the various kinds of defects of testimonial qualifications already considered, it will be seen that the evidence was aimed clearly and specifically at a particular defect; it showed either that or nothing. Former perjury would indicate probably a deficient sense of moral duty to speak truth; relationship to the party, a probable inclination to distort the facts, consciously or unconsciously; misjudgment of a test-specimen of handwriting, a probable lack of skill in judging of writings; and so on. Now the present sort of fact is not offered as definitely showing any specific defect of any of these kinds, and yet it may justify an inference of the existence of any one or more of them. We know simply that an erroneous statement has been made on one point, and we infer that the witness is capable of making an erroneous statement on other points. We are not asked, and we do not attempt to specify, the particular defect which was the source of the proved error and which might therefore be the source of another error. The source might be a mental defect as to powers of observation or recollection; it might be a lack of veracity-character; it might be bias or corruption; it might be lack of experiential capacity; it might be lack of opportunity of knowledge. As to all this, nothing can be specified. The inference is only that since, for this proved error, there was *some unspecified defect* which became a source of error, the same defect may equally exist as

the source of some other error, otherwise not apparent. No doubt the repetition of instances affects the strength of the inference; *i. e.* if a witness has testified to ten separate points, and if his assertions are proved to be incorrect not merely upon one but upon six of these points, one is more inclined to believe that the underlying defective quality, whatever it may be, is radical and complete, and to assume easily that it applies to and annuls his assertions on all the remaining points. But it is still true that the error in itself does not definitely indicate any one specific defect; that there is no attempt consciously to analyze its bearings in that respect; and that the typical probative process is that of inferring a general defective trustworthiness on other points from proved defective trustworthiness on one point.¹

It will thus be seen, as above suggested, that the *strength* and usefulness of this sort of evidence consists in the wide range of defective qualities which it opens to our inference; and that its *weakness* consists in the indefiniteness of its inference.

In view of this source of its weakness, there is no difficulty in appreciating the logical basis for a limitation that is well established in the law; and this is now to be considered:

§ 1001. **Error on Collateral Matters cannot be Shown; (1) Logical Basis.** In so far as the point on which the proved error exists is removed in conditions and circumstances from the point as to which the inference of other error is desired to be drawn, the possible explanations (in the way of defective qualities) multiply which may be accepted without necessarily accepting one which applies to the desired point; conversely, in so far as the conditions and circumstances are the same, then the explanations tend to become identical, *i. e.* so that the defective quality, whatever it was, that caused the proved error, must have operated, more or less certainly, to cause error also on the point at issue, so closely connected with it in conditions and circumstances. For example, suppose a witness to testify that the accused struck the first blow in an affray; and suppose it to appear that this witness, four years ago, incorrectly asserted that a street-car conductor had not returned him the right amount of change after payment of fare; or that two years ago he incorrectly asserted that Yankton was the capital of South Dakota; or that one year ago he incorrectly asserted that his brother was in California; or that one month ago he incorrectly stated the day of the month; in all these instances the significance of the error is felt logically to be trifling, because the defect which was the source of any one of those errors may not be operating with respect to his assertion now in question, and the probability of its operating is so indefinite as not to be worth considering. But suppose it to appear that another assertion of this witness, that the deceased had no weapon in his hand when struck, is incorrect; now we may begin to attach significance to this error, because the source of it, while it *need* not be also operating as to the main assertion in question, is much more likely to be

¹ See the opinion of Holmes, J., in *Gertz v. Fitchburg R. Co.*, 137 Mass. 77, quoted *post*, § 1109.

operating. Or, if the error consist in asserting that the deceased was knocked down by the accused's blow (when in truth he remained standing), the error is vital, because the defective source of that assertion must almost necessarily have operated also for the assertion that the accused struck first; and, if the former assertion appears to be untrustworthy, the latter must fall with it (so far as this witness' testimony is concerned).¹

Thus, an error upon a distant and distinct matter is logically much inferior in value to an error upon a closely connected matter, in its bearing upon the trustworthiness of the assertion in question. This seems to be the logical foundation for the readiness of our law to draw a distinction, in allowing proof of such errors, between matters "collateral" and other matters.

§ 1002. *Same*: (2) *Reasons of Auxiliary Policy*. But it remains true that "collateral" errors, though only remotely probative, are still probative, *i. e.* relevant; and the controlling reason for exclusion is the reason of Auxiliary Policy (*ante*, § 42). This is the one emphasized by the Courts, with varying phrases and arguments:

1670, *Whitebread's Trial*, 7 How. St. Tr. 311, 374; the defendant offered to prove that Oates had made a false statement as to his companions, in his testimony at a prior trial for the Popish Plot; L. C. J. *North*: "That is nothing to the purpose. If you can contradict him in anything that hath been sworn here, do." Defendant: "If we can prove him a perjured man at any time, we do our business." L. C. J.: "How can we prove one cause in another? . . . Can he come prepared to make good everything that he hath said in his life?" Another defendant: "All that I say is this, If he be not honest, he can be witness in no case;" L. C. J.: "But how will you prove that? Come on, I will teach you a little logic. If you will come to contradict a witness, you ought to do it in a matter which is the present debate here; for if you would convict him of anything that he said in Ireland's trial, we must try Ireland's cause over again."

1680, *Earl of Castlemaine's Trial*, 7 id. 1067, 1081, 1107; on an offer to contradict on a collateral matter; Attorney-General: "If he may ask questions about such foreign matters as this, no man can justify himself; . . . any man may be caught thus"; Defendant: "How can a man be caught in the truth?"; L. C. J. *Scroggs*: "We are not to hearken to it. The reason is this, first: You must have him perjured, and we are not now to try whether that thing sworn in another place be true or false; because that is the way to accuse whom you please, and that may make a man a liar that cannot imagine this will be put to him; and so no man's testimony that comes to be a witness shall leave himself safe."

1847, *Atterson, B.*, in *Attorney-General v. Hitchcock*, 1 Exch. 104: "When the question is not relevant, strictly speaking, to the issue, but tending to contradict the witness, his answer must be taken (although it tends to show that he in that particular instance speaks falsely, and although it is [thus] not altogether immaterial to the issue) for the sake of the general public convenience; for great inconvenience would follow from a continual course of those sorts of cross-examinations which would be let in in the case of a witness being called for the purpose of contradiction"; *Rolfe, B.*: "The laws of evidence on this subject, as to what ought and what ought not to be received, must be considered as founded on a sort of comparative consideration of the time to be occupied in examinations of this nature and the time which it is practicable to bestow upon them. If we lived for a thousand years, instead of about sixty or seventy, and every case were of sufficient importance, it might be possible and perhaps proper to throw a light on matters in

¹ See the remarks of Story, J., in *Santissima Trinidad*, 7 Wheat. 233, 333.

which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible. Therefore some line must be drawn."

1861, *Robinson, C. J.*, in *R. v. Brown*, 21 U. C. Q. B. 334: ["These controversies] arise when a counsel, in cross-examination of a witness, uses a license which the practice allows him of asking a variety of questions having no apparent connection with the matter to be tried, in the hope of involving the witness in some contradiction. He is not in such cases obliged to explain the object of his questions, because that might often defeat his object; but he must be content to take the answers which the witness gives to any question that is irrelevant, and is not allowed to call witnesses to disprove the statements he makes in reply, because that would lead to the trial of innumerable issues irrelevant to the case, and would distract the attention of the jury. And besides, which is even a better reason, it would be unsafe and would be unjust towards the witness to infer, from any contradiction that might be given by another witness, that the one who has been cross-examined has sworn falsely and is unworthy of belief; since he could not have contemplated that he would be questioned upon points unconnected with the facts to be tried, and could therefore not be expected to be able on the sudden to support his testimony by the evidence of other persons, though it might be perfectly true in itself, notwithstanding the contradiction."

1847, *Allen, J.*, in *Charlton v. Unis*, 4 Gratt. 62: "Any other rule would tend to divert the attention of the jury from the real enquiry before them, whether the witness was entitled to credit in the evidence he had given, to the enquiry whether he had told the truth upon some collateral question; and the danger is encountered that, upon this collateral issue raised on the trial, evidence may become proper, and so be let in, which would be illegal upon the trial of the issue between the real parties to the cause; and such illegal testimony may make an improper impression upon the minds of the jury, notwithstanding any instruction of the Court as to the proper bearing thereof."

1854, *Reifield, C. J.*, in *Powers v. Leach*, 26 Vt. 277: "The issue attempted to be raised in regard to P.'s testimony was altogether collateral to the main issue in the case, and the Court might have rejected the testimony altogether and it would not have been error. We may suppose that such collateral issues might spring up in regard to the testimony of every witness upon the stand, and thus a single issue branch out into an indefinite number of subordinate and collateral ones, and these again into many more upon each point, so that it would become literally impossible ever to finish the trial of a single case. This rule, therefore, that one cannot be allowed to contradict a witness upon a matter wholly collateral to the main issue, becomes of infinite importance in the trial of cases before the jury. A judge may no doubt in his discretion allow a departure from the rule, but is not obliged to do so."¹

It is here important to observe how far these reasons of policy coincide with the reasons which exclude extrinsic testimony of particular acts of misconduct to show bad moral character (*ante*, § 979). (1) There is a reason of unfair surprise (*post*, § 1849); one might contrive and charge upon the witness an error of any kind, time, or place; and it would obviously be unfair to expect him to be prepared to refute it, except so far as it bears directly upon the matter in litigation. This reason, then, is in general the same as in the other rule. (2) There is a reason of confusion of issues (*post*, § 1904); for the necessity of investigating each error alleged would add to

¹ So also: 1896, *Brickell, C. J.*, in *Crawford v. State*, 112 Ala. 1, 21 So. 214; 1897, *Wallin, J.*, in *State v. Haynes*, 7 N. D. 70, 72 N. W. 923 (a careful statement of the principle); 1900, *Chase, J.*, in *Cooper v. Hopkins*, 70 N. H. 271, 48 Atl. 100.

the trial so much consumption of time and confusion of issues as to be intolerable. But here the reason points out a peculiar limitation; for while, in an issue of the witness' misconduct as relevant to show bad moral character, we are distinctly adding a mass of testimony otherwise irrelevant and out of place, yet this is not necessarily so with testimony directed to show the witness to be in error, since the point of the error may very well be a point already relevant in the case, and thus the testimony upon that point is no additional testimony, but is testimony which could have been in any case offered and must have been admitted if offered; on such a point, then, the proof of the witness' error is *not* an addition to the issues of the trial, and therefore is in no way obnoxious to the reason for exclusion.

§ 1003. *Test of Collateralness.* The reason above examined suggests immediately the limitation to the rule of exclusion. It is not the proof of every error that is obnoxious to the rule. The common term for designating the line of exclusion is "collateral"; no contradiction, we are told, shall be permitted on "collateral" matters.¹

But this term furnishes no real test. If it be asked what "collateral" means, we are obliged either to define it further — in which case it is a mere epithet, not a legal test —, or to illustrate by specific examples — in which case we are left to the idiosyncrasies of individual opinion upon each instance. The test that is dictated by the principle above explained, and the only test in vogue that has the qualities of a true test — definiteness, concreteness, and ease of application — is that laid down in *Attorney-General v. Hitchcock*: *Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the contradiction?* This test was laid down in connection with the Self-Contradiction doctrine, and is examined in further detail under that principle (*post*, § 1021). That the test is identical for both doctrines is perhaps not a necessary consequence of principle, though it may be (*post*, § 1019); but it is always accepted by the Courts as identical. The test of *Attorney-General v. Hitchcock* (as explained *post*, § 1021) is as yet explicitly accepted by only a few Courts in this country for the doctrine of Self-Contradiction; but the same Courts apply it also to the present doctrine.² Other Courts are content to invoke simply the term "collateral," and to decide according to the circumstances of each case.³

¹ 1824, *Starkie*, Evidence, I, 190 ("If a question as to a collateral fact be put to a witness for the purpose of discrediting his testimony, his answer must be taken as conclusive, and no evidence can be afterwards admitted to contradict it. This rule does not exclude the contradiction of the witness as to any facts immediately connected with the subject of inquiry.")

² 1877, *People v. Chin Mook Sow*, 51 Cal. 527 ("When the question asked on cross-examination calls for a response in respect to a matter which the party asking the question would have a right to prove as an independent fact, the rule [as to collateralness] does not apply"; here a former conviction was admitted); 1882, *Lang*,

horne v. Com., 76 Va. 1019, *semble*. The term "immaterial" ought on principle to be equivalent to this, and is employed in some cases: 1834, *Com. v. Buzzell*, 16 Pick. 158 ("an immaterial fact"). In Chancery, it must be noted, a rule of special bearing arises as to questioning for the purpose of collateral contradiction, *i. e.* whether new interrogatories can be filed for that purpose after publication of the depositions; here collateral contradiction is allowed; see *Purcell v. M'Namara*, 8 Ves. Jr. 324 (1803), and note; *Carlos v. Brook*, 10 id. 49 (1804).

³ In the following cases the rule was acknowledged and applied, but no specific test or useful illustration is furnished by them; in the ensuing sections (§§ 1004-1006) will be found

The sound rule would be to leave the application of the rule entirely in the control of the trial Court;⁴ but there is as yet little sign of such a practice.

§ 1004. **Two Classes of Facts not Collateral; (1) Facts relevant to the Issue.** In applying the test of *Attorney-General v. Hitchcock*, it is obvious that there are two different groups of facts of which evidence would have been admissible independently of the contradiction: (1) facts relevant to some issue in the case, and (2) facts relevant to the discrediting of a witness.

(1) *Facts relevant to some issue in the case.* The test in question usually causes here no difficulty in its application; the issues in the case indicate what facts would be relevant:

1844, *Com. v. Buzzell*, 16 Pick. 158; indictment for entering and burning, as members of a mob, an Ursuline convent; an exciting cause to the action of the mob was a rumor that one of the nuns was confined there against her will, and testimony to her insanity had been offered by the prosecution; the defendant then offered evidence of her sanity;

those rulings which are concerned with some question of principle; the following list is not exhaustive, but the general rule is everywhere fully conceded, and a citation of every case in which it has been invoked is unnecessary: *Eng.*: 1805, *R. v. Rudge*, Peake Adl. Cas. 232; 1800, *Spenceley v. Willmot*, 7 East 108 (usury; the terms of other contracts with other persons of the same circle about the same time, not allowed to be contradicted); 1852, *Palmer v. Trower*, 8 Exch. 247 (the fact of a statement by a third party, inadmissible in itself; excluded); 1852, *R. v. Dean*, 6 Cox Cr. 23 (an irrelevant statement of the prosecutrix at a former time; excluded); 1860, *Tohnan v. Johnstone*, 2 F. & F. 69; 1898, *Re Hagenmacher's Patents*, 2 Ch. 280; *Ala.*: 1859, *Rosenbaum v. State*, 33 Ala. 361; 1896, *Louisville J. C. Co. v. Lischkoff*, 109 id. 136, 19 So. 436; 1896, *Crawford v. State*, 112 id. 1, 21 So. 214; 1897, *Bunzel v. Mass.*, 116 id. 68, 22 So. 568; 1900, *Bessemer L. & I. Co. v. Dubose*, 125 id. 442, 28 So. 380; *Ark.*: 1879, *Butler v. State*, 34 Ark. 484; *Cal.*: 1878, *People v. Bell*, 53 Cal. 119; 1886, *People v. Webb*, 70 id. 120, 11 Pac. 509; 1888, *People v. Dye*, 75 id. 111, 16 Pac. 537; 1890, *People v. Tiley*, 84 id. 654, 24 Pac. 290; 1890, *Davis v. Powder-Works*, ib. 627, 24 Pac. 387; *Fla.*: 1900, *Stewart v. State*, 42 Fla. 591, 28 So. 815; *Ga.*: 1903, *Atlanta R. & P. Co. v. Monk*, 118 Ga. 449, 45 S. E. 494; *Ill.*: 1898, *East Dubuque v. Burhyte*, 173 Ill. 553, 50 N. E. 1077; *Ind.*: 1897, *Reynolds v. State*, 147 Ind. 3, 46 N. E. 51; 1900, *Barton v. State*, 154 id. 670, 57 N. E. 515; 1901, *Hinkle v. State*, 157 id. 237, 61 N. E. 196; *Kan.*: 1890, *State v. Blakesley*, 43 Kan. 254, 23 Pac. 570; *State v. Reick*, ib. 636, 23 Pac. 1076; *Ky.*: 1889, *Com. v. Honrigan*, 39 Ky. 312, 12 S. W. 550; 1898, *Stephens v. Com.*, — id. —, 47 S. W. 229; *La.*: 1898, *State v. Wiggins*, 50 La. An. 330, 23 So. 334; *Md.*: 1900, *Baltimore City P. R. Co. v. Tanner*, 90 Md. 315, 45 Atl. 188; *Mass.*: 1861, *Com. v. Fitzgerald*, 2 Atl. 297; 1881, *Shurtleff v. Parker*, 130 Mass. 297; 1889, *Fitzgerald v. Williams*, 148 id. 462, 466, 20 N. E. 100; 1805, *Chalmers v. Mfg. Co.*, 164 id. 532, 42 N. E. 93; *Mich.*: 1366, *Fisher v. Hood*, 14 Mich. 190; *Mo.*: 1876, *Iron Mountain Bank v. Murdock*, 62 Mo. 70, 74; 1896, *State v. Taylor*, 134 id. 109, 35 S. W. 92; *Mont.*: 1903, *Bullard v. Smith*, — Mont. —, 72 Pac. 761; *Nebr.*: 1894, *Carpenter v. Lingenfelter*, 42 Nebr. 723, 60 N. W. 1022; 1903, *Burke Co. v. Fowler*, — id. —, 98 N. W. 760; *N. H.*: 1851, *Hersom v. Henderson*, 23 N. H. 508; 1858, *Gerrish v. Pike*, 36 id. 512, 517; *N. J.*: 1900, *State v. Sprague*, 64 N. J. L. 419, 45 Atl. 788; *N. D.*: 1897, *State v. Haynes*, 7 N. D. 70, 72 N. W. 923; *Oh.*: 1865, *Mimus v. State*, 16 Oh. St. 233; *Or.*: 1901, *Williams v. Culver*, 39 Or. 337, 64 Pac. 763; 1901, *Oldenburg v. Oregon Sugar Co.*, ib. 564, 65 Pac. 869; *Pa.*: 1859, *Schenley v. Com.*, 36 Pa. 61; 1861, *Wright v. Campsty*, 41 id. 110; 1867, *Gregg v. Jamison*, 55 id. 471; 1900, *Cones v. Chapman*, 195 id. 109, 45 Atl. 676; *S. C.*: 1890, *State v. Wyse*, 33 S. C. 591, 12 S. E. 556; 1897, *State v. Adams*, 49 id. 414, 27 S. E. 451; 1898, *State v. Sanders*, 52 id. 580, 30 S. E. 616; *Tenn.*: 1882, *Rocco v. Parczyk*, 9 Lea 328, 331; *Tex.*: 1890, *Sutor v. Wood*, 76 Tex. 407; 1897, *Texas & P. R. Co. v. Phillips*, 91 id. 278, 42 S. W. 852; 1903, *Connell v. State*, — Tex. Cr. —, 75 S. W. 512; *U. S.*: 1898, *Safter v. U. S.*, 31 C. C. A. 1, 87 Fed. 30; 1899, *Scott v. U. S.*, 172 U. S. 343, 19 Sup. 209; *Va.*: 1811, *Fall v. Overseers*, 3 Mu. 495, 506; 1847, *Charlton v. Unia*, 4 Gratt. 61; 1873, *Murphy v. Com.*, 23 id. 965; *Vt.*: 1840, *Stevens v. Beach*, 12 Vt. 587; 1858, *State v. Thibault*, 30 id. 101, 104; 1881, *Smith v. Royalton*, 53 id. 609; *Wash.*: 1903, *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357; *W. Va.*: 1901, *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 676.

⁴ 1893, *Spaulding v. Merilmack*, 67 N. H. 382, 36 Atl. 253; *Baldwin v. Wentworth*, ib. 408, 36 Atl. 365; 1897, *Perkins v. Roberge*, 69 id. 171, 39 Atl. 583. *Contra*: 1900, *Coofer v. Hopkins*, 70 id. 271, 43 Atl. 100.

per Curiam: "The question is whether the statement of an immaterial fact can be contradicted, if it comes out on the examination of a witness in chief. Now neither party can be allowed to show the internal condition of this institution, by way of excuse, justification, or apology for the attack made upon it; so upon an indictment for setting fire to a house of ill-fame, the bad character of the house is no ground of defence. . . . Now here the evidence as to the insanity of the nun was immaterial, . . . and the other party cannot call witnesses to contradict it."

§ 1005. Same: (2) *Facts discrediting the Witness in respect to Bias, Corruption, Skill, Knowledge, etc.* Since, by the rule in *Attorney-General v. Hitchcock*, any fact which would be independently admissible may be made the subject of a contradiction, a second class of facts includes those which could otherwise be receivable for the purpose of impeaching some specific testimonial quality. The range of such modes of impeachment has already been considered (*ante*, §§ 943-996); and they must now be reviewed in the application of the present rule:

(a) *Moral character.* Particular acts of misconduct are not provable by extrinsic testimony to impeach moral character (*ante*, § 979); they are therefore also not provable merely in contradiction of the witness' statements on the stand;¹ except a judgment of conviction of crime, which, so far as it is provable by extrinsic testimony to impeach character (*ante*, §§ 980, 987), is therefore also thus provable in contradiction.²

(b) *Bias.* Particular circumstances and expressions indicating bias are provable by extrinsic testimony (*ante*, §§ 948-950); they are therefore also provable in contradiction:

1836, *Coleridge, J.*, in *Thomas v. David*, 7 C. & P. 350 (assumpsit on a promissory note; the plaintiff's female servant had attested the signature; being asked, on cross-examination, "whether she did not constantly sleep in the same bed with her master, the

¹ 1871, *R. v. Holmes*, L. R. 1 C. C. R. 334 (rape; in course of the prosecutrix with a third person); 1880, *Com. v. Dunan*, 123 Mass. 422 (the witness' residence); 1881, *Hamilton v. People*, 46 Mich. 186, 9 N. W. 247; 1882, *Dra-coll v. People*, 47 id. 416, 11 N. W. 221; 1883, *People v. Wolcott*, 51 id. 617, 17 N. W. 78; 1883, *State v. Knapp*, 45 N. H. 154 (rape, intercourse with the prosecutrix); 1887, *Pullen v. Pullen*, 43 N. J. Eq. 136, 6 Atl. 887 (whether the witness had committed larceny); 1900, *Bull-lock v. State*, 65 N. J. L. 557, 47 Atl. 63; 1862, *Newcomb v. Griswold*, 24 N. Y. 299; 1873, *Stokes v. People*, 53 id. 175 (a witness denied having "taken things"; error not allowed to be shown); 1881, *Conley v. Meeker*, 85 id. 618 (a witness answered evidence of his conviction for crime by declaring that he had since reformed; evidence of his having, since discharge, conducted gambling-houses, was rejected as collateral); 1888, *People v. Greenwall*, 108 id. 296, 300, 15 N. E. 404 (that the defendant, a witness, had committed a burglary, denied by him, excluded); 1891, *Humphrey v. State*, 78 Wis. 571, 47 N. W. 386 (mere reflections on the complainant's character in a bastardy case, but not actual opportunities of intercourse with

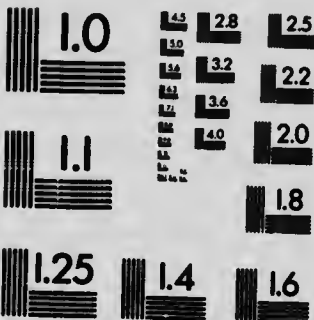
other men about the time in question, excluded). In some of these cases, this prohibition of extrinsic testimony of misconduct is put on the sole ground of Collateral Contradiction; e. g. 1871, *R. v. Holmes*, L. R. 1 C. C. R. 334 (attempt at rape; the prosecutrix denied having had intercourse with one S., and a contradiction was refused). But this error is a fundamental one, for it ignores the vital distinction, of history as well as of principle, between the present rule and the rule against extrinsic testimony of particular misconduct. The distinction has been already pointed out *ante*, § 979. It is enough here to note that there is a double exclusion of such evidence, i. e. (1) it cannot enter for the purpose of showing character, for reasons affecting that purpose of proof; and (2) it cannot enter as a contradiction, for reasons already here explained. Compare *Ahlerson, B.*, in *Attorney-General v. Hitchcock* (1847), 1 Exch. 103 ("the inadmissibility of such a contradiction [as to his personal character and as to his having committed any particular crime] depends, indeed, upon another principle altogether").

² 1877, *People v. Chin Mook Sow*, 51 Cal. 597; and cases cited *ante*, §§ 980, 987.



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plaintiff," and denying it, she was allowed to be contradicted): "If the question had been whether the witness had walked the streets as a common prostitute, I think that that would have been collateral to the issue, and that, had the witness denied such a charge, she could not have been contradicted. But here, the question is whether the witness had contracted such a relation with the plaintiff as might induce her the more readily to conspire with him to support a forgery, just in the same way as if she had been asked if she was the sister or daughter of the plaintiff and had denied that."³

(c) *Corruption.* For the same reason as the preceding, a contradiction is permissible upon facts which tend to show (*ante*, §§ 956-963) the witness' corrupt testimonial intent for the case in hand.⁴

(d) *Skill.* Particular instances of error indicating lack of expertness are usually not provable by extrinsic testimony, while circumstances other than these, diminishing the witness' qualifications, may perhaps be thus proved (*ante*, §§ 991, 992). Such facts, therefore, may or may not be provable in contradiction.⁵ The trial Court should have discretion.

(e) *Intoxication, and Illness.* The facts of intoxication and of illness, at the time of the events observed or of giving testimony, are admissible to discredit the witness' testimonial powers (*ante*, §§ 933, 934). This class of facts is therefore also provable in contradiction.⁶

³ *Accord*: 1858, O'Brien, J., in *R. v. Burke*, 8 Cox Cr. C. 49; 1903, *Purdee v. State*, — Ga., 45 S. E. 606; 1900, *Whitney v. State*, 154 Ind. 578, 57 N. E. 398; 1901, *Powers v. Com.*, — Ky., —, 61 S. W. 735; 1890, *Helwig v. Las-cow*, 82 Mich. 623, 46 N. W. 1033 ("the question of the status of the witness as to interest, relationship, or conviction of crime, is not now and never was a collateral one, in the sense that the party cross-examining him is bound by his answer"); 1852, *Martin v. Farnham*, 25 N. H. 199; 1881, *Watson v. Twombly*, 60 id. 491; 1856, *Van Wyck v. McIntosh*, 14 N. Y. 439, 443; 1896, *Cathey v. Shoemaker*, 119 N. C. 424, 26 S. E. 44; 1900, *Hayes v. Smith*, 62 Ob. 161, 56 N. E. 879; 1900, *Livermore F. & M. Co. v. Union S. & C. Co.*, 105 Tenn. 187, 58 S. W. 270, *semble*; 1895, *Fenstermaker v. R. Co.*, 12 Utah 439, 43 Pac. 112.

Add the similar cases on *self-contradiction*, *post*, § 1023.

Contra: 1879, *Haley v. State*, 63 Ala. 86, *semble*; 1882, *Langhorne v. Com.*, 76 Va. 1019 (refusing to allow evidence of incorrectness in matters not admissible in chief to show bias, since the rule on the latter subject is strict in this State; see *ante*, § 950).

⁴ 1850, *Melluish v. Collier*, 19 L. J. Q. B. 493 (an attempt by a party to suborn testimony; admitted); 1839, *Alexander v. Vye*, 16 Can. Sup. 501, 502, 521 (that the defendant, denying the genuineness of a document, could be asked whether he had not changed his style of signature since action begun, and his denial refuted by documents bearing his signature, allowed; two judges diss. on the latter point); 1897, *State v. McKinstry*, 100 Ia. 82, 69 N. W. 267 (an attempt to bribe); 1901, *Powers v. Com.*, — Ky., —, 63 S. W. 976 (bribery); 1899,

Richrdson v. State, 90 Md. 109, 44 Atl. 999 (attempt to bribe another witness); 1871, *Strang v. People*, 24 Mich. 7 (facts tending to show a corrupt agreement between the witness and his party). *Contra*: 1811, *Harris v. Tippet*, 2 Camp. 637 (whether the witness had attempted to dissuade opponent's witness from attending; contradiction excluded, because "collateral," "irrelevant to the issue"; but this ruling has been universally treated as erroneous; see the exposition *post*, § 1023, under *Self-Contradiction*).

For the application of the rule to proof of particular errors to impeach the credit of a party's book of accounts, see *post*, §§ 1531, 1557.

For proof of *prior false claims or charges* in impeachment, see *ante*, § 963.

⁵ 1867, *Whitney v. Boston*, 98 Mass. 316 (error as to the dimensions of a shop, illustrating the witness' acquaintance with land valued by him; admitted); 1895, *Kennett v. Engle*, 105 Mich. 693, 63 N. W. 1009 (a physician was asked a test question unconnected with the case, and he was not allowed to be contradicted). Compare the citations *ante*, §§ 991, 992.

For proof of *other sales*, to discredit a *value-witness*, see *ante*, § 464.

⁶ 1900, *Cooper v. Hopkins*, 70 N. H. 271, 48 Atl. 100 (trespass to an alleged shop-lifter; clerk testifying for defendant allowed to be contradicted as to her excitement at the time, because this affected her ability "to correctly observe what took place"; but not as to her statements that the trespassing clerk "had done the same thing before"); 1893, *People v. Webster*, 139 N. Y. 73, 86, 34 N. E. 730 (that she was under the influence of opium at the time, allowed, since "the value of her testimony de-

(f) *Opportunity of observing the events.* A necessary qualification in a witness is personal knowledge, *i. e.* an opportunity, as to place, time, proximity, and the like, to observe the event or act in question (*ante*, § 650), and the deficiency of such opportunity may be shown to discredit (*ante*, § 994). Hence, all facts which bear upon the position, distance, and surroundings, the bystanders and their conduct, the time and the place, the things attracting his attention, and similar circumstances, said by the witness to have been observed by him at the time of observing the main event testified to by him, are material to his credit in so far as they purport to have formed a part of the whole scene to his observation; thus, if an error is demonstrated in one of the parts observed, the inference (more or less strong) is that his observation was erroneous (or his narration manufactured) on other and more important parts also. This source of discredit is of vast importance in the overthrow of false or careless testimony; and its permission must be provided for in any definition of the term "collateral":

1684, *Lady Ivy's Trial*, 10 How. St. Tr. 555, 569; the defendant's title depended on a pretended old deed, from one Marcellus Hall to one Stepkins, found opportunely by one Knowles in his own garret; Knowles did not know that any Hall deeds affected the defendant's title, and he was questioned as to how he had known in his pretended search that this deed would be material; *L. C. J. Jeffreys*: "Look you, then, we ask you how you came to know it was a deed belonging to Stepkins?" *Witness*: "I read the backside, and put my hand to it"; *L. C. J.*: "How came you to put your hand to this deed as belonging to Stepkins, when you never looked into the deed [as you have already sworn]?" *Witness*: "When I found this deed to have written upon it 'Marcellus Hall,' I did believe it was something that concerned the Stepkins"; *L. C. J.*: "Let us see the deed now. You say that was the reason, upon your oath?" *Witness*: "Yes, it was"; *L. C. J.*: "Give Mr. Sutton [the defendant's attorney] his oath. Look upon the outside of that deed, and tell us whose handwriting that is"; *Sutton*: "All but the word 'Lect.' is my handwriting"; *L. C. J.*: "Then how couldst thou, [Knowles.] know this to belong to the Stepkins' by the words 'Marcellus Hall' when you first discovered this deed in September, 1682, and you found it by yourself and put your hand to it, and yet that 'Marcellus Hall' be written by Mr. Sutton, which must be after that time?" *Counsel for defendant*: "Here are multitudes of deeds, and a man looks on the inside of some and the outside of others; is it possible for a man to speak positively as to all the particular deeds, without being liable to mistake?" *L. C. J.*: "Mr. Solicitor, you say well. If he had said, 'I looked upon the outside of some and the inside of others, and wherever I saw either on the outside or in the inside the name of Stepkins or Marcellus Hall, I laid them by and thought they might concern my lady Ivy,' that had been something. But when he comes to be asked about this particular deed, and he upon his oath shall declare that to be the reason why he thought it belonged to Stepkins, [namely.] because of the name of 'Marcellus Hall' on the outside, and never read any part of the inside, when Sutton swears 'Marcellus Hall' was [later] written by him, what would you have a man say? . . . And you shall never argue me into a helief that it is impossible for a man to give a true reason, if he have one, for his remembrance of a thing"; and before

depended largely on the accuracy of her perceptions"; 1893, *State v. Rollins*, 113 N. C. 722, 732, 18 S. E. 394 (intoxication at the time of the events; because it did not affect his character, but "his capacity to know and remember with accuracy what took place," contradiction was allowed); 1896, *Ludtke v. Hertzog*, 18 C.

C. A. 487, 72 Fed. 142 (dates of occurrences being material, extrinsic testimony was admitted as to a gross error of date made by an aged witness on a point otherwise wholly immaterial); 1898, *Kuenster v. Woodhouse*, 101 Wis. 216, 77 N. W. 165 (contradiction allowed as to intoxication at and about the time of the events).

long the defendant's counsel were obliged to withdraw the witness as a clear liar; the defendant was afterwards indicted for forging the deeds.

1861, *Robinson, C. J.*, in *R. v. Brown*, 21 U. C. Q. B. 830, 336 (indictment for murder; M. testified that she saw the defendant and S. throw the deceased off a bridge, giving a detailed description of S.; the defendant offered a witness D. to show that S. was 50 miles away at that time; the judge insisted that S. himself should be called, and if contradicted, then D.; held, that D. also should have been called, the point of contradiction being material): "It appears to me that any fact so closely connected with the alleged offence as to be in fact a part of what was transacted or said to be transacted at the very moment cannot be treated as irrelevant in investigating the truth of the charge. If, for instance, the witness for the Crown, knowing a particular watch or some remarkable article of dress that the deceased usually wore, had sworn that she saw Brown take the article from his person before throwing him into the river, it would have been a material circumstance to be shown on the part of the prisoner, if it could have been, that the deceased had left the watch or the article of dress at home when he went out that evening, and if they could be produced to the jury on the trial. So if the Crown witness had sworn the offence was committed in some obscure hovel in the woods or in the town, which she pretended to describe with certainty and which she had known well, it could not have been irrelevant to the case to prove that that house or hovel had been totally destroyed by fire some weeks before the time spoken of, so that the murder could not have been committed in it. Yet in all these cases it must be admitted that if the crime of murder were committed by the prisoner, he would not the less be guilty of that crime because the deceased had not been robbed as well as murdered, or because he had not been killed in the place described by the witness; nor would the prisoner be less guilty of murder if he committed the deed alone, or without being assisted by Sherrick as the witness described."

† The following cases illustrate this mode of contradiction: 1679, *Harcourt's Trial*, 7 How. St. Tr. 311, 387 (Oates, the mainstay of the prosecution, had testified that one Ireland, another conspirator, not on trial, had in his presence parted from the defendant at London, between Aug. 8 and 12; it was proposed to show that this was false, Ireland being in the country at that time; L. C. J. Scroggs: "They [defendants] must have right, though there be never so much time lost, and patience spent. Say they, 'We must prove and contradict men by such matters as we can; people may swear downright things, and it is impossible to contradict them; but we will call witnesses to prove those particulars that can be proved'; and it was by just such minor falsities as this that the whole monstrous fabric of Oates' perjury was later discovered and his punishment obtained); 1831, *R. v. Campbell*, Cr. & Dix Abr. 581 (contradiction as to the presence at the riot of one C., jointly indicted, but not on trial; admitted); 1838, *R. v. McKenna*, Cr. & Dix Abr. 580 (contradiction as to the presence at the murder of one M., jointly indicted with defendants, but now at large; admitted); 1842, *R. v. Overton*, 2 Moo. Cr. C. 263 (perjury; on a charge against H. of coursing with a dog without a license, the now defendant testified that the dog was his, and in giving the date of the receipt for his purchase from H. swore falsely; yet either date if correct would have exonerated H.; evidence of the incorrectness of the assertion admitted by all the Judges

present); 1862, *R. v. Dennis*, 3 F. & F. 502 (eye-witness of a crime; present statement that she was not acquainted with the man; the contrary offered; admitted); 1902, *Barry v. People*, 29 Colo. 395, 68 Pac. 274; 1893, *East Tennessee R. Co. v. Daniel*, 91 Ga. 768, 18 S. E. 22 (contradiction allowed, against an alleged eye witness, of his statement that immediately before arriving at the place he made a purchase at a store; "it contradicts the witness as to the train of events which led him to be present, and thus tends to discredit him as to the fact of his presence"); 1900, *Tiller v. State*, 111 id. 840, 36 S. E. 201 (four persons being defendants, testimony to the presence of all four at a place was allowed to be shown erroneous, as to one of the four, by another of the four); 1834, *Goodhand v. Benton*, 6 G. & J. 481, 488 (title to a slave; whether the possession by B. was in the year 1816 or 1817 was material; a witness who testified that, on going to pay rent to B. in 1817 he saw the slave in B.'s possession, and that, the final settlement occurred two years later, was allowed to be contradicted by evidence that the final settlement occurred in 1818, so that he was in error in one or the other statement); 1859, *Stephens v. People*, 19 N. Y. 572 (charge of murder by arsenic; testimony for defence that the arsenic purchased by defendant was used for rats in the cellar where provisions were eaten by them; contradiction, that no provisions were kept in the cellar, allowed); see the cases cited *post*, § 1006, for cross-examination only. *Excluded*, but errone-

(g) *Recollection.* When the memory is tested by asking for the witness' recollection of facts not otherwise material, his errors of recollection cannot be shown by extrinsic testimony (*ante*, § 995). But circumstances which form the alleged grounds of his recollection of material facts testified to by him should be subject to contradiction, for the same reason as in the preceding topic.⁹

(h) *Narration.* Circumstances affecting the witness' ability to narrate his story intelligently and correctly are material to his credit, and should be subject to contradiction.⁹

(i) *Prior consistent statements* of the witness are usually not provable to corroborate him (*post*, § 1124); hence, his error in affirming that he has made them is not provable by other witnesses, except in those situations in which those statements would have been admissible for him.¹⁰

In general, the exclusionary rule seems to be too strictly enforced. "Everything," said Lord Denman, "is material that affects the credit of the witness." The discretion of the trial Court should be left to control. It is a mistake to lay down any fixed rule which will prevent him from permitting such testimony as may expose a false witness. History has shown, and every day's trials illustrate, that not infrequently it is in minor details alone that the false witness is vulnerable and his exposure is feasible.¹¹

§ 1006. *Same; Collateral Questions on Cross-Examination.* (1) The essential feature of this mode of impeachment is the *demonstration of the witness error* (*ante*, § 1000). This not only can be but often is accomplished by *cross-examination alone*,—and not only (as a matter of course) through the witness' own confession of error, but through an instant comparison of the witness' statement with truths of common knowledge (judicially noticeable) or with tangible objects already in the case. The following anecdotes illustrate the possibilities of this mode:

only: 1897, *Chicago City R. Co. v. Allen*, 169 Ill. 287, 48 N. E. 414 (contradiction of a witness explaining presence at a place as going there to vote, by showing that it was not his lawful voting place, excluded).

⁹ 1854, *Com. v. Hunt*, 4 Gray 422 (that a memorandum, said by the witness to have been written by him, and serving as a record of his past recollection, was in fact not in his writing; admitted); compare the cases cited *ante*, § 995.

¹⁰ Cases cited *ante*, § 996. The following case was erroneously decided by the majority; compare with it O'Connell's story, cited *ante*, § 811: 1858, *R. v. Burke, Ire.*, 8 Cox Cr. 45 (witness who stated that he could not speak English and was therefore examined in Irish through an interpreter; not allowed to be contradicted as to having spoken in English within a few days; three judges diss.).

¹¹ 1861, *M'Kewan v. Thornton*, 2 F. & F. 599 (denial of the fact of a former complaint; correction allowed because the complaint would thus appear not to have been an afterthought, as claimed; this illustrates the principle, for the former statement would here have been admis-

sible independently in corroboration); 1843, *Whiteford v. Burekmyer*, 1 Gill 140 (the cross-examining party's own declarations in his favor, excluded); 1889, *Morris v. R. Co.*, 116 N. Y. 556, 22 N. E. 1097 (a showing of error as to whether he had said what he now says, excluded).

¹¹ The following celebrated instance of perjury illustrates this: 1681, *Colledge's Trial*, 8 How. St. Tr. 549, 641 (Dugdale the informer, who had for three years helped send to the gallows many persons accused of the supposed Popish Plot, was in this case discredited by the charge that he had given out that the Papists had poisoned him, though in fact his disease was the French pox; whereon Dugdale on the stand said: "If any doctor will come forth and say he cured me of the clap or any such thing, I will stand guilty of all that is imputed to me"; whereon, later, "Dr. Lower, the most noted physician then in London, proved it at the Council board, both by his bills and by the apothecary, that he had been under cure in his hands for that disease; which was such a slur upon Dugdale's credit that he was never used as a witness more").

Anon., Green Bag, 1893, X, 53: "My poor old confessor, Father Grady," said O'Connell, "who resided with my uncle when I was a boy, was tried in Tralee on the charge of being a Papish priest, but the judge defeated Grady's prosecutors by distorting the law in his favor. There was a sippant scoundrel who came forward to depose to Father Grady's having said mass. 'Pray, sir,' said the judge, 'how do you know he said mass?' 'Because I heard him say it, my Lord.' 'Did he say it in Latin?' asked the judge. 'Yes, my Lord.' 'Then you understand Latin?' 'A little.' 'What words did you hear him say?' 'Ave Maria.' 'That is the Lord's Prayer, is it not?' asked the judge. 'Yes, my Lord,' was the fellow's answer. 'Here is a pretty witness to convict the prisoner,' cried the judge. 'He swears Ave Maria is Latin for the Lord's Prayer.' The judge charged the jury for the prisoner, so my poor old friend Father Grady was acquitted."

Anon., Green Bag, 1892, IV, 319: "One of the witnesses to the will was the deceased man's valet, who swore that after signing his name at the bidding of his master, he then, also acting under instructions, carefully sealed the document by means of the taper by the bedside. The witness was induced to describe every minute detail of the whole process, the exact time, the position of the taper, the size and quality of the sealing-wax, 'which,' said the counsel, glancing at the document in his hand, 'was of the ordinary red description?' 'Red sealing-wax, certainly,' answered the witness. 'My Lord,' said the counsel, handing the paper to the judge, 'you will please observe that it was fastened with a wafer.'"

(2) Since the only object of the excluding rule is to prevent confusion of issues and unfair surprise by extrinsic testimony (*ante*, § 1002), it follows that the cross-examiner may at least *question upon even collateral points*, subject always to the general discretion of the trial Court (*ante*, § 944) to limit cross-examination.²

(3) The rule for prior inconsistent statements, requiring that the *witness be asked*, before the extrinsic testimony be produced (*post*, § 1025) has of course no application here.³

(4) The two expedients of Confrontation of Witnesses (*post*, § 1395) and Sequestration of Witnesses (*post*, § 1838), which have a probative operation similar to that of the present mode of impeachment, are not obnoxious to the present rule. By the former expedient, in its earlier form, the contradictory witnesses of opposing sides were confronted with each other and made to repeat their stories, in the expectation that the untruthful one would break

² *Accord*: 1726, Gilbert, Evidence, 147 ("Now that which sets aside credit and overthrows his testimony is the incredibility of the fact . . . ; for if the fact be contrary to all manner of experience and observation, it is too much to receive it upon the oath of one witness"); 1887, Becker v. Koch, 104 N. Y. 394, 401, 10 N. E. 701 (the witness testified to an assignment in which apparently fictitious debts were included; on further explanation, however, he testified that the debts were not fictitious; the trial Court ruled that as no extrinsic contradiction of the testimony had been offered, the explanation must be accepted as true; *held*, however, that the explanation could be shown false "by its own absolute and inherent improbability"; practically overruling Fordham v. Smith, 46 id. 683). *Contra*, but erroneous: 1887, People v. Ching Hing Chang, 74 Cal. 390, 16 Pac. 201.

For other good examples of this kind of

demonstration, see the South Carolina cross-examination (1899, Marshall Brown, Wit and Honor of the Bench and Bar, 8); O'Connell's cross-examination (*ib.* 370).

³ 1861, R. v. Brown, 21 U. C. Q. B. 334 (quoted *ante*, § 1005); 1871, R. v. Holmes, 12 Cox Cr. 143, per Kelly, C. B., *semble*. The contrary ruling, in Spenceley v. Wilmot, 7 East 108 (1806), has often been cited *obiter*, and sometimes followed: 1903, State v. Caudle, 174 Mo. 388, 74 S. W. 621. But it is obviously inconsistent with the general right of the cross-examiner to test memory on all points (*ante*, § 995), and to refrain from stating the purpose of his questions (*post*, § 1871).

⁴ 1808, Younger v. State, — Wyo. —, 73 Pac. 551. *Contra*, but erroneous: 1861, Wright v. Cumpsty, 41 Pa. 110 (whether the witness had been indicted).

down; but it was assumed that the contradiction was on a material point. By the latter expedient, the inconsistencies of narration in witnesses called on the same side were brought to light, and here the telling inconsistencies might involve only minor details, — as in Susannah's classical case. But no extrinsic testimony was involved; for the witnesses were by supposition in the case for other purposes, and a cross-examination would be all that was needed.

§ 1007. **Contradicting Answers on the Direct Examination; Supporting the Contradicted Witness.** Since the main object underlying the rule is to avoid unfair surprise and confusion of issues (*ante*, § 1002), the obvious expedient for this purpose is to cut off testimony which would not have been already proper for other purposes. But occasionally are found misapprehensions of the fundamental purpose of the rule.

(1) Occasionally, before the theory had been completely worked out by the Courts, the argument of Unfair Surprise was treated as the only objection, and it was thought that where the *assertion* desired to be contradicted had been *made on the direct examination* — *i. e.* had been "volunteered," as the phrase went —, the witness had himself only to blame if he was not prepared to support every statement thus volunteered; in short, that *all assertions made on the direct examination could be contradicted* and shown erroneous, and that the prohibition was equally inapplicable to assertions *volunteered on the cross-examination*; upon which, it was thought, there could not be any unfair surprise. This form of the rule, which still crops up occasionally,¹ is based on an ignoring of the other cooperating reason for the rule, *i. e.* Confusion of Issues; and even if it could be conceded (as it cannot) that this form sufficiently obviates the reason of Unfair Surprise, the other reason would still remain, and would be equally fatal, even when the assertion on the collateral matter was made on the direct examination. The following passage satisfactorily disposes of the error in question:

1850, *R. W. Walker, J., in Blakey's Heirs v. Blakey's Executrix*, 33 Ala. 619: "In *Dozier v. Joyce*² it seems to have been considered that the main reason for the rule which prevents a cross-examination upon immaterial matters for the mere purpose of contradicting the witness, is that he cannot be presumed to come prepared to defend himself on such collateral questions; and, as this reason fails when the testimony is voluntarily given, the rule itself does not in that case apply. The reason referred to is doubtless one of those on which the rule was founded, but it is not the only or even the chief one. The principal reasons of this rule are, undoubtedly, that but for its enforcement the issues in a cause would be multiplied indefinitely, the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points, the minds of jurors would thus be

¹ 1895, *Redington v. Cable Co.*, 107 Cal. 317, 40 Pac. 435; 1896, *People v. Roemer*, 114 id. 51, 45 Pac. 1003; 1864, *Carpenter v. Wahl*, 30 N. Y. 243; 1898, *People v. Van Tassel*, 156 id. 561, 51 N. E. 274 ("must be material or relate to a fact brought out by adverse counsel"); 1893, *Union P. R. Co. v. Reese*, 5 C. C. A. 510, 56 Fed. 291; 1869, *Ellsworth v. Potter*, 41 Vt. 8:0 ("it was entirely for the Court to say how much, if anything, in their discretion was

necessary to be heard to repel the prejudice calculated to be produced by the improper testimony").

For the nearly opposite error — that an answer concerning the cross-examiner's own case, *improperly inquired into on cross-examination*, cannot be contradicted, because of the rule against impeaching one's own witness, see *ante*, § 914.

² 1838, 8 Porter 303.

perplexed and confused, and their attention wearied and distracted, the costs of litigation would be enormously increased, and judicial investigations would become almost interminable. An additional reason is found in the fact that, the evidence not being to points material in the case, witnesses guilty of false swearing could not be punished for perjury. These reasons apply equally whether the evidence on such collateral matters is brought out on the examination in chief or upon cross-examination, and whether the witness gives it voluntarily or in response to questions calling for it."³

(2) If the opposing party has succeeded in *introducing, without objection by the other*, testimony to contradict on a collateral point, this does not justify the other in proceeding to join issue and adduce new testimony in support of the original witness' statement.⁴ The general rule that one irrelevancy does not justify another (*ante*, § 15) is not here controlling, for the collateral error may be relevant to discredit, and is objectionable for reasons of policy rather than of irrelevancy. It is the same reason of policy (*i. e.* Confusion of Issues) that here operates to stop the controversy from being carried any further; and there is no unfairness, because the original party has only himself to thank for not preventing the introduction of the contradicting testimony. The argument that the cross-examiner has no right to object to the answering testimony because he himself began the contradiction⁵ is beside the point; for it is not a question of rights, but of the discovery of truth, and in the interest of truth the confusion of issues by immaterial controversies is to be prevented.

§ 1008. *Falsus in uno, falsus in omnibus*; In general. The maxim, "He who speaks falsely on one point will speak falsely upon all," is in strictness concerned, not with the admissibility, but with the weight of evidence. The jury are told by it what force to give to a falsity after the evidence has shown its existence. But the maxim occurs so often in connection with the use of Contradictions and of Self-Contradictions (*post*, § 1018) and throws so much light on their nature, that it is desirable to analyze the bearings of the maxim as applied by the Courts. It may be said, once for all, that the maxim is in itself worthless, first, in point of validity, because i. one form it merely contains in loose fashion a kernel of truth which no one needs to be told, and in the others it is absolutely false as a maxim of life; and secondly, in point of utility, because it merely tells the jury what they may do in any event, not what they must do or must not do, and therefore it is a superfluous form of words. It is also in practice pernicious, first, because there is frequently a misunderstanding of its proper force, and, secondly, because it has become in the hands of many counsel a mere instrument for obtaining new trials upon points wholly unimportant in themselves.¹

³ *Accord*: 1834, *Com. v. Buzzell*, 16 Pick. 153.

⁴ 1840, *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 461 (*semble*); but here rejected on other grounds; 1840, *Stevens v. Beach*, 12 Vt. 587; 1847, *Charlton v. Unis*, 4 Gratt. 61 (where the plaintiff allowed without objection the defendant to offer evidence disproving a collateral statement contained in a prior self-contradictory

affidavit of the plaintiff's witness; and the plaintiff was then not allowed to substantiate those statements).

⁵ 1878, *State v. Cardoza*, 11 S. C. 242, *per Willard*, C. J.

¹ The following statutes are the basis of some of the ensuing rulings: *Alaska* C. C. P. 1900, § 673 (like *Or. Annot. C. 1892*, § 845); *Cal. C. C. P. 1872*, § 2061 (3) ("a witness false in

§ 1009; Same: (1) **First Form of Rule: The entire testimony must be rejected.** The notion which was originally associated with this maxim was that the testimony of one detected in a lie was wholly worthless and must of necessity be rejected.¹ This notion was quite consistent with the artificial philosophy of testimony (*post*, § 2032) which prevailed as late as the 1700s, and was only abolished from the law (long after it had practically lost its social acceptance) as a result of Bentham's pungent criticisms. The philosophy of character which weighed testimony by numerical units and absolutely disqualified one who had been guilty of perjury would readily reject the testimony of one detected in a single lie. Its attitude is represented in the following passage:

1824, Mr. Thomas Starkie, Evidence, I, 583: "A witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim *falsum in uno, falsum in omnibus*. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness' testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected."

1828, Henderson, J., in *State v. Jim*, 1 Dev. 510: "The jury's belief must be founded on that which is regarded in law as testimony. . . . I can see no difference in principle — and if so, there should be none in practice — between a person heretofore convicted and one who stands convicted before the jury in the case they are trying. Hence the maxim *falsum in uno, falsum in omnibus*. Were it otherwise, the law would be untrue to itself."

1864, Ranney, J., in *Stoffer v. State*, 15 Oh. St. 47, 56: "But it is said that he may still speak the truth upon other points, although perjured as to one or more. This is very true; very few men are so utterly false as not to be compelled, from the exigencies of their being, to utter more truth than falsehood. But it must also be admitted that the motive which has prompted him to commit perjury in one part of his testimony may and is very likely to lead him to make it effective by falsifying other material points. At least it is left entirely uncertain whether he has uttered truth or falsehood; and it is not consistent with that moral certainty of the existence of facts which the law requires before men are affected in their lives, liberty, or property, to act upon what may be true or false, or to use such corrupt and deceptive instrumentalities in the pursuit of truth."²

§ 1010. Same: (2) **Second Form of Rule: The entire testimony may be rejected.** But in spite of the careless perpetuation of this artificial notion by

one part of his testimony is to be distrusted in others"); P. C. § 1102; Ga. Code 1895, § 5295 (if "wilfully and knowingly falsely," "ought to be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence"); *Mont. C. C. P.* 1895, § 3390 (like Cal. C. C. P. § 2061); *Or. C. C. P.* 1892, § 845 (like Cal. C. C. P. § 2061). Compare also the now obsolete principle *nemo turpitudinem suam allegans audietur* (*ante*, § 525), which has certain relations with the present principle.

¹ 1743, *Craig v. Earl of Anglesea*, 17 How. St. Tr. 1421, per Bowes, C. B. The following case seems to be the earliest instance of its appearance in our law: 1684, Hampden's Trial, 9 How. St. Tr. 1053, 1101 (quoted by Mr. Williams, for the defence).

² The doctrine has been occasionally repeated: *Ga.*: 1853, *Day v. Crawford*, 13 Ga. 512; 1874, *Pierce v. State*, 53 id. 368; *Kan.*: 1866, *Campbell v. State*, 3 Kan. 488, 496; 1871, *Hale v. Rawallie*, 8 id. 136, 142, *semble* (but this was overruled later: 1875, *Shellabaiger v. Nafus*, 15 id. 547, 554); *N. Y.*: 1799, *Silva v. Low*, 1 Johns. Cas. 184, 188, per Radcliff, J. (phrased in a limited form, the judge drawing inferences as a jury would); *Nebr.*: 1880, *Dell v. Oppenheimer*, 9 Nebr. 456, 4 N. W. 51; *Ok.*: 1864, *Stoffer v. State*, 15 Oh. St. 54; *Pa.*: 1849, *Miller v. Stern*, 12 Pa. 390, *semble*; *U. S.*: 1822, *The Santissima Trinidad*, 7 Wheat. 339, *semble*.

a few authorities, it had ceased to be the law of England by the beginning of the 1800s.¹ There are on principle two reasons which exhibit its unsoundness as a rule of law. (1) It is untrue to human nature. It is not correct that a person who tells a single lie is therefore necessarily lying throughout his testimony, nor that there is any strong probability that he is so lying. The probability is to the contrary. (2) The jury are the part of the tribunal charged with forming a conclusion as to the truth of the testimony offered. They are absolutely free to believe or not to believe a given witness. Once the witness is determined by the judge to be qualified to speak, the belief of the jury in his utterances rests solely with themselves. Hence the judge cannot legally require them to believe or to disbelieve any portion of testimony. There therefore cannot be, for the jury, a "must" in this matter, but only a "may":

1855, *Pearson, J.*, in *State v. Williams*, 2 Jones L. 269: "When the credit of a witness is to be passed upon, each juror is called upon to say whether he believes him or not. This belief is personal, individual, and depends upon an infinite variety of circumstances. Any attempt to regulate or control it by a fixed rule is impracticable, worse than useless, inconsistent and repugnant to the nature of a trial by jury."

1856, *Appleton, J.*, in *Parsons v. Huff*, 41 Me. 411: "The truth or falsehood of testimony depends upon the motives, or the balance of motives, acting upon the witness at the time of its utterance. The motives which influence the human mind are as various as the feelings and desires of man. . . . There is no motive the action of which upon testimony is uniform. The same motive may lead to truth or to falsehood. . . . The witness may be exposed to the action of a different class of motives as to the several facts to which his testimony may relate. It is obvious therefore that, of the testimony of the same witness, part may be true and reliable and part false and mendacious. A rule of law which requires a jury to infer from one false assertion that all facts uttered by the witness are false statements is manifestly erroneous. . . . It is the determination of the trustworthiness or untrustworthiness of testimony in advance of its utterance, and in utter and hopeless ignorance of all facts essential to a correct decision."

1864, *Denio, C. J.*, in *Dunn v. People*, 29 N. Y. 529: "The true question is whether, when it appears that the witness has sworn differently upon the same point on a former occasion, he is to be pronounced by the judge to be incompetent, and his testimony stricken out and wholly excluded from consideration as though he had been convicted of a crime rendering him incompetent to testify as a witness; or whether the testimony remains in the case, to be considered by the jury in connection with the other evidence, under such prudential instructions as may be given by the Court, and subject to the determination of the Court" above on appeal.

1867, *Campbell, J.*, in *Knowles v. People*, 15 Mich. 412: "There has never been any positive rule of law which excluded evidence from consideration entirely, on account of the wilful falsehood of a witness as to some portions of his testimony. Such disregard of his oath is enough to justify the belief that the witness is capable of any amount of falsification, and to make it no more than prudent to regard all that he says with strong suspicion, and to place no reliance on his mere statements. But when testimony is once before the jury, the weight and credibility of every portion of it is for them, and not for the Court to determine."

¹ 1809, *R. v. Teal*, 11 East 309, per L. C. J. Ellenborough ("It may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence alto-

gether. But still that would not warrant the rejection of the evidence by the judge. . . . It goes only to the credit of the witness, on which the jury are to decide").

The correct principle, therefore, can go no farther than to say that the jury may disregard the testimony, not that they *must* disregard it; and this is the form of the rule as laid down in the great majority of jurisdictions.¹ The propriety of giving such an instruction is nevertheless questionable; for it merely informs the jury of a truth of character which common experience has taught all of them long before they became jurymen.²

§ 1011. **Same: Third Form of Rule: The entire testimony must be rejected, unless corroborated.** This is merely a variant of the first form of rule. It removes the injunction to treat the entire testimony as worthless, on condition that there is corroboration of the other portions by circumstances or by other testimony. This form of the rule is equally unsound and is rarely advanced.¹

¹ Only those cases are noted in which there has been controversy or confusion; those in which "may" is the regular and unquestioned term, used *obiter*, are not here enumerated; where otherwise not specified the orthodox form, that the jury "may" reject, is approved: *Cal.*: 1879, *People v. Sprague*, 53 Cal. 493 (C. C. P. § 2061, declares that the witness "is to be distrusted"; *McKinstry, J.*, interprets this that "the jury may reject the whole," — "that is to say, must" distrust him "and reject all, unless they believe him corroborated; and thus the Code" by requiring a jury to distrust necessarily authorizes them to reject all"; here a "may" before "reject all" would reconcile the statements); *Estate of Clark*, ib. 355, per *Crockett, J.* (that the witness "is to be distrusted in others, and not that his whole testimony is to be absolutely rejected"); 1896, *People v. Oldham*, 111 id. 648, 44 Pac. 312 (may, not must; but here the instruction was absurdly construed to violate the rule); 1901, *People v. Wilber*, 184 id. 182, 66 Pac. 228 (may, not must); *Ill.*: 1857, *Dean v. Blackwell*, 18 Ill. 337; 1873, *Pollard v. People*, 69 id. 152; 1875, *Reynolds v. Greenbaum*, 80 id. 416; 1881, *Pennsylvania Co. v. Conlan*, 101 id. 108; 1896, *Taylor v. Felsing*, 164 id. 331, 45 N. E. 161 (but doubtfully stated); *Ind.*: 1834, *McGlemery v. Keller*, 3 Blackf. 488; 1859, *Terry v. State*, 13 Ind. 72; *Ky.*: 1859, *Letton v. Young*, 2 Metc. 565; *Mo.*: 1840, *Lewis v. Hodgdon*, 17 Me. 273; *Mass.*: 1858, *Com. v. Wood*, 11 Gray 85, 93; 1867, *Com. v. Billings*, 97 Mass. 406; 1903, *Root v. Boston El. R. Co.*, 183 id. 418, 67 N. E. 365; *Mich.*: 1870, *Fisher v. People*, 20 Mich. 146; 1880, *O'Rourke v. O'Rourke*, 43 id. 58, 61, 4 N. W. 531; *Mo.*: 1867, *Paulette v. Brown*, 40 Mo. 57 (interpreting *State v. Mix*, 1851, 15 id. 153, 158, and intervening cases of *State v. Dwire*, 25 id. 553; *State v. Cushing*, 29 id. 215); 1895, *State v. Duffey*, 128 id. 549, 31 S. W. 98; *Nebr.*: 1895, *Stoppert v. Nierle*, 45 Nebr. 105, 63 N. W. 382; *N. Y.*: 1864, *Dunn v. People*, 29 N. Y. 529 (settling the effect of the following cases: 1823, *Insurance Co. v. DeWolf*, 2 Cow. 68, 108; 1825, *Peop. v. Douglass*, 4 id. 37; 1825, *Dunlop v. Patterson*, 5 Cow. 23; 1829, *Forsyth v. Clerk*, 3 Wend. 643; 1836, *People v. Davis*, 15 id. 60"); then in *Peo-*

ple v. Evans, 40 id. 5 (1869), the mandatory form was prescribed, apparently in ignorance of *Dunn v. People*; the rule of the latter case was reestablished in the following series: 1874, *White v. McLean*, 57 id. 672; 1875, *Pease v. Smith*, 61 id. 483. But in 1878, *Deering v. Metcalf*, 61 id. 507, the Court is found saying (apparently without any real appreciation of the question involved) that when one has sworn "corruptly false," the jury "ought to disregard" his testimony; then follow: 1881, *Moett v. People*, 85 id. 377 (a charge that "it is sometimes the duty of the jury to reject the whole" is approved, as not injurious to a defendant in a criminal case, but *Deering v. Metcalf* was expressly affirmed); 1898, *People v. Van Tassel*, 156 id. 561, 51 N. E. 274 ("must" reject, is improper); *N. C.*: 1855, *State v. Williams*, 2 Jones L. 258 (explaining and practically overruling *State v. Jim*, 1828, quoted *supra*, § 1009); 1869, *State v. Brantley*, 63 N. C. 518 (the instruction asked for told the jury they were "authorized to reject," and the judge's substitute that "they could believe a part, all, or none," was declared better); *Nis.*: 1854, *Mercer v. Wright*, 3 Wis. 645, 647; 1869, *Morey v. Dunbar*, 24 id. 185, 189; 1879, *Mack v. State*, 48 id. 271, 286, 4 N. W. 449; 1894, *Little v. R. Co.*, 88 id. 402, 60 N. W. 705; 1905, *Schmitt v. R. Co.*, 89 id. 195, 61 N. W. 834.

² In the following cases the rule was discarded: 1894, *Com. v. Clune*, 162 Mass. 206, 215, 38 N. E. 435; 1897, *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813 (whole doctrine rejected, as involving a charge upon the weight of evidence; *Brannon, J.*, disa.).

¹ 1877, *Skipper v. State*, 59 Ga. 63, 65; 1861, *Crahtree v. Hagenbaugh*, 25 Ill. 240; 1900, *Hill v. Mont. Terry*, 184 id. 220, 56 N. E. 320; 1900, *Mantonya v. Reilly*, ib. 183, 56 N. E. 425. In *Troxdale v. State*, 9 Humph. 423 (1848), it is uncertain whether the Court is dealing with this rule. A practically equivalent form is that the jury may believe, in spite of the falsity, if the witness is corroborated: 1896, *Duncan v. State*, 97 Ga. 180, 25 S. E. 182; 1902, *West Chicago S. R. Co. v. Lieserowitz*, 197 Ill. 607, 64 N. E. 718.

§ 1012. **Same: Fourth Form of Rule: The entire testimony may be rejected, unless corroborated.** This form is an erroneous variant of the second. The objection to it is not only that it fetters the jury's action by attaching a condition to their discretion, but that this condition involves logically an impossible and wrong consequence, namely, that if there is such corroboration, the jury may not reject the testimony but *must* give it credit:

1877, *Henry, J.*, in *Brown v. R. Co.*, 66 Mo. 588, 599: "Is the jury not at liberty to disregard the testimony of one who has committed perjury in their presence, as to some fact testified to by him, because as to that or some other fact testified to by him he is corroborated? . . . That is not the law; the jury may or may not believe him; that is a matter for their determination, . . . notwithstanding he may have been corroborated as to that or any other fact to which he testified."¹

The Courts that have employed this form have spoken usually under a misconception of the permissive form (*ante*, § 1010); for they treat "may" as if it were "must," and then argue that it would be unfair to require a rejection in spite of corroboration; in short, they mean to lay down in effect the third rule above. But whether judged by their intention or by their expressed phrasing, they offer a test wholly unsound. Only occasionally is this form of rule found.²

§ 1013. **Same: There must be a Conscious Falsehood.** The notion behind the maxim is that, though a person may err in memory or observation or skill upon one point and yet be competent upon others, yet a person who once deliberately mis-states, one who goes contrary to his own knowledge or belief, is equally likely to do the same thing repeatedly and is not to be reckoned with at all. Hence it is essential to the application of the maxim that there should have been a conscious falsehood:

1743, *Bowes, C. B.*, in *Annesley v. Anglesca*, 17 How. St. Tr. 1139, 1421: "You will permit me to observe that there is a great difference between not recollecting circumstances, and a witness swearing to those that are false. The not recollecting may consist with integrity; the swearing to a falsehood never can."

1841, *Harrington, J.*, in *Kinney v. Hosea*, 3 Harringt. 401: "But the disbelief of what any witness has testified to does not necessarily impute to him falsehood and perjury. This would compel the jury in every case of contradictory testimony to believe that one or the other witness, or perhaps one set of witnesses or the other, must be wilfully perjured.

¹ The following cases also reject this fallacy: 1898, *Gantling v. State*, 40 Fla. 237, 23 So. 857; 1903, *Sumpter v. State*, — id. —, 33 So. 981; 1897, *State v. Sexton*, 10 S. D. 127, 72 N. W. 84, *semble*.

² Some of these Courts (*e. g.* in Illinois) are to be found also, in other rulings, employing the first or the second form above; there is too little effort at consistency: *Ariz.*: 1903, *Trumble v. Terr.*, — *Ariz.* —, 71 Pac. 932; *Ga.*: 1857, *Richardson v. Roberts*, 23 Ga. 218; *Smith v. State*, *ib.* 304 (but held to have been improperly applied); *Ivey v. State*, *ib.* 581; 1874, *Pierce v. State*, 53 *id.* 369; *Ill.*: 1864, *Meixsell v. Williamson*, 35 *Ill.* 531; 1865, *Blanchard v. Pratt*, 37 *id.* 246; 1867, *Howard v. McDonald*, 46 *id.* 124; 1866, *Yndt v. Hartrumpf*, 41 *id.* 16

(where the phrases are used with full understanding); *Chittenden v. Evans*, *ib.* 254 (where the Court merely says that rejection "would not necessarily follow"); 1870, *Martin v. People*, 54 *id.* 226; *Huddle v. Martin*, *ib.* 260; 1872, *Chicago & A. R. Co. v. Buttolf*, 66 *id.* 348 (where rejection is distinctly forbidden). *Ind.*: 1895, *White v. R. Co.*, 142 *Ind.* 648, 42 N. E. 456; 1897, *Hank v. State*, 143 *id.* 238, 46 N. E. 127, 47 N. E. 465; *Mich.*: 1893, *Cole v. R. Co.*, 95 *Mich.* 77, 80, 54 N. W. 638; 1897, *Hedde v. R. Co.*, 112 *id.* 547, 70 N. W. 1096, *semble*; *Wis.*: 1894, *Allen v. Murray*, 87 *Wis.* 41, 51 N. W. 979; 1897, *Dohmen Co. v. Ins. Co.*, 93 *id.* 33, 71 N. W. 69 (by circumstances or by testimony); 1900, *Miller v. State*, 106 *id.* 156, 31 N. W. 1020.

Nothing is further from the truth than such a conclusion. A thousand innocent mistakes are committed in courts of justice, for one intentional and corrupt falsehood; and it is the commonest duty of a jury to distinguish between conflicting testimony arising from the mistakes of witnesses."

This requirement is variously phrased by different Courts, and even by the same Court.¹ Occasionally, however, a Court is found declaring, through carelessness, that proof of a material error (contradiction) or self-contradiction will justify the application of the maxim.² There is no ground of logic

¹ Ala.: 1897, *Burton v. State*, 115 Ala. 1, 22 So. 585; *Aris*: 1898, *Schultz v. Terr.*, — Ariz. —, 52 Pac. 352 (knowingly and intentionally); Ark.: 1848, *Yoes v. State*, 9 Ark. 43 ("wilfully and knowingly"); 1900, *Bloom v. State*, 68 Id. 336, 58 S. W. 41; Cal.: 1886, *People v. Stroug*, 30 Cal. 155 ("wilfully"); 1879, *People v. Sprague*, 53 Id. 498 (in which the Cole phrase of § 2061, C. C. P., "a witness false," etc., is said to be properly construed "a witness wilfully false"); Estate of Clark, lb. 355 (same); 1886, *People v. Treadwell*, 69 Id. 226, 238, 10 Pac. 502 ("wilful" not essential); 1898, *People v. Luchetti*, 119 Id. 501, 51 Pac. 707 (like *People v. Sprague*); 1899, *People v. Lou Yeck*, 123 Id. 246, 55 Pac. 984 (like *People v. Treadwell*); 1903, *People v. Dobbins*, 138 Id. 694, 72 Pac. 339 (an instruction following C. C. P. § 2061, and omitting the requirement of wilfulness, is not improper); Colo.: 1876, *Gottlieb v. Hartman*, 3 Colo. 53, 60 ("intentionally"); 1898, *Last Chance Co. v. Anes*, 23 Id. 167, 47 Pac. 382 ("wilfully or corruptly"); 1898, *Ward v. Ward*, 25 Id. 53, 52 Pac. 1105 ("wilful or corrupt"); Ga.: 1857, *Ivey v. State*, 23 Ga. 581 ("wilfully and knowingly"); 1874, *Pierce v. State*, 53 Id. 369 (same); 1877, *Skipper v. State*, 59 Id. 63, 65 ("knowingly and wilfully"); 1902, *Holston v. R. Co.*, 116 Id. 656, 43 S. E. 29 (Code, § 5295, applied); Ill.: 1854, *Brennan v. People*, 15 Ill. 517 ("wilfully and knowingly"); 1881, *Craltree v. Hagenbaugh*, 25 Id. 240 ("wilfully"); 1866, *Chittenden v. Evans*, 41 Id. 253 ("knowingly or corruptly"); 1863, *Chicago v. Smith*, 48 Id. 107 ("wilfully and knowingly"); 1871, *Pope v. Dolson*, 63 Id. 360, 365 ("wilfully and corruptly"); U. S. Express Co. v. Hutchins, ib. 45 ("intentionally"); 1873, *Pollard v. People*, 69 Id. 152 ("wilfully and knowingly"); 1881, *Swan v. People*, 98 Id. 610, 612 ("knowingly and intentionally"); 1899, *Overtom v. R. Co.*, 181 Id. 323, 54 N. E. 898; 1903, *Perkins v. Kuisely*, — Id. —, 63 N. E. 488 ("wilfully and knowingly," "knowingly and corruptly or wilfully," "wilfully and corruptly and intentionally"; the counsel is here rebuked for propounding a defective instruction, "in view of the many decisions by this Court"; but it would seem that these "many decisions" have not yet made clear precisely what the tenor of the instruction should be; if a quibbling rule like this is to be enforced, the terms of the quibble should be tangibly prescribed); Ind.: 1854, *Shanks v. Hayes*, 6 Ind. 59 ("wilfully and knowingly"); Ind. Terr.: 1899, *Noyes v. Tootie*, 2 Ind. Terr. 144, 48 S. W. 1031 ("intentionally," equivalent to "knowingly and wilfully"); Ia.: 1868, *Callanan v. Shaw*, 24 Ia. 447 ("wilfully and knowingly"); 1877, *State v. Wells*, 48 Id. 665 ("knowingly and intentionally"); Kan.: 1871, *Hale v. Rawallie*, 8 Kan. 136, 112 ("wilfully, or some word of kindred meaning"); Mich.: 1789, *Sanders v. Leigh*, 2 H. & Mell. 380 (by the witness himself or known to him); 1899, *Wheeler v. Jenkins*, 120 Mich. 422, 79 N. W. 646; Mo.: 1851, *State v. Mix*, 15 Mo. 153 ("wilfully"); 1858, *State v. Dalton*, 27 Mo. 16 ("wilfully"); 1876, *Iron Mountain Bank v. Murdock*, 62 Id. 74 ("knowingly"); 1876, *State v. Elkins*, 63 Id. 166 ("intentionally"; "designedly and wilfully"); Nebr.: 1884, *Buffalo Co. v. Van Sickle*, 18 Nebr. 363, 367, 20 N. W. 261 ("knowingly and wilfully"); 1895, *Stoppert v. Niede*, 45 Id. 105, 113, 63 N. W. 382 ("wilfully"); 1896, *Omaha R. Co. v. Krayenbuhl*, 48 Id. 553, 67 N. W. 447 ("knowingly and wilfully"); 1896, *McCormick Co. v. Serman*, 49 Id. 312, 68 N. W. 482 ("wilfully and intentionally"); 1897, *Davis v. State*, 51 Id. 301, 70 N. W. 984 ("wilfully"); 1900, *Donney v. Stout*, 59 Id. 731, 82 N. W. 18 ("wilfully and corruptly"); N. M.: 1895, *Pacific Gold Co. v. Skillicorn*, 3 N. M. 8, 41 Pac. 533 ("wilfully and knowingly"); N. Y.: 1875, *Pease v. Smith*, 61 N. Y. 484 ("wilfully"); 1878, *Deering v. McTeal*, 74 Id. 505 ("intentionally," "corruptly"); 1881, *Moett v. People*, 85 Id. 377 ("deliberately," "intentionally"); N. C.: 1828, *State v. Jim*, 1 Dev. 510 ("corruptly"); 1854, *State v. Peace*, 1 Jones L. 256 ("wilfully and corruptly"); N. D.: 1898, *McPherrin v. Jones*, 5 N. D. 261, 65 N. W. 685 ("wilfully or knowingly or intentionally"); 1897, *State v. Campbell*, 7 Id. 58, 72 N. W. 935 ("wilfully or knowingly"); S. D.: 1900, *Hurlburt v. Loper*, 12 S. D. 321, 81 N. W. 631 ("wilfully"); 1901, *Elrod v. Ashton*, 14 Id. 350, 85 N. W. 599; U. S.: 1822, *The Santissima Trinidad*, 7 Wheat. 339 ("deliberate"); 1901, *Singer Mfg. Co. v. Cramer*, 48 C. C. A. 588, 109 Fed. 652; Wis.: 1896, *Cahn v. Ladd*, 94 Wis. 134, 68 N. W. 652 (mere falsity not enough); 1902, *Lanphere v. State*, 114 Id. 193, 89 N. W. 128.

² 1898, *Churchwell v. State*, 117 Ala. 122, 23 So. 72 (if any witness has been impeached, his testimony may be disregarded); 1870, *Martini v. People*, 54 Ill. 226; *Huddle v. Martin*, ib. 260 ("successfully impeached," suffices); 1895, *White v. R. Co.*, 142 Ind. 648, 42 N. E. 456 (self-contradiction); 1854, *Powers v. Leach*, 26 Vt. 273, 278 (mistake). For a discussion on the related

or of precedent for such a conclusion; and it has frequently been repudiated when advanced.³

§ 1014. **Same: Falsehood must be on a Material Point.** It is commonly said that the falsehood must be upon a material point.¹ No doubt the Courts have here been led away by the inapt analogy of the limitations upon the criminal law of perjury. In the nature of character, a person who would lie upon a collateral point is perhaps likely to be a more determined liar than one who dares it only upon a material point; at any rate, there is no less a call to distrust the former than the latter.² But Courts have seen fit to accept this consequence.

§ 1015. **Same: Time of the Falsehood.** Perhaps it is not logical to say that only lies told within a specific time shall create this distrust of the witness' entire testimony; but the Courts which affect this maxim insist on fixing some such limitations to the operation of the jury's belief. They commonly hold that the lie, to have any derogatory operation, may appear to have been told at any stage of the proceedings,—not necessarily while on the stand at the present time, but at any former stage of the same proceedings.¹

scholastic quibble whether a witness who has been "impeached" can be believed, see *Smith v. State*, 109 Ga. 479, 35 S. E. 59 (1900); and compare §§ 2033, 2498, *post*.

¹ 1828, *R. v. Jackson*, 1 Lew. Cr. C. 270, per Holroyd, J. (self-contradiction); 1876, *Gulliber v. People*, 32 Ill. 146 (contradiction); 1896, *Moran v. People*, 163 id. 372, 45 N. E. 230 (self-contradiction; the principle being not clearly laid down, because of the unjudicial and impolitic assignment of a dissenting judge to state the opinion of the ruling majority); 1897, *Chicago City R. Co. v. Allen*, 169 id. 287, 48 N. E. 414 (mere exaggeration not sufficient; falsity necessary); 1903, *Beedle v. People*, 204 id. 197, 68 N. E. 434; 1901, *Hahn v. Bettingen*, 84 Minn. 512, 88 N. W. 10 (self-contradiction); 1870, *Wilkins v. Earle*, 44 N. Y. 182 (contradiction); 1875, *Place v. Miuster*, 65 id. 103 (self-contradiction); 1878, *Deering v. Metcalf*, 74 id. 503 (contradiction); 1849, *Müller v. Stern*, 12 Pa. St. 389 (self-contradiction); 1896, *Sofferstein v. Bertels*, 178 id. 401, 35 Atl. 1000 (contradiction); 1847, *Jones v. Laney*, 2 Tex. 349 (contradiction).

² 1898, *People v. Plyler*, 121 Cal. 160, 53 Pac. 553; 1872, *McLean v. Clnrk*, 47 Ga. 71 (because "it seems absurd to charge a witness with wilfully telling falsehoods immaterial to the issue in hand"); 1874, *Fishel v. Ireland*, 52 id. 636; 1861, *Crabtree v. Hagenbaugh*, 25 Ill. 240; 1871, *U. S. Express Co. v. Hutchins*, 58 id. 45; 1877, *Swan v. People*, 98 id. 612; 1866, *Campbell v. State*, 3 Kan. 488, 496; 1871, *Hale v. Rawallie*, 8 id. 136, 142; 1872, *State v. Horne*, 9 id. 119, 131; 1895, *State v. Duffy*, 128 Mo. 549, 31 S. W. 98; 1901, *Holdrege v. Watson*, — Nebr. —, 96 N. W. 67; 1895, *Pacific Gold Co.*

v. Skillicorn, 8 N. M. 8, 41 Pac. 533; 1854, *State v. Peace*, 1 Jones L. 256; 1902, *First Nat'l Bank v. Minneapolis & N. E. Co.*, 11 N. D. 280, 90 N. W. 436; 1896, *State v. Carter*, 15 Wash. 121, 45 Pac. 745; 1903, *Richardson v. Babcock*, — Wis. —, 96 N. W. 554.

³ 1884, *Elliott, C. J.*, in *Seller v. Jenkins*, 97 Ind. 436: "A witness who tells a falsehood concerning a matter incidentally connected with the subject of the action is as likely to testify untruly as if the falsehood had directly affected the issue." For illustrations of this, see the cross-examinations quoted *ante*, §§ 1005, 1006.

¹ 1809, *R. v. Teal*, 11 East 309 (former testimony, now confessed to have been perjured; present prosecution being for the conspiracy to charge falsely); 1825, *Dunlop v. Patterson*, 5 Cow. 23; 1864, *Dunn v. People*, 29 N. Y. 529; 1828, *State v. Jini*, 1 Dev. 509 (former trial); 1855, *State v. Williams*, 2 Jones L. 260 (grand jury); *State v. Woody*, ib. 259, 279 (committing magistrate). In *Lavenburg v. Harper*, 27 Miss. 301 (1854), an instruction was declared erroneous because it did not confine the jury to the evidence before the Court as their basis of belief, and because it was under the circumstances hardly applicable.

The doctrine of *falsus in uno* is to be distinguished from the principle, of which our jurisprudence is at present much enamored, that the judge may not express an opinion upon the weight of the testimony; in stating the maxim as applicable to a particular witness, this latter principle is often violated. With this question of trial procedure we have here nothing to do; see an example in *Bunce v. McMahon*, 6 Wyo. 24, 42 Pac. 23 (1895).

SUB-TITLE II (continued): TESTIMONIAL IMPEACHMENT.

TOPIC V: SELF-CONTRADICTION.

CHAPTER XXXIV.

1. General Principle.

- § 1017. Theory of Relevancy.
- § 1018. Same: not admitted as Substantive Testimony, nor excluded as Hearsay.
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5. Explaining away the Inconsistency.

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§ 1045. Putting in the Whole of the Contradictory Statement.

§ 1046. Joining Issue as to the Explanation.

1. General Principle.

§ 1017. Theory of Relevancy. The end aimed at by the present sort of impeaching evidence is the same as that of the preceding sort, namely, to show the witness to be in general *capable of making errors* in his testimony (*ante*, § 1000); upon perceiving that the witness has made an erroneous statement upon one point, we are ready to infer that he is capable of making an error upon other points. But the method of showing this is here slightly different; for, instead of invoking the assertions of other witnesses to prove his specific error, we resort simply to the witness' own prior statements, in which he has given a contrary version. We place his contradictory statements side by side, and, as both cannot be correct, we realize that in at least

one of the two he must have spoken erroneously. Thus, we have detected him in one specific error, from which may be inferred a capacity to make other errors. Two important features of this method of proof are to be noticed.

(1) The general end attained is the same indefinite end attained by the preceding method (*ante*, § 1000), *i. e.* some *undefined capacity to err*; it may be a moral disposition to lie, it may be partisan bias, it may be faulty observation, it may be defective recollection, or any other quality. No specific defect is indicated; but each and all are hinted at. It has been often said that a Prior Self-Contradiction shows "a defect either in the memory or in the honesty" of the witness:

1852, *Shaw, C. J.*, in *Com. v. Starkweather*, 10 Cush. 60: "It is founded on the obvious consideration that both accounts cannot be true, and tends to prove a defect of intelligence or memory on the subject testified of, or, what is worse, a want of moral honesty and regard to truth; and so, in either case, that the witness is less worthy of belief."

1870, *Cole, J.*, in *Knox v. Johnson*, 26 Wis. 43: "This circumstance is well calculated to throw suspicion on her accuracy and credibility. It shows that her memory is exceedingly unreliable and treacherous in reference to the times of payment of moneys by her, or that she does not realize the importance of adhering to actual facts when making statements under oath."¹

This may be roughly true in the majority of instances; but there is no such invariable, certain indication; the scope is much broader and more intangible. There has also sometimes been an inclination on the part of the bar to argue as if every Prior Self-Contradiction involved a lie and illustrated the maxim, *Falsus in uno, falsus in omnibus* (*ante*, § 1008); but this also is without foundation; the discrediting effect of a Prior Self-Contradiction is independent of whether or not the jury believe it to involve a conscious lie.²

(2) The process of using a Self-Contradiction to show error is in one respect weaker, in another respect stronger, than the preceding process of using Contradiction by other witnesses. It is *weaker*, in that the proof of the specific error can never be as *positive* as is possible by the other mode.³ For example, if five credible witnesses testify that the assailant had a scar upon his face, contradicting the first witness, a belief in his present error is more readily reached than if a single former contradictory statement of his own is brought forward; in the latter case we are by no means compelled to believe that his statement on the stand is erroneous. On the other hand, in the present mode, the process of discrediting is in its chief aim incomparably *stronger*, because it *always* shows that the witness has made *some sort of a mistake* at some time, and thus demonstrates a capacity to make errors. In other words, both of his statements cannot be correct; one of the two must be incorrect; therefore, he shows a capacity to err. It is the repugnancy of the two that is fatal:

¹ So, too, *Best, Evidence*, § 478.

² 1872, *Craig v. Rohrer*, 63 Ill. 326.

³ See the opinion of *Holmes, J.*, in *Gertz v.*

Fitchburg R. Co., 137 Mass. 77, quoted *post*, § 1109.

Ante 1727, Chief Baron Gilbert, Evidence, 147, 150: "Another thing that derogates from the credit of a witness is, if upon oath he affirmed directly contrary to what he asserts; . . . and this takes from the witness all credibility, inasmuch as contraries cannot be true. . . . Now that which sets aside his credit and overthrows his testimony is . . . the repugnancy of his evidence; . . . if what he says be contradictory, that removes him from all credit; for things totally opposite cannot receive belief from the attestation of any man."

Thus, the process of discrediting by Prior Self-Contradiction is on the whole the more effective. The capacity to err invariably appears, from the very fact of self-contradiction; while in the other process it does not appear unless we believe the opposing witnesses' assertions. Logically, therefore, the present process is more direct and effective, because self-operative. Practically, however, it may fall to the same level as the other, if the utterance of the self-contradiction is denied by the witness and is obliged to be evidenced by calling other witnesses; when it requires (as in the other process) that we first believe the other witnesses.⁴ Yet, even then, in compensation, it may acquire a double force, for if we believe the other witnesses, the first witness has twice erred and perhaps twice falsified, — once, in his self-contradiction, and once again in denying that he uttered it.⁵

§ 1018. Same: not admitted as Substantive Testimony, nor excluded as Hearsay. (a) Since, in the words of Chief Baron Gilbert (*ante*, § 1017), it is "the repugnancy of his evidence" that discredits him, obviously the Prior Self-Contradiction is not used *assertively*; i. e. we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary Contradictions by other witnesses). We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other, — but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not in any sense accept his former statement as replacing his present one; the one merely neutralizes the other as a trustworthy one. In short, the *prior statement is not hearsay*, because it is not used *assertively*, i. e. not testimonially. The Hearsay Rule (*post*, § 1361) simply forbids the use of extrajudicial utterances as credible testimonial assertions; the prior contradiction is not used as a testimonial assertion to be relied upon. It follows, therefore, that the use of Prior Self-Contradictions to discredit is not obnoxious to the Hearsay Rule.¹

⁴ This becomes important under Mr. J. Cooley's theory of Corroboration (*post*, § 1126).

⁵ This is the chief reason for disputing the policy of the rule in the Queen's Case, about showing the writing to the witness (*post*, § 1260).

¹ This was not always understood, and though we find this sort of evidence frequently used in the 1700s (e. g. 1679, Langhorn's Trial, 7 How. St. Tr. 451, 462, 467; Wakeman's Trial, ib. 653; 1699, Spencer Cowper's Trial, 13 id. 1154, 1179; 1744, Heath's Trial, 18 id. 58, 77; 1761, Wright v. Littler, 3 Burr. 1244, 1255), yet the

particular objection made to it (in the last two cases, for example) seems to have rested on a feeling that the Hearsay Rule was being infringed. Mr. Starkie, however, clearly pointed out the groundlessness of this notion (1824, Starkie, Evidence, I, 206). To-day it is clearly enough understood that the Hearsay Rule interposes no obstacle: 1861, State v. Mulholland, 16 La. An. 377; 1867, State v. Johnson, 12 Minn. 488; 1882, Tabor v. Judd, 62 N. H. 292, *semble*; and many of the cases cited in the next note *infra*. A good example may be seen, in Robinson v. Blakely, 4 Rich. 589 (1851), of a

(b) It follows, conversely, that Prior Self-Contradictions, when admitted, are not to be treated as assertions having any *substantive or independent testimonial value*; they are to be employed merely as involving a repugnancy or inconsistency; otherwise they would in truth be obnoxious to the Hearsay Rule:

1847, *Allen, J.*, in *Charlton v. Unis*, 4 Gratt. 60: "Such testimony of inconsistent statements is admissible only for the purpose of impeaching the credit of the witness, but cannot be received as evidence of any fact touching the issue to be tried; for that would be to substitute the statements of a witness, generally when not on oath, as evidence between the parties, for his evidence given under the sanction of an oath upon the trial."

1852, *Shaw, C. J.*, in *Gould v. Norfolk Lead Co.*, 9 Cush. 346: "It is no evidence whatever that the facts are as he formerly stated them; and, though appeals are sometimes made to a jury that it is so, it is the province of the Court to inform them that it is not so."²

§ 1019. *Principle of Auxiliary Policy; Rules for avoiding Unfair Surprise and Confusion of Issues.* Reasons of Auxiliary Policy apply to limit the present process of proving error as they do to the preceding one (*ante*, § 1002). In addition to the inferior probative value of errors upon distant and unconnected points, there obtain here, as there, the two strong considerations of Unfair Surprise and Confusion of Issues. The reasons are phrased by the authorities in almost the same language and are treated as applying equally to both modes of impeachment:

1849, *Woods, J.*, in *Seavy v. Dearborn*, 19 N. H. 356: "A question not otherwise material or proper does not become so by force of any purpose of the examining party to make use of it to discredit the witness by contradicting his answers to it. The reason assigned by writers for these rules are that a contrary course of proceedings would introduce issues in interminable numbers and perplex and harass litigants in questions which do concern their cause."

statement, inadmissible when offered merely as hearsay, becoming admissible when the opponent had put the declarant on the stand and thus laid him open to contradiction by the utterance before inadmissible.

² *Accord: Del.*: 1838, *Rash v. Purnel*, 2 Harringt. 448, 457; *Ga.*: 1896, *Ficken v. State*, 97 Ga. 813, 25 S. E. 925; 1898, *Brush E. L. & P. Co. v. Wells*, 103 id. 512, 30 S. E. 533; *Ill.*: 1884, *Moore v. People*, 108 Ill. 487; 1889, *Ritter v. People*, 130 id. 255, 260, 22 N. E. 605 (former testimony at the coroner's inquest); 1892, *Purdy v. People*, 140 id. 46, 52, 29 N. E. 700 (same); *Ind.*: 1881, *Davis v. Hardy*, 76 Ind. 280; 1888, *Conway v. State*, 118 id. 482, 488, 21 N. E. 285; *Ky.*: 1898, *Jones v. Com.*, — *Ky.* —, 46 S. W. 217; 1900, *Nussbaum v. R. Co.*, — id. —, 57 S. W. 249; 1902, *Mullins v. Com.*, — id. —, 67 S. W. 824; 1902, *Ashcraft v. Com.*, — id. —, 68 S. W. 847; *La.*: 1897, *State v. Reed*, 49 La. An. 704, 21 So. 732; *Me.*: 1872, *State v. Reed*, 60 Me. 553; *Md.*: 1807, *DeSobry v. DeLaistre*, 2 H. & J. 220; 1875, *Mason v. Poulson*, 43 Md. 161, 176; *Mass.*: 1852, *Com. v. Starkweather*, 10 Cush. 60; 1890, *Francis v. Rosa*, 151 Mass. 535, 24 N. E. 1024; 1899, *Manning v. Carberry*,

172 id. 432, 52 N. E. 521; 1899, *Harriman v. R. Co.*, 173 id. 28, 53 N. E. 156; *Mich.*: 1878, *Howard v. Patrick*, 38 Mich. 795, 804; 1883, *Brown v. Dean*, 52 id. 267, 269, 17 N. W. 837; 1887, *Catlin v. R. Co.*, 66 id. 358, 364, 33 N. W. 515; 1892, *Tisman v. District*, 90 id. 510, 513, 51 N. W. 549; 1897, *Eno v. Allen*, 113 id. 399, 71 N. W. 842; *Minn.*: 1867, *State v. Johnson*, 12 Minn. 488; *Mo.*: 1877, *Peck v. Ritchey*, 66 Mo. 119; 1879, *State v. Kilgore*, 70 id. 558, *semble*; 1880, *State v. Hughes*, 71 id. 635; 1896, *State v. Baker*, 136 id. 74, 37 S. W. 810; *Nebr.*: 1899, *Zimmerman v. Bank*, 59 Nebr. 23, 80 N. W. 54; *N. Y.*: 1871, *Sloan v. R. Co.*, 45 N. Y. 127; *N. D.*: 1903, *Balding v. Andrews*, — *N. D.* —, 96 N. W. 305; *Oh.*: 1829, *Hand v. Elvira*, 1 Gilp. 60; 1884, *Kent v. State*, 42 Oh. St. 433; *Pa.*: 1895, *Dampman v. R. Co.*, 166 Pa. 520, 31 Atl. 244; *Tex.*: 1894, *Armstrong v. State*, 33 Tex. Cr. 417, 421, 26 S. W. 829; 1897, *Texas & P. R. Co. v. Johnson*, 90 Tex. 304, 38 S. W. 520; *Vt.*: 1874, *Law v. Fairfield*, 46 Vt. 431; *Wis.*: 1879, *Warder v. Fisher*, 48 Wis. 344, 4 N. W. 470; 1889, *Heddles v. R. Co.*, 74 id. 251, 42 N. W. 251, 76 id. 232, 45 N. W. 308.

1884, *Elliott, C. J.*, in *Seller v. Jenkins*, 97 Ind. 436: "The Courts do not put the rule (that a witness cannot be impeached upon collateral matters) on the ground that the nearer the false statement is to the main issue, the stronger is its effect upon the testimony of the witness. It is put upon an entirely different ground. By one Court it is put upon the ground that the time of the Court is too limited to permit collateral inquiries. An older and a stronger reason is . . . that such a practice would confuse the jury by an interminable multiplication of issues."

But these two considerations do not bear upon the present sort of evidence in precisely the same way as upon the preceding sort.

(a) Take, first, Confusion of Issues. The force of this objection is clear. But what remedy or limitation does it suggest? We cannot here say, as we could in dealing with Contradictions by outside testimony (*ante*, § 1002), that only such evidence shall be admitted as would have been otherwise admissible in any case; for no Prior Self-Contradictions would otherwise have been admissible. In the process of contradicting by extrinsic testimony, it was easy to draw the line by admitting only such testimony as would otherwise have been admissible, and thus the objection of Confusion of Issues was entirely obviated. In the present case, no such line is dictated by the logic of the situation. As a matter of history, however, Courts have always drawn the same line for both classes of evidence. Some line had to be drawn, and it was simpler to draw the same line for both. Its definition, and the application of it, are examined (*post*, §§ 1020-1023).

(b) Next, the consideration of Surprise. It was seen, in dealing with Contradiction by extrinsic testimony (*ante*, § 1002), to expect the witness or his party to be prepared to refute alleged errors of his ceases to be unfair when the subject of the error is concerned with the matter in litigation or the qualifications of the witness; for upon such subjects they ought in any case to have come prepared. Thus the line is naturally drawn between Contradictions by other witnesses upon such subjects and Contradictions upon collateral subjects. But in the present class of evidence — Self-Contradictions — it is of no value to draw such a line. It is just as difficult to come prepared upon alleged Self-Contradictions dealing with the subject of litigation as upon other Self-Contradictions. For example, if after a witness has left the stand, the opponent offers (by a false witness) to prove that he formerly declared the assailant to be a tall man, whereas now he testifies that he was a short man, it is obviously impossible for any one but a prophet to have foreknown that the alleged self-contradiction would deal with this subject. By hypothesis, the witness has never made such an assertion and can so testify; but how can he have known until now what it is that he is to disprove? The fact that the matter is relevant to the case could not have warned him of the precise topic, time, and place of the fabricated remark. Thus, the line of distinction which naturally suggested itself to prevent surprise in the case of Contradiction by extrinsic testimony has no bearing in preventing surprise in the case of Prior Self-Contradictions. Another method of obviating surprise must be sought. It is this, as followed by nearly every

Court to-day: The witness must be *asked in advance* — *i. e.* on cross-examination and before any other testimony to the Prior Self-Contradiction is offered — whether he made the contradictory statement which it is desired to prove. In this way he receives ample warning, and, if the alleged contradiction is a mere fabrication of the impeaching party, the other has ample time to prepare to disprove it, or to explain it away if it was made. Thus, the method of obviating the objection of Surprise is, not to draw a line between collateral and other matters, but to require that express warning be given to the opposing witness before any attempt is made to prove the alleged Self-Contradiction. This rule is later examined (*post*, §§ 1025–1038).

Surveying, then, the scope of these two objections, Confusion of Issues and Surprise, as applied to Contradictions by extrinsic testimony (*ante*, § 1000) and to Self-Contradictions (the present subject), it is seen that the objections themselves are of the same nature in both classes; that the rules naturally resorted to for obviating the objections are not necessarily the same; that for the former class of evidence a single rule suffices to obviate both objections — the rule excluding Contradictions on Collateral Matters (*ante*, § 1002); but that for the present class two rules are required, one excluding Self-Contradictions on Collateral Matters (thus obviating the objection of Confusion of Issues), the other requiring a Preliminary Warning (thus obviating the objection of Surprise). These two main rules may now be taken up in order.

2. Collateral Matters Excluded.

§ 1020. **Test of Collateralness.** It has just been noticed that the test of collateralness is in fact, though not in logical necessity, the same for this class of evidence as for the preceding one, *i. e.* Contradiction by extrinsic testimony (*ante*, § 1003). Here, as there, most Courts content themselves with invoking the term “collateral” as the test. Others employ the terms “material” or “relevant” as indicating the matters that may be the subject of a Prior Self-Contradiction. The difficulty with all these terms is that without further definition they are too indefinite to be useful. When we seek to learn what “collateral” means, we are obliged either to define further — in which case it is a mere epithet, not a legal test —, or to illustrate by specific instances — in which case we are left to the idiosyncrasies of individual opinion. The only test in vogue that has the qualities of a true test — definiteness, concreteness, and ease of application — is that laid down in *Attorney-General v. Hitchcock*: *Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose independently of the self-contradiction?*

1847, *Attorney-General v. Hitchcock*, 1 Exch. 99; *Pollock*, C. B.: “My view has always been that the test whether the matter is collateral or not is this: If the answer of a witness is a matter which you would be allowed on your part to prove in evidence, if it have such a connection with the issue that you would be allowed to give it in evidence, then it is a matter on which you may contradict him. . . . I think the expression ‘as to any matters connected with the subject of inquiry’ is far too vague and loose to be the founda-

tion of any judicial decision. And I may say I am not all prepared to adopt the proposition in those general terms, that a witness may be contradicted as to anything he denies having said, provided it be in any way connected with the subject before the jury. It must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a particular way, would contradict a part of the witness' testimony; and if it is neither the one nor the other of these, it is collateral to, though in some sense it may be considered as connected with, the subject of the inquiry. A distinction should be observed between those matters which may be given in evidence by way of contradiction as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper, and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other. It is certainly allowable to ask a witness in what manner he stands affected toward the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him and prevent him from having an unprejudiced state of mind, and whether he has not used expressions importing that he would be revenged on some one or that he would give such evidence as might dispose of the cause in one way or the other. If he denies that, you may give evidence as to what he said, — not with the view of having a direct effect on the issue, but to show what is the state of mind of that witness in order that the jury may exercise their opinion as to how far he is to be believed. But those cases, where you may show the condition of a witness or his connection with either of the parties, are not to be confounded with other cases where it is proposed to contradict a witness on some matter unconnected with the question at issue"; *Allerson*. B.: "The question is this, Can you ask a witness as to what he is supposed to have said on a previous occasion? You may ask him as to any fact material to the issue, and if he denies it you may prove that fact, as you are at liberty to prove any fact material to the issue. . . . The witness may also be asked as to his state of equal mind or impartiality between the two contending parties, — questions which would have a tendency to show that the whole of his statement is to be taken with a qualification, and that such a statement ought really to be laid out of the case for want of impartiality; [and these answers may be contradicted]. . . . Such, again, is the case of an offer of a bribe by a witness to another person, or the offer of a bribe accepted by a witness from another person; the circumstance of a witness having offered or accepted a bribe shows that he is not equal and impartial. . . . But with these exceptions I am not aware that you can with propriety permit a witness to be examined first and contradicted afterwards on a point which is merely and purely collateral."

This rule of Attorney-General *v. Hitchcock* is expressly accepted in only a few of the United States.¹ Moreover, the rule is often misunderstood. Courts are found phrasing the test of admissibility in this way: "Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea?"² or "Whether the question, the answer to which is proposed to be contradicted, would be admissible if proposed by the party calling him?"³ These are accurate enough as far as they go; but they omit to provide for an important class of matter clearly admissible, namely, facts relating to the bias, corruption, or other specific deficiencies of the witness. It is not merely matters which are a "part of the case" that may be the subject of a self-contradiction, but *any matter which would have been otherwise admissible in evidence*. The simple test is (in the language of Chief Baron

¹ See the cases cited *post*, § 1021.

² 1870, *Hildeburn v. Curran*, 65 Pa. 63; 1896, *Williams v. State*, 73 Miss. 820, 19 So. 826.

³ 1859, *Combs v. Winchester*, 39 N. H. 16; said here to be "substantially the rule" of Attorney-General *v. Hitchcock*.

Pollock) whether it concerns "a matter which you would be allowed on your part to prove in evidence" independently of the self-contradiction, — i. e. if the witness had said nothing on the subject. It may be added that there sometimes is found an erroneous notion (precisely similar to that described already as obtaining sometimes for Contradiction by extrinsic testimony) that nothing said on the direct examination can be collateral and therefore a *Self-Contradiction of anything said on the direct examination* is admissible.⁴ The history of this misunderstanding, and the reason why it is erroneous, have already been explained (*ante*, § 1007). The error has been frequently repudiated by other Courts.⁵

§ 1021. **Two Classes of Facts not Collateral; (1) Facts relevant to the Issue.** In applying the foregoing test, it is obvious that there are two classes of facts of which evidence would have been admissible independently of the self-contradiction: (1) facts relevant to some issue in the case under the pleadings; (2) facts admissible to discredit the witness as to bias, corruption, or the like.

(1) *Facts relevant to some issue in the case.* Here the circumstances of each separate case determine the admissibility; and no general principle can be laid down. Most rulings are useless as precedents.¹

⁴ 1864, *Forde's Case*, 16 Gratt. 557, *semble* ("it does not fall within the reason assigned, that the answer of a witness to collateral matter cannot be contradicted by the party asking it because it would be unjust to expect the witness to come prepared to prove the truth of every collateral statement; as he has embodied it himself in his own narrative of the transactions, he must be prepared to sustain it"); 1850, *State v. Sargent*, 32 Me. 429; 1864, *Forde's Case*, 16 Gratt. 556, *semble*; 1878, *Furst v. R. Co.*, 72 N. Y. 544, *semble*.

⁵ 1857, *Dillon v. Bell*, 9 Ind. 320; 1884, *Seller v. Jenkins*, 97 id. 437; 1896, *Williams v. State*, 73 Miss. 820, 19 So. 326.

¹ The following list does not include all the rulings in which the doctrine of "collateralness" has been incidentally sanctioned; it is everywhere conceded to be the law; compare also the cases and statutes cited *ante*, § 1004: *Eng.*: 1827, *Meagoe v. Simmons*, 3 C. & P. 75 (usury; the consideration for a former bill discounted between the same parties at the same time); 1829, *R. v. Phillips*, 1 Lew. Cr. C. 105 (in using former utterings of forged notes to show guilty knowledge, the defendant's statements at the time of former uttering could not be contradicted by his statements "at a time collateral to a former uttering," "because the prisoner could not be prepared to answer or explain evidence of that description"); 1847, *R. v. White*, 2 Cox Cr. 192; 1853, *R. v. Rorke*, 6 Cox Cr. 196 (former testimony on a purely collateral point, admitted: *Lefroy, C. J.*: "No matter whether the question is relevant or irrelevant to the present issue, it goes to the inconsistency of her evidence on the two trials"); 1862, *Fowkes v. Ins. Co.*, 3 F. & F. 443 (denial by a medical examiner that he had before de-

clared the life bad which he now testified he had accepted; allowed); *Can.*: 1874, *Hamilton v. Holder*, 15 N. Br. 223; 1874, *McCulloch v. Ins. Co.*, 34 U. C. Q. B. 383, 387, and 32 Kl. 614 (action on a fire policy; the plaintiff on cross-examination denied that he had told the defendant's agent that he had not been burned out before; contradiction excluded); *Ala.*: 1848, *Moore v. Jones*, 13 Ala. 303; 1853, *Ortez v. Jewett*, 23 Kl. 663; 1859, *Blakey's Heirs v. Blakey's Ex'x*, 33 id. 618; 1879, *Washington v. State*, 63 id. 192; 1895, *Orr v. State*, 107 id. 35, 18 So. 142; *Ark.*: 1855, *Atkins v. State*, 16 Ark. 587; *Cal.*: 1852, *McDaniel v. Baca*, 2 Cal. 338; 1872, *People v. Devine*, 44 id. 458 (place of a homicide; admitted); 1898, *Trabing v. N. & I. Co.*, 121 id. 137, 53 Pac. 644; *Colo.*: 1897, *Aakew v. People*, 23 Colo. 446, 48 Pac. 524; *Fla.*: 1901, *Myers v. State*, 43 Fla. 200, 31 So. 275; *Ga.*: Code 1895, § 5292, Cr. C. § 1026 (allowable "as to matters relevant to his testimony and to the case"); 1899, *Hudgins v. Bloodworth*, 109 Ga. 197, 34 S. E. 364; *Ill.*: 1884, *Moore v. People*, 108 Ill. 486; *Ind.*: 1820, *Shields v. Cunningham*, 1 Blackf. 37 ("irrelevant and immaterial"); 1843, *McIntire v. Young*, 6 id. 497 (siander; that the witness proving the utterance did not know the plaintiff at the time, and held the same views as those uttered by defendant; excluded); 1853, *Lawrence v. Lanning*, 4 Ind. 194; 1869, *Fogleman v. State*, 32 id. 145; 1873, *Burdick v. Hunt*, 43 id. 388; 1883, *Brown v. Owen*, 94 id. 36; 1884, *Seller v. Jenkins*, 97 id. 434; 1885, *Welch v. State*, 104 id. 351; 3 N. E. 850; 1889, *Stasser v. Hogan*, 120 id. 220, 21 N. E. 911, 22 N. E. 990 (in these two cases the misunderstood test is used: "Would the cross-examining party be entitled to prove it as a part of his case tending to estab-

§ 1022. Same: (2) Facts discrediting the Witness as to Bias, Corruption, Skill, Knowledge, etc. A second class of matters which, by the rule in

lish his plea"); 1895, *Blough v. Parry*, 144 id. 463, 40 N. E. 70; *Id.*: 1844, *Wau-kon-ohaw-neck-kaw v. U. S.*, 1 *Morris* 337; 1857, *Cokely v. State*, 4 *la.* 480; 1859, *State v. Ruhl*, 8 *Id.* 451; *Ky.*: 1859, *Champ v. Com.*, 2 *Metc.* 23; 1878, *Kennedy v. Com.*, 14 *Bush* 357; 1882, *Loving v. Com.*, 80 *Ky.* 511; 1884, *Crittenden v. Com.*, 82 *Id.* 167; 1889, *Com. v. Hourigan*, 89 *Id.* 311, 12 *S. W.* 550; 1896, *Louisville & N. R. Co. v. Webb*, 99 *Id.* 332, 35 *S. W.* 1117, 1121; *La.*: 1896, *State v. Scott*, 48 *La. An.* 1418, 20 *So.* 909; 1896, *State v. Conerly*, 48 *Id.* 1561, 21 *So.* 192; *Me.*: 1831, *Ware v. Ware*, 8 *Greenl.* 53 ("the true line of distinction is that which has been established between those questions which are merely collateral and have no immediate connection with the cause and those which intimately relate to the subject of the inquiry"); 1857, *Brackett v. Weeks*, 43 *Me.* 291; 1870, *State v. Kingsbury*, 58 *Id.* 243; 1872, *Bell v. Woodman*, 60 *Id.* 466, 468; 1874, *State v. Benner*, 64 *Id.* 287; *Davle v. Roby*, *lb.* 429; *Mass.*: two points are here to be noted: (1) The doctrine of the modern rulings is that the trial Judge has discretion to determine whether matter is collateral and even to allow a cross-examination upon matters concededly collateral; hence, most of such rulings simply decide that the discretion below was not improperly exercised in admitting or excluding; (2) Self-contradictions of one's own witness (*ante*, § 905) are admitted by virtue of a statute, *P. S. c.* 169, § 22, *R. L.* 1902, c. 75, § 24; how far the discretion-doctrine affects this statutory evidence does not appear: 1843, *Brockett v. Bartholomew*, 6 *Metc.* 396; 1843, *Hathaway v. Crocker*, 7 *Id.* 264; 1857, *Benjamin v. Wheeler*, 8 *Gray* 413; 1857, *Lane v. Bryant*, 9 *Id.* 247 (a statement as to the witness' former hearsay and inadmissible remarks, excluded); 1861, *Fletcher v. R. Co.*, 1 *All.* 13 (same); 1863, *Coullard v. Duncan*, 6 *Id.* 440 (fraudulent transfer; creditor's inconsistent statement of the amount of the debt; admitted); 1865, *Prescott v. Ward*, 10 *Id.* 205, 208 (discretion rule); 1866, *Marsh v. Hammond*, 11 *Id.* 486 (statements by an insolvent debtor, a fraudulent transfer being involved; admitted); 1867, *Carruth v. Bayley*, 14 *Id.* 532 (statements by a transferee and by another creditor, as to former's knowledge of insolvency, and as to the existence of a claim corroborating the other testimony; admitted); 1868, *Foot v. Hunkins*, 98 *Mass.* 524 (issue as to C.'s ownership, C. denying it; C.'s lack of money and failure having been testified to by him, former statements by him that he had means were received); 1869, *Ryerson v. Abington*, 102 *Id.* 530 (an inadmissible opinion; excluded); 1873, *Com. v. McBean*, 111 *Id.* 438 (indecent assault while on a drive; a statement on another occasion that the prosecutrix would kiss the defendant if he took her to drive; admitted); 1873, *Davis v. Keyes*, 112 *Id.* 436 (contract on a warranty of a horse's age; defendant's testimony that he did not know the horse's age, and had never warranted a horse, excluded); 1875, *Woodard v. Eastman*, 118 *Id.* 403; 1876, *Kaler v. Ins. Co.*, 120 *Id.* 334; 1877, *Fames v. Whittaker*, 123 *Id.* 342, 344; 1886, *Hatchelder v. Hatchelder*, 139 *Id.* 1, 29 *N. E.* 61 (under statute; that the witness had not had a conversation with the testator's wife regarding a will prior to the one in issue; excluded); 1889, *Phillips v. Marblehead*, 148 *Id.* 328, 19 *N. E.* 547 (cross-examination on collateral matters, discretionary); 1889, *Alexander v. Kaler*, 149 *Id.* 321, 21 *N. E.* 376; 1889, *Roberts v. Boston*, *lb.* 346, 352, 21 *N. E.* 668 (discretion doctrine); 1895, *Pierce v. Boston*, 164 *Id.* 92, 41 *N. E.* 229 (discretion doctrine); 1896, *Howes v. Colburn*, 165 *Id.* 385, 43 *N. E.* 125 (discretion-doctrine; testimony of prior contradictions offered against a witness called in rebuttal); *Mich.*: 1866, *Fisher v. Hood*, 14 *Mich.* 189; 1869, *Patten v. People*, 18 *Id.* 329; 1878, *Hitchcock v. Burgett*, 88 *Id.* 501, 505; 1881, *Hamilton v. People*, 46 *Id.* 186, 188, 9 *N. W.* 247; 1882, *Driscoll v. People*, 47 *Id.* 413, 417, 11 *N. W.* 221; 1882, *People v. Broughton*, 49 *Id.* 839, 13 *N. W.* 621; 1886, *Butterfield v. Gilchrist*, 63 *Id.* 161, 29 *N. W.* 682; 1887, *McDonald v. McDonald*, 67 *Id.* 122, 34 *N. W.* 276; 1890, *People v. Hillhouse*, 80 *Id.* 585, 45 *N. W.* 484; 1892, *Electric Light Co. v. Grant*, 90 *Id.* 475, 51 *N. W.* 539; 1895, *People v. De France*, 104 *Id.* 563, 62 *N. W.* 709; 1896, *McClellan v. R. Co.*, 105 *Id.* 101, 62 *N. W.* 1026 (a former expression of opinion, by one now testifying to a motorman's care, that the latter was to blame, admitted); *Minn.*: 1868, *Hicks v. Stone*, 13 *Minn.* 439; 1869, *State v. Staley*, 14 *Id.* 115; 1897, *Murphy v. Backer*, 67 *Id.* 510, 70 *N. W.* 799; *Miss.*: 1885, *Jamison v. R. Co.*, 63 *Miss.* 83, 37; 1889, *Jones v. State*, 67 *Id.* 111, 115, 7 *So.* 220; 1896, *Williams v. State*, 73 *Id.* 820, 19 *So.* 826 (test, whether the matter would be admissible as part of the case); 1899, *Garner v. State*, 76 *Id.* 515, 25 *So.* 363; *Mo.*: 1871, *Harper v. R. Co.*, 47 *Mo.* 581; 1875, *McKern v. Calvert*, 59 *Id.* 243; 1880, *State v. Hughes*, 71 *Id.* 635; 1901, *Hamburger v. Rinkel*, 164 *Id.* 898, 64 *S. W.* 104 (the facts must be such as are "pertinent to the issue and could have been shown in evidence as facts independently of the inconsistency"); *Nebr.*: 1884, *George v. State*, 16 *Nebr.* 321, 20 *N. W.* 811 (test, whether the same matter could be used affirmatively); 1897, *Johnston v. Spencer*, 51 *Id.* 198, 70 *N. W.* 982 (provable if "a part of his case, tending to establish his plea"); 1899, *Zimmermann v. Kearney Co. Bank*, 57 *Id.* 800, 78 *N. W.* 366, *semble* (test of Attorney-General v. Hitchcock adopted); *N. H.*: 1859, *Combs v. Winchester*, 39 *N. H.* 16 (Bell, J.: "It may always, we think, be determined whether evidence in contradiction of a witness is admissible by considering whether the question, the answer to which is proposed to be contradicted would be admissible if proposed by the party calling him. . . . But if the question is admissible only on cross-examination, it is merely collateral and cannot be contradicted");

Attorney-General *v.* Hitchcock, may be the subject of a self-contradiction, because they concern facts which could have been introduced in evidence independently of the self-contradiction, includes all those which evidence specific discrediting qualities in the witness, — in particular, Bias, Interest, and Corruption, and occasionally also, lack of Skill, Knowledge, and the like. In this class, on the other hand, are not included facts of misconduct impeaching Moral Character. The admissibility of the self-contradiction thus depends indirectly on the scope of the rules governing the above kinds of facts (*ante*, §§ 948-996). The general principle is to-day almost everywhere conceded, but it is in matters of bias, interest, and corruption that it receives most frequent mention:

1867, *Wells, J.*, in *Day v. Stickney*, 14 All. 258: "The credit of a witness, upon whose testimony in part the issue is to be determined, is not merely collateral, and cannot be immaterial. The weight of his testimony with the jury may depend entirely upon their supposition that he is under no influence to prevaricate. If he is prejudiced for or against one of the parties to the suit, or has a strong purpose or feeling of interest in relation to the matter in controversy, it is a circumstance which may materially affect his testimony. . . . Under the English rule requiring that the witness should himself be interrogated as to his interest, bias, or hostile feeling, before other witnesses could be

1861, *Dewey v. Williams*, 43 id. 385, 386; 1864, *Sumner v. Crawford*, 45 id. 417; *N. J.*: 1880, *Fries v. Brugler*, 12 N. J. L. 80; *N. Y.*: 1880, *Lawrence v. Barker*, 5 Wend. 305; 1881, *Jackson v. Warford*, 7 id. 61; 1847, *Howard v. Ins. Co.*, 4 Den. 504, 506 (a plea of fraudulent overvaluation to an action on a fire-policy; the witness, plaintiff's brother and business-manager, was asked whether he had, in originally making purchases, represented the plaintiff's capital (really \$400) as \$10,000; it was said *obiter* that the answer could not be contradicted); 1863, *Plato v. Reynolds*, 27 N. Y. 587; 1871, *Sloan v. R. Co.*, 45 id. 126 (negligence in not keeping the track in repair; prior inconsistent statements admitted of a witness to the condition of the track); *N. C.*: 1886, *Rudford v. Rice*, 2 Dev. & B. 42 (the matter must be "relevant to the issue," "the fact in issue or its attendant circumstances or any facts immediately connected with the subject of inquiry"); 1869, *State v. Kirkman*, 63 N. C. 246 (allowed); 1871, *Clark v. Clark*, 65 id. 660 (details affecting bias; excluded); 1873, *Kerrans v. Brown*, 68 id. 43 (capacity of testator, his sanity being disputed; admitted); 1873, *State v. Elliott*, ib. 125 (circumstances of a killing; excluded); 1876, *State v. Patterson*, 74 id. 157 (affidavit proceedings; whether prosecutrix had four years before had intercourse with a third person; excluded); 1879, *State v. Scott*, 81 id. 606 ("rather than be outdone by a negro, he would swear any amount of lies"; excluded); 1880, *State v. Parish*, 83 id. 613 (similar to *Patterson's Case*, *supra*, but involving a peculiar doctrine of this State); 1882, *State v. Cronse*, 86 id. 621 (like *Patterson's Case*); 1882, *State v. Davis*, 87 id. 524 (a fact indicating the witness to be an accessory after the fact and thus affecting his motive to testify falsely; admitted); 1897, *Bur-*

nett v. R. Co., 120 id. 517, 26 S. E. 819; *Oh.*: 1884, *Kent v. State*, 42 Oh. 434 (rule of Attorney-General *v.* Hitchcock said to be ordinarily the test; whether universally, is doubted); *Pa.*: 1870, *Hildeburn v. Curran*, 65 Pa. 63 (test, "Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea?"); 1874, *Schinter v. Wimpenny*, 75 id. 325; 1888, *Zehley v. Storey*, 117 id. 480, 489, 12 At. 569; *S. C.*: 1831, *Smith v. Henry*, 2 Bail. 118, 127; 1890, *State v. Boile*, 33 S. C. 129, 11 S. E. 624; *S. D.*: 1897, *State v. Davidson*, 9 S. D. 564, 70 N. W. 879 (provable if "a part of his case, tending to establish his plea"); *Tenn.*: 1890, *Franklin v. Franklin*, 90 Tenn. 48, 16 S. W. 557; 1897, *Saunders v. R. Co.*, 99 id. 130, 41 S. W. 1031 ("as a part of and as tending to establish his case"); *U. S.*: 1806, *Lamaire v. Caze*, 1 Wash. C. C. 413 ("pertinent to the cause"; "relative to the cause"); 1840, *U. S. v. Dickinson*, 2 McLean 330; *Utah*: 1895, *Fenstermaker v. Tribune Pub. Co.*, 12 Utah 439, 43 Pac. 117; *Vt.*: 1858, *Hobbrook v. Hobbrook*, 30 Vt. 434; 1888, *Lewis v. Barker*, 55 id. 21; 1888, *Alger v. Castle*, 61 id. 57, 17 At. 727; 1901, *Lynds v. Plymouth*, 73 id. 216, 50 At. 1083; *Va.*: 1833, *Daniels v. Conrad*, 4 Leigh 402, 404, 405; 1882, *Lunghorne v. Com.*, 76 Va. 1019 (*semble*, the test of Attorney-General *v.* Hitchcock); 1895, *Robertson v. Com.*, — id. —, 22 S. E. 359; *Wash.*: 1900, *State v. Coates*, 22 Wash. 601, 61 Pac. 726 (confession of prior burglaries, admitted); *Wis.*: 1903, *Barton v. Brutey*, — Wis. —, 96 N. W. 815 (here erroneously excluded, for the fact of bias was involved); *Wyo.*: 1903, *Horn v. State*, — Wyo. —, 73 Pac. 705 (prior statements showing motive, held not collateral).

called to prove it by his declarations, such proof always involved a question of [self-] contradiction, and was generally treated in this secondary aspect alone. But the whole investigation relating thereto was regarded as belonging to the province of impeachment. Its character is the same although the contradiction be omitted."

1891, *Elliott, J.*, in *Johnson v. Wiley*, 74 Ind. 230: "It can make no difference whether the motives arise from hatred, interest, or affection; the principle is the same. If it be proper to contradict a witness by proving that statements have been made indicating hostility and enmity, it surely must be competent to prove statements showing that the impartiality of the witness is affected by motives arising from friendship, affection, fear, or interest."

¹ The rulings in the different jurisdictions are given below. The list given in the preceding note should also be consulted, as a strict line of division is sometimes difficult to draw. Compare also the cases cited *ante*, §§ 948-969, and §§ 990-996, which sometimes also throw light on the present rule. *England*: Some early rulings were inclined to treat all such matters as material: 1811, *Yewin's Case*, 2 Camp. 638, n. (whether a witness for prosecution had not said he would be revenged on defendant; allowed to be shown, "as the words were material to the guilt or innocence of the prisoner"); 1839, *R. v. Barker*, 3 C. & P. 590 (contradiction as to the loose conduct of the prosecutrix in a rape case; admitted); 1843, *R. v. Robins*, 2 M. & Rob. 512 (contradicting the prosecutrix in a rape case as to previous connection with other men; admitted); but other rulings were inclined to treat them as collateral, even where bias was distinctly involved: 1838, *Harrison v. Gordon*, 2 Law. Cr. C. 156, *Aiderson, B.* (excluding an apparent denial of circumstances indicating a hostile spirit); 1838, *Lee's Case*, 2 id. 154, *Coleridge, J.* (that the witness had said that the prisoner should be acquitted if it cost him £20; that he had tried to persuade witnesses for the prosecution not to testify; excluded). But this unsettled condition of the law was brought to an end in 1847 by Attorney-General *v. Hitchcock* (admitting all matters involving bias or corruption; in this particular case the evidence was excluded as not really of that sort; the information was for making mail in an unregistered cipher; a witness testifying for the prosecution to the making was asked on cross-examination if he had not said that the Crown officers had offered him £20 to testify to that effect; this he denied, and another witness was called to prove it, but was rejected; *Pollock, C. B.*: "The reason is that it is totally irrelevant to the matter in issue that some person should have thought fit to offer a bribe to the witness to give an untrue account of a transaction, and it is of no importance whatever if that bribe was not accepted"); 1883, *R. v. Shaw*, 16 Cox Cr. 503, *Cave, J.* (bias, admissible); *Ala.*: 1858, *McHugh v. State*, 31 Ala. 320 (bias; admitted); 1859, *Blakey's Heirs v. Blakey's Executrix*, 33 id. 618 (excluded); 1860, *Lewis v. State*, 35 id. 386 (attempts to coerce a witness; admitted); 1866, *Bullard v. Lambert*, 40 id. 210 (bias; admitted); *Ark.*: 1889, *Crumpton v. State*, 52 Ark. 274 (bias; admissible); 1890, *Hollingsworth v.*

State, 58 id. 387, 388, 14 S.W. 41 (that the witness was working for a reward); *Cal.*: 1878, *People v. McKeller*, 53 Cal. 65 (length of residence in one place; excluded); 1897, *People v. Wong Chuoy*, 117 id. 624, 49 Pac. 833 (that the witness had attempted to bribe another; admitted); *Conn.*: 1828, *Atwood v. Welton*, 7 Conn. 70 (bias; admissible); 1874, *Beardsley v. Wildman*, 41 id. 515 (same); *Ind.*: 1859, *Berach v. State*, 13 Ind. 435, *semble* (place of residence may affect credibility); 1869, *Fogelman v. State*, 32 id. 145 (the witness' motives for turning State's evidence in another case; excluded); 1878, *Scott v. State*, 64 id. 400 (bias; admissible); 1881, *Johnson v. Wiley*, 74 id. 233, 238 (same); *Ia.*: 1898, *State v. Hancock*, 106 Ia. 191, 76 N.W. 654 (bias; excluded); *Ky.*: 1855, *Cornelius v. Com.*, 15 B. Monr. 545 (bias; admissible); *Me.*: 1867, *New Portland v. Kingfield*, 55 Me. 176 (bias; admissible); 1874, *Davis v. Roby*, 64 id. 428, 430 (a statement by the witness that her memory was poor and her husband had to keep telling her what to say; admitted); *Mass.*: 1854, *Harrington v. Lincoln*, 2 Gray 133 (a statement, after testifying, to another witness, that the former would lie on the stand under certain circumstances; excluded, as affecting only general morals, not bias in the case); 1857, *Collins v. Stephenson*, 8 id. 439 (threats of revenge); 1857, *Cont. v. Farrar*, 10 id. 7 (a statement as to conduct alleged to show bias; excluded, because it did not); 1864, *Tyler v. Pomeroy*, 3 Ail. 483, 505 (bias; admissible); 1869, *Sweet v. Shinnway*, 102 Mass. 369 (that the witness had improperly offered money to obtain a copy of the contract from the opponent; admitted); 1875, *Brooks v. Acton*, 117 id. 204, 209 (bias; admissible); 1882, *Com. v. Donahoe*, 133 id. 408 (that the defendant had not offered to pay him money to suppress his testimony; admitted, under the statute mentioned in the preceding section); *Mich.*: 1871, *Geary v. People*, 22 Mich. 220 (unscrupulousness; admitted); 1874, *Hamilton v. People*, 29 id. 173, 182 (fabrication of testimony; admissible); *Miss.*: 1859, *Newcomb v. State*, 37 Miss. 383, 401 (bias; admissible); 1889, *Jones v. State*, 67 id. 115, 7 So. 220 (same); *Nebr.*: 1892, *Consani v. Sheldon*, 35 Nebr. 254, 52 N.W. 1104 (same); *N.H.*: 1851, *Titus v. Ash*, 24 N.H. 332 (same); 1852, *Martin v. Farnham*, 25 id. 99 (same); 1852, *Folsom v. Brawn*, 1h. 122 (tampering with another witness; admitted); *N.Y.*: 1847, *People v. Austin*, 1 Park. Cr. C. 156 (an offer by deceased's father

Two special cases need mention. (1) In the early part of the 1800s, little discrimination was shown between different sorts of facts tending to discredit; and thus facts indicating Corruption or Bias were occasionally treated as facts affecting Moral Character, and therefore such prior Self-Contradictions were excluded. This is seen in some of the earlier English rulings;² but in *Attorney-General v. Hitchcock* this misunderstanding was cleared up, and the distinction between Bias or Corruption and Character was firmly settled. (2) In some instances — for example, showing previous connection of a rape-prosecutrix with third persons — the fact may be regarded either as affecting her moral character as witness (*ante*, § 979) or as affecting the probability of her consent (*ante*, § 200); in the former view, a Self-Contradiction would not be admissible, while in the latter view it would be admissible if the jurisdiction in question recognized the admissibility of that class of evidence. But Courts differ on that point; thus, the propriety of using a Self-Contradiction will there depend on the view taken by the Court of the other controversy.

§ 1023. *Cross-Examination to Self-Contradiction, without Extrinsic Testimony.* Suppose that the witness is asked, "Did you at such a time and place say the contrary?", the matter being a collateral one; is this much allowable, provided no attempt is made by outside testimony to prove the self-contradiction if it is denied by the witness? It has been sometimes said that even this much — *i. e.* the attempt to prove the collateral self-contradiction by the witness himself — is not allowable.³ But on principle

to compound for the former's death was held inadmissible independently, yet admissible to contradict denials of it by the witness, as not "collateral" because it showed "corrupt or revengeful feelings"; 1832, *Schultz v. R. Co.*, 39 N. Y. 248 (procuring another witness to testify falsely, admitted); N. C. : 1842, *State v. Patterson*, 2 Ired. 353 ("the temper, disposition, or conduct of the witness in relation to the cause or the parties"; here, whether the witness had been paid for coming from another State to testify, allowed); 1871, *Clark v. Clark*, 65 N. C. 661 ("Had the question upon cross-examination been general, 'Are your feelings towards the plaintiff friendly or unfriendly?' and the answer been 'My feelings towards him are friendly,' evidence in contradiction might have been offered as tending to show the animus. . . . But when the cross-examiner, instead of being general, descends to particulars, then the party is bound by the answer and cannot be allowed to go into evidence *aliunde* in order to contradict the witness"; this distinction is un- sound); 1901, *Carr v. Smith*, 129 id. 232, 39 S. E. 831 (expressions indicating bias, held collateral, where the witness was a party); Oh. : 1884, *Kent v. State*, 42 Oh. St. 428, 431 (bias, etc.; admissible); 1865, *Gaines v. Com.*, 50 Pa. 326, 328 (statements showing the witness possibly the real murderer and thus motivated to divert suspicion from himself, admitted); S. C. (see the cases in the note *ante*, § 1021); U. S. : 1840, U. S. v. Dickinson, 2 McL. 330 :

1850, U. S. v. Schindler, 18 Blatchf. 230, Benedict, J. (the utterances showing prejudice "would have been admissible if no inquiry had first been made of W. in regard to them, and inquiry of and denial by him did not make them any the less admissible"); Va. : 1882, *Langhorna v. Com.*, 76 Va. 1019 (bias, admissible; but limiting the evidence to declarations directly expressing hostility); Vt. : 1862, *Hutchinson v. Wheeler*, 35 Vt. 340 (bias; admissible); 1869, *Eliaworth v. Potter*, 41 id. 690 (same).

Presumably, the impeaching witness himself may also be impeached by a prior contradictory statement of what he now says the first witness said; *i. e.* this will not be a collateral matter: 1881, *State v. Lawlor*, 28 Minn. 222, 9 N. W. 698 ("at least within reasonable limits").

² Particularly in *Harris v. Tippett*, *ante*, § 1005.

³ 1856, *Gilbert v. Gooderham*, 6 U. C. C. P. 46 (*Draper, C. J.* : "It very frequently happens that questions which in strictness are irrelevant are put and answered without objection. But I take the rule to be clearly established that no question can be legally put to a witness on cross-examination for the mere purpose of contradicting him. And if such question be put, the answer is conclusive"). *Accord*: 1831, *Jackson v. Werford*, 7 Wend. 61; 1849, *Seavy v. Dearborn*, 19 N. H. 356; 1824, *Starkie, Evidence*, 1, 189.

there seems to be no objection. The reasons invariably advanced by the Courts (*ante*, § 1019) have reference solely to the formation of a new collateral issue for outside testimony; i. e. if the witness deny the prior utterance, the impeacher would proceed to prove it by other witnesses and the impeached would wish to disprove it by other witnesses, and it is to this process that the objections of Unfair Surprise and Confusion of Issues apply. They do not apply at all where the impeacher merely seeks to prove the utterance by the witness himself and rests content with the witness' admission or denial. There is therefore no objection, either of principle or of policy, to such an attempt to prove the self-contradiction by the witness himself.³ Moreover, it is not uncommon to obtain, by cross-examination alone, an adequate exposure of the witness' inconsistencies; and no artificial limits should be set for its employment. The following passages illustrate what may sometimes be thus effected:

1664, *Turner's Trial*, 6 How. St. Tr. 565, 606; it was vital to the defendant's case that he was at home on Thursday night and absent Friday night; his maid-servant being called for him, L. C. J. Hyde: "Did your master go forth on Friday night?" Maid: "No; he was at home and in bed all that night till 8 in the morning; and Thursday night before"; Defendant: "A silly soul, she knows not what she says"; L. C. J. Hyde: "I will ask you again; was your master at home on Friday night?"; Maid: "No, I think he was not"; L. C. J. Hyde: "Why did you say so before?"; Maid: "I cannot remember, sir"; C. J. Bridgman: "She knows her master's mind."

1811, *Berkeley Peerage Trial*, Sherwood's Abstract, 189, 192, 273; the issue was whether Lord and Lady Berkeley were married before their eldest son was born, and this again turned mainly upon the genuineness or forgery of an entry in the marriage-register made in the name of Hupsman, the pariah vicar; Lady Berkeley claimed its genuineness; Nicholas Hicks, an attorney, was offered to prove this, and swore convincingly, as being well acquainted with the writing; he was asked at the beginning of his cross-examination: "Have you been conversing with anybody lately as to this handwriting?" "I have not," the time of the trial being May; "You have not been at Spring Gardens, [Lady Berkeley's residence,] lately, have you?" "I have not; not to converse with anybody on the subject"; "Have you been there?" "I have been there several times"; "Whom did you go to there?" "I saw Lady Berkeley." "Do you mean to say you have not talked with anybody since you came to London as to the manner in which Hupsman wrote?" "I have not." After a long series of questions on other matters, the cross-examiner finally returned and asked how he came to be a witness, when he said that he had told Lady Berkeley that he could identify the register-entry; "When?" "I think in the month of April." "It was in Spring Gardens you went to Lady Berkeley?" "Yes"; "And you there told her you could swear to Hupsman's handwriting?" "Yes"; "And that was what passed between you?" "Yes"; whereupon his first answers above were read; and he was later committed to Newgate for contempt of the House.⁴

³ *Accord*: 1871, *R. v. Holmes*, 12 Cox Cr. 143, per Kelly, C. B., *semble*; 1899, *Spring Valley v. Gavin*, 182 Ill. 282, 54 N. E. 1035 (trial Court has discretion); 1847, *Howard v. Ins. Co.*, 4 Den. 501, 506. Compare also the cases cited *ante*, § 1006. For the propriety of repeating the matter of the direct examination on the cross-examination, in order to involve the witness in self-contradictions, see *ante*, § 782.

⁴ 1871, *Tichborne v. Lushington*, Heywood's Rep. 148 (cross-examination of the claimant as to the reason for making his will in Australia; a good illustration); 1860, *Wardlaw, J.*, in *Chapman v. Cooley*, 12 Rich. 660 ("there is no difference in principle between his contradiction of himself on the stand and outside of the court-house").

3. Preliminary Warning Necessary.

§ 1025. **Reason of the Rule.** It has been already noticed (*ante*, § 1019) that, to obviate the objection of Unfair Surprise, a natural expedient is to ask the witness, while on the stand under cross-examination, whether he made the supposed contradictory statement. He is thus warned that it will be offered against him by testimony later produced; and he may thus either prepare to deny it, if he claims not to have made it, or explain it, if he admits having made it. The reason and the nature of this preliminary question and warning have often been explained by the judges:

1820, *Abbott, C. J.*, in *The Queen's Case*, 2 B. & B. 313: ¹ "If it be intended to bring the credit of a witness into question by proof of anything he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary, and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which in our opinion is the most convenient course. . . . [If the witness denies the utterance or claims the privilege of silence], the proof in contradiction will be received at the proper season. But the possibility that the witness may decline to answer the question affords no sufficient reason for not giving him the opportunity of answering and of offering such explanatory or exculpatory matter as I have before alluded to. . . . not only for the purpose already mentioned, but because, if not given in the first instance, it may be wholly lost, for a witness who has been examined and has no reason to suppose that his further attendance is requisite often departs the Court, and may not be found or brought back until the trial be at an end. So that, if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done, . . . and one of the great objects of the course of proceeding established in our courts is the prevention of surprise, as far as practicable, upon any person who may appear therein."

1851, *Ranney, J.*, in *King v. Wicks*, 20 Oh. 91: "In addition to the reasons already stated [the fairness of giving opportunity for explanation], others equally cogent could be given. To make the truth manifest upon the issues joined between the parties is the object of all evidence. This testimony has no direct bearing upon any disputed fact, but raises a collateral issue upon the credit to be given to a witness, and with all collateral issues, is calculated to divert the minds of the jury from the points in controversy in the case. Such collateral inquiry may and often will become necessary; but it should be avoided where it can be, and I firmly believe it may be avoided in a majority of cases where the inquiry is first made of the witness himself, either by his confessing such contradictory statements or giving such explanations in regard to them as will convince the party that nothing is to be made by pursuing the matter further. Again, witnesses are required, willing or unwilling, to come into court and testify. They should appear there under the full confidence that their feelings and reputations will be respected and protected, so far as is consistent with the ends of justice. The witness suddenly finds himself on trial for his veracity. . . . A word imperfectly heard, forgotten, or omitted, may change his whole meaning, and make him say what he never thought of. . . . [A bitter strife may ensue] which might all have been avoided by one minute's explanation in the first instance from the party implicated in the presence of those brought to impeach him."

¹ s. c., *Queen Caroline's Trial*, Linn's ed., III, 259.

§ 1026. **History of the Rule.** But this rule is by no means an immemorial tradition. The reasons above explained were not worked out until well into the 1800s. The rule, as a rule, may be said to have had its birth with the response of the Judges in *The Queen's Case* (quoted above) in 1820. This utterance is said to have come as a surprise to the Bar; and up to that time no established requirement of the kind existed.¹ None of the treatises by practitioners, English or American, published prior to *The Queen's Case* mentions such a proviso. Add to this that, in all of the New England jurisdictions, the continuous traditions of practice down through the first half of the 1800s recognized no such requirement,² that in such others of the original States as Pennsylvania and New Jersey the rule has never found favor,³ and that in New York,⁴ Virginia,⁵ and Georgia⁶ traces of a similar sort appear. We may believe, therefore, that, as a requirement indispensable, the doctrine is an innovation dating from 1820. Thus, it may be fairly expected to stand upon its merits, and not upon long traditional membership in our system of evidence; and it is worth while to appreciate this, for the rule is open, particularly in its more recent arbitrary form, to serious objection.

§ 1027. **Objections to the Rule.** The objection in brief is that in many cases it is impossible for the impeaching party to ask the question while the witness is on the stand, because it is often not until after the testimony is delivered that the prior contradictions are brought to the opponent's notice, and thus, wherever the witness becomes unavailable by death or absence, the contradictions cannot be used. As there is at least an equal chance that the alleged contradictions were really uttered and cannot be explained away, it is a poor policy that favors exclusively the witness to be impeached by exempting him from impeachment; justice demands with equal force that the impeaching party, if acting in good faith, should not be invariably the one to suffer, as he is under a rigid enforcement of the rule. This argument has been well expounded in the following opinion:

1847, *Davis, J.*, in *Downer v. Dana*, 19 Vt. 345: "Were the question *res integra*, I confess I could see no advantages to the cause of truth and justice, from the adoption of this

¹ It is said by Church, C. J., in 22 Conn. 267 (1853) and by Parker, C. J., in 17 Mass. 160 (1821), that the practice in England before *The Queen's Case* was not established, but that the circuits and judges differed. So far as extant decisions go, the matter seems to have been left unnoticed: 1732, *Pendrell v. Pendrell*, 2 Str. 925 (preliminary question not spoken of); 1761, *Wright v. Littler*, 3 Burr. 1247, 1255 (a dying declaration by an attesting witness that he had forged the will; no requirement of this sort is spoken of).

² *Mass.*: 1821, *Tucker v. Welch*, 17 Mass. 160; 1852, *Gould v. Norfolk Lead Co.*, 9 Cush. 347 (*Shaw, C. J.*: "that is the English rule, but we have always adopted a different rule"); 1855, *Com. v. Hawkins*, 3 Gray 465; 1867, *Day v. Stickney*, 14 All. 260; *Conn.*: 1853, *Church, C. J.*, in *Hedge v. Clapp*, 22 Conn. 266; *Vt.*: 1847, *Davis, J.*, in *Downer v. Dana*, 19 Vt. 345 ("at that time [1821] I think no lawyer in

Vermont had heard of such a rule here, and even now I do not find it naturalized anywhere except here"); *N. H.*: 1851, *Titus v. Ash*, 24 N. H. 331; 1857, *Cook v. Brown*, 34 id. 471; *Me.*: 1831, *Ware v. Ware*, 3 Greenl. 52, *semble*; 1850, *Wilkins v. Babbershall*, 32 Me. 184; 1867, *New Portland v. Kingfield*, 55 id. 176; *R. I.*: 1833, *Avery's Trial (Newport)*, R. I., *Hildreth's Report*, 90 (before Eddy, C. J., Brayton, and Durfee, JJ.); "this question had been settled a year ago at Providence, where it was decided" that the witness must first be asked; counsel intimated that the prior practice had been to the contrary).

³ 1830, *Fries v. Brugler*, 12 N. J. L. 80, *semble*; 1872, *Walden v. Finch*, 70 Pa. 463.

⁴ In *People v. Moore*, 15 Wend. 422 (1836), the rule seems to have been forgotten.

⁵ 1855, *Unis v. Charlton*, 12 Gratt. 497.

⁶ 1846, *Sealy v. State*, 1 Kelly 218 (left undecided).

rule of evidence, which are not equally well secured by the old practice of allowing the party whose witness has in that way been attacked to recall him, if he chose, for the purpose of contradicting or explaining the conduct or declarations imputed to him. Indeed, I have seen no objections of consequence to that course, except that it may sometimes happen that the witness may have departed from court supposing his attendance no longer necessary. Such an objection practically is entitled to very little weight, as it would be provided against by requiring, as is in fact generally done for other reasons, witnesses to remain in court until the testimony is finished. On the other hand, this rule would be productive of intolerable mischiefs, were it not mitigated by the somewhat awkward and inconvenient expedient of suspending the regular course of testimony, for the purpose of recalling the witness proposed to be impeached and laying a foundation for the impeaching testimony by interrogating him whether he did or said the things proposed to be proved. Besides, the privilege of doing this will be lost in all those cases where the witness has left court and cannot be found; the party has every inducement to cut off this opportunity by immediately discharging such as he may have reason to suspect are liable to be impugned. In addition to this, the avowed attempt to produce self-impeachment, made of course in a tone and manner evincing distrust of the general narrative, too often both surprises and disconcerts a modest witness. He answers hastily and confusedly, as is natural from having such a collateral matter hastily sprung upon him. Every one conversant with judicial proceedings must have often observed with pain an apparent contradiction produced in this way, when he is satisfied none would have existed under a different mode of proceeding. . . . To my mind these considerations present very formidable objections to the practice first authoritatively developed on the trial of the Queen in the House of Lords."

A due consideration for these arguments leads to the conclusion that in general the preliminary question should indeed be put, before producing the alleged contradiction, but that this requirement, instead of being rigid and invariable, should be open to exceptions, and should be dispensed with, in the Court's discretion, where the putting of the question has become impossible and the impeaching party has acted in good faith. This sensible form of the rule is, however, in vogue in a few jurisdictions only.⁷ The modern tendency has been to enforce the rule with inconsiderate and arbitrary rigidity. Today it does, upon the whole, as much evil as good, and it is to be hoped that a reaction will some day manifest itself.

§ 1028. *State of the Law in the Various Jurisdictions.* In all but a few jurisdictions the rule is recognized, and is enforced as an inflexible one. In a few jurisdictions its enforcement is left to the trial Court's discretion. In a few others it is not recognized at all.¹

⁷ See a forcible opinion by Church, C. J., in *Hedge v. Clapp*, 22 Conn. 266 (1853).

¹ The rule is sanctioned, where not otherwise noted: *England*: 1820, *The Queen's Case*, 2 B. & B. 313, by all the Judges; 1837, *Andrews v. Askey*, 8 C. & P. 7; 1840, *Carpenter v. Wall*, 11 A. & E. 803 (where in a seduction suit a former admission of the plaintiff's daughter that B had seduced her was subjected to this rule, though it had also legitimate effect as showing lightness of conduct; the Court do not say that the rule would have been foregone had the other purpose of the evidence been the chief or the sole one; and it is not clear just when the line is to be drawn); St. 1854, c. 125, § 23 ("If a wit-

ness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement"); *Canada*: the statutes are like the English statute *supra*: Dom. Crim. Code 1892, § 701; *B. C.*: Rev. St. 1897, c. 71, § 31; *N. Br.*: Cons. St. 1877, c. 46, § 20; *Newf.*: Cons. St. 1892, c. 57, § 18;

§ 1029. Preliminary Question must be Specific as to Time, Place, and Person. If the preliminary question is to be useful as a warning to enable the

N. Sc.: Rev. St. 1900, c. 43; *Ont.*: Rev. St. 1897, c. 73, § 18; *P. E. I.*: St. 1889, c. 9, § 16; *Que.*: 1876, *Décary v. Polrier*, 20 Low. Can. Jur. 167; *United States: Ala.*: 1840, *Lewis v. Post*, 1 Ala. 69; *Alaska*: C. C. P. 1900, § 670 (like Or. Annot. C. 1892, § 841); *Ark.*: Stats. 1894, § 2960 ("Before other evidences can be offered of the witness having made at another time a different statement, he must be inquired of concerning the same, with the circumstances of time and persons present, as correctly as the examining party can present them"); 1854, *Dreunen v. Lindsey*, 15 Ark. 1; 1877, *Collins v. Mack*, 31 id. 694; 1881, *Smith v. State*, 37 id. 328; 1896, *Carpenter v. State*, 62 id. 286, 36 S. W. 900; *Cal.*: C. C. P. 1872, § 2052 ("before this can be done, the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made them, and if so, allowed to explain them"); 1866, *Rice v. Cunningham*, 29 Cal. 501; 1875, *Leonard v. Kingsley*, 50 id. 658; 1892, *Young v. Brady*, 94 id. 130, 29 Pac. 489; 1895, *People v. Chin Hane*, 108 id. 597, 41 Pac. 697 (applied to an offer to show that one identifying the accused as a murderer had at first identified a different person); 1897, *People v. Wade*, 118 id. 672, 50 Pac. 841 (under § 2052, C. C. P., asking is necessary); *Colo.*: 1896, *Mullen v. McKim*, 22 Colo. 468, 45 Pac. 416; *Conn.*: 1853, *Hedge v. Clapp*, 22 Conn. 266 (required, but subject to exceptions); *Fla.*: Rev. St. 1892, § 1102 ("the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement"); *Ga.*: 1846, *Sealy v. State*, 1 Kelly 218 (left undecided); 1849, *Williams v. Turner*, 7 Ga. 351 (required); *Johnson v. Kinsey*, ib. 429; *Williams v. Chapman*, ib. 470; Code 1895, § 5292, Cr. C. § 1026 ("with as much certainty as possible to the time, place, person, and circumstances"); *Haw.*: Civ. Laws 1897, § 1422 (like Eng. St. 1854, c. 125, § 23); *Ida.*: Rev. St. 1887, § 6083 (like Cal. C. C. P. § 2052); *Ill.*: 1845, *Regnier v. Cabot*, 7 Ill. 41; 1856, *Sigsworth v. Coulter*, 18 id. 205; *Ind.*: 1839, *Doe v. Reagan*, 5 Blackf. 219; 1843, *McIntire v. Young*, 6 id. 497; 1861, *Judy v. Johnson*, 16 Ind. 371; 1862, *Hill v. Goode*, 18 id. 207, 209; *Ia.*: 1889, *Richmond v. Sundburg*, 77 Ia. 258, 42 N. W. 184; 1895, *Klotz v. James*, 96 id. 1, 64 N. W. 648; *Kan.*: 1872, *State v. Horne*, 9 Kan. 128 (required); 1888, *Hughes v. Ward*, 38 id. 454, 16 Pac. 810, *semble* (not required); *Ky.*: C. C. P. 1895, § 598 ("circumstances of time, place, and persons present, as correctly as the examining party can present them"); 1883, *Craft v. Com.*, 81 Ky. 250 (Code rule held applicable to criminal cases); *La.*: 1853, *State v. Cazneau*, 8 La. An. 115; 1880, *State v. Angelo*, 32 id. 408; 1895, *State v. Johnson*, 47 id. 1225, 17 So. 789; 1896, *State v. Delaneville*, 48 id. 502, 19 So. 550; *Ma.*: 1831, *Ware v. Ware*, 8 Greenl. 52, *semble* (not required); 1850, *Wilkins v. Babbershall*, 32 Me. 184 (same); 1867, *New Portland v. Kingfield*, 55 id. 176 (same); *Md.*: 1839, *Franklin Bank v. Navig. Co.*, 11 G. & J. 35; 1843, *Whiteford v. Burkinyer*, 1 Gill 139; 1890, *Brown v. State*, 72 Md. 475, 20 Atl. 140; 1896, *Peterson v. State*, 83 id. 194, 34 Atl. 834; *Mass.*: here, down to 1869, the question was not required at all (the early citations are given *ante*, § 1026, note); in that year a statute adopted the requirement where *one's own witness* was to be contradicted: St. 1869, c. 425; Pub. St. 1882, c. 169, § 22, Rev. L. 1902, c. 175, § 24 ("before proof of such inconsistent statements is given, the circumstances thereof sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked if he has made such statements, and if so, shall be allowed to explain them"); 1869, *Ryerson v. Abington*, 102 Mass. 526, 531 (applies the statute strictly); 1876, *Newell v. Homer*, 120 Mass. 277, 283; 1883, *Com. v. Thyng*, 134 id. 191, 193 (mentioning person only, without time or place, and with no reason for the omission, is not sufficient); 1885, *Batchelder v. Batchelder*, 139 id. 1, 29 N. E. 61; but for an *opponent's witness*, the old rule remains unaltered: 1871, *Blake v. Stoddard*, 107 id. 111; 1895, *Carville v. Westford*, 163 id. 544, 40 N. E. 894; 1898, *Allin v. Whittemore*, 171 id. 259, 50 N. E. 618; *Mich.*: 1842, *Sawyer v. Sawyer*, Walk. Ch. 48; 1852, *Smith v. People*, 2 Mich. 415; *Minn.*: 1869, *State v. Staley*, 14 Minn. 114; *Mo.*: 1839, *Garrett v. State*, 6 Mo. 2, 4; 1851, *Clementine v. State*, 14 id. 115; 1858, *State v. Dalton*, 27 id. 15; 1860, *State v. Davis*, 29 id. 397; 1868, *State v. Starr*, 38 id. 279; *Mont.*: C. C. P. 1895, § 3380 (like Cal. C. § 2052); *Nebr.*: 1890, *Wood River Bank v. Kelley*, 29 Nebr. 597, 46 N. W. 86; 1892, *Hanscom v. Burmood*, 35 id. 506, 53 N. W. 371; 1896, *Columbia Bank v. Rice*, 48 id. 428, 67 N. W. 165; *N. H.*: 1851, *Titus v. Ash*, 24 N. H. 331 (not required); 1857, *Cook v. Brown*, 34 id. 471 (same); *N. J.*: 1830, *Fries v. Brugler*, 12 N. J. L. 80, *semble* (not required); *N. M.*: Comp. L. 1897, §§ 3024, 3026 ("the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he did make such statement"); *N. Y.*: 1837, *Everson v. Carpenter*, 17 Wend. 421, *semble*; 1847, *People v. Austin*, 1 Park. Cr. C. 159; *People v. Jackson*, 3 id. 598; 1859, *Stephens v. People*, 19 N. Y. 570; 1871, *Sloan v. R. Co.*, 45 id. 127; 1872, *Gaffney v. People*, 53 id. 423; 1873, *Height v. People*, 50 id. 394; *N. C.*: 1842, *State v. Patterson*, 2 Ired. 354; 1847, *Pipkin v. Bond*, 5 Ired. Eq. 101; 1848, *Edwards v. Sullivan*, 8 Ired. 304; 1856, *Hooper v. Moore*, 3 Jones 429; 1869, *State v. Kirkman*, 63 N. C. 248; 1876, *State v. Wright*, 75 id. 440; 1879, *Jones v. Jones*, 80 id. 246, 247 (not necessary for points "pertinent and material to the inquiry," as distinguished from statements invol-

witness to prepare to disprove the utterance or to explain it away if admitted, it must usually specify some details as to the occasion of the remark. The witness may perhaps without this understand the occasion alluded to; but usually he will not, and in such a case this specification of the details is a mere dictate of justice. The modern tendency of American Courts, however, is to lose sight of the fact that this specification is a mere means to an end (namely, the end of adequately warning the witness), and to treat it as an inherent requisite, whether the witness really understood the allusion or not. The result of this is that unless the counsel repeats a particular arbitrary formula of question, he loses the use of his evidence, without regard to the substantial adequacy of the warning. Such a practice is impolitic and unjustified by principle. Add to this that the same Court is seldom uniform with itself in the elements of this fetish-formula which it prescribes as indispensable; and it will be seen that the rule on the whole is apt to produce to-day in its application as much detriment as advantage.

There are thus two ways of treating the rule that the details must be specified: (1) It may be treated as a general requirement that the witness' attention be adequately called to the alleged utterance, the trial Court to determine whether this has been done in a given case; this is the practice in England, Alabama, and Vermont, for example. (2) It may be treated as an invariable formula, the same for all cases; this is the unfortunate practice in most American courts.¹

ing bias, etc.); 1891, *Rhea v. Deaver*, 85 id. 337, 339 (same); 1882, *Black v. Bayless*, 86 id. 527, 534 (same); 1884, *State v. Milla*, 91 id. 581, 598 (same); 1890, *State v. Morton*, 107 id. 890, 12 S. E. 112 (same); 1897, *Burnett v. R. Co.*, 120 id. 517, 26 S. E. 319 (same); *Ok.*: 1851, *King v. Wicks*, 20 Oh. 89; *Or.*: *Annot. C. & Stata.* 1892, § 841 (like Cal. C. C. P. § 2052); 1895, *State v. Brown*, 28 Or. 147, 41 Pac. 1042; *Pa.*: 1839, *Sharp v. Emmet*, 5 Whart. 288, 300 (discretion of the trial Court); 1845, *McAteer v. McMullen*, 2 Pa. St. 32; 1846, *Kay v. Fredrigal*, 3 id. 221, 223 (discretion of the trial Court); 1847, *McKee v. Jones*, 6 id. 425, 429 (same); 1865, *Gaines v. Com.*, 50 id. 328; 1872, *Walden v. Finch*, 70 id. 436 (to be applied with discretion); 1874, *Brubaker v. Taylor*, 76 id. 83, 87 ("in general," necessary); 1879, *Rothrock v. Gallagher*, 91 id. 108, 113 (discretion); 1898, *Cronkrite v. Trexler*, 137 id. 100, 41 Atl. 22 ("It is now settled" that the matter rests in the trial Court's discretion); *S. C.*: 1898, *State v. Henderson*, 52 S. C. 470, 30 S. E. 477; *Tenn.*: 1837, *Richmond v. Richmond*, 10 Yerg. 346; 1848, *Story v. Saunders*, 8 Humph. 666; 1873, *Cole v. State*, 6 Baxt. 239; *Tex.*: 1864, *Ayres v. Duprey*, 27 Tex. 599; *U. S.*: 1840, *McKinney v. Neil*, 1 McLean 547; *U. S. v. Dickinson*, 2 id. 329; 1847, *Chapin v. Siger*, 4 id. 381; 1853, *Conrad v. Griffey*, 16 How. 46; 1858, *U. S. v. Holmes*, 1 Cliff. 114; 1890, *Chicago, M. & St. P. E. Co. v. Artery*, 137 U. S. 519, 11 Sup. 129; 1893, *Hickory v. U. S.*, 151 id. 303, 309, 14 Sup. 334; 1894, *Mattox v. U. S.*,

156 id. 237, 245, 15 Sup. 337; *Vt.*: 1837, *Pierce v. Gilson*, 9 Vt. 222; 1847, *Downer v. Dana*, 19 id. 344; *Va.*: 1853, *Wormeley's Case*, 10 Gratt. 689, *semble* (required); 1855, *Units v. Charlton's Adm'r*, 12 Gratt. 497 (*Daniel, J.*: "Cases may be supposed in which the Courts may be strongly called upon to dispense with or to make exceptions to the rule; and I will not undertake to say that special exigencies may not occasionally arise requiring the Courts to depart from the rule rather than to sacrifice justice by sternly adhering to it"); 1880, *Davis v. Frauke*, 33 id. 424; *St.* 1899-1900, c. 117, § 2 ("the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned"); *Wis.*: 1853, *Ketchingsmu v. State*, 6 Wis. 426, 431; 1888, *Welch v. Abbot*, 72 id. 515, 40 N. W. 223.

¹ *England*: this part of the rule seems to have been first promulgated in 1829, in *Angus v. Smith, Moo. & M.* 474 (*Tindal, C. J.*: "You must 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"); *United States*: the statutory provisions on this point have been already cited *vide*, § 1028; the judicial rulings are as follows: *Ala.*: 1840, *Lewis v. Post*, 1 Ala. 73 (time and person; here the witness asked for specifications, and the counsel refused them); 1841, *State v. Marler*, 2 id. 46 (where the witness had been asked as to statements to two named persons or any other; the two named were allowed to testify to contradictions, but not a

§ 1030. Testimony of Absent or Deceased Witnesses; is the Requirement here also Indispensable? Suppose that it has become impossible to put the

third); 1847, *Howell v. Reynolds*, 12 id. 128; 1848, *Moore v. Jones*, 13 id. 303; 1849, *Carlisle v. Hunley*, 15 id. 625 (time, place, and person); 1851, *Powell v. State*, 19 id. 581 (time, place, and circumstances); 1851, *Armstrong v. Huffattler*, 19 id. 63 (substance of the statement suffices); 1853, *Nelson v. Iverson*, 24 id. 15 (same; here the time stated was held reasonably accurate for the purpose); 1879, *Atwell v. State*, 63 id. 64 (time, place, and persons present); 1897, *Southern R. Co. v. Williams*, 113 id. 620, 21 So. 323 ("But the rule is not ironclad, — that is, it does not require perfect precision as to either (time, place, circumstances, or persons); when it is clear that the witness cannot be taken by surprise, and ample opportunity is afforded to make any explanation desired, the predicate is sufficient"); *Ark.*: 1881, *Griffith v. State*, 37 Ark. 332 (time, place, and person spoken to); 1883, *Frazier v. State*, 42 id. 70 (held sufficient, on the facts); *Cal.*: 1860, *Baker v. Joseph*, 16 Cal. 177 ("time, place, and the precise matter"; "time, place, and occasion"); 1872, *People v. Devine*, 44 id. 457 (time, place, and person); 1897, *People v. Bosquet*, 116 id. 75, 47 Pac. 879 (statute applied); 1898, *Plas v. Plas*, 122 id. 4, 54 Pac. 372 ("persons present," construed); 1898, *Green v. R. Co.*, 122 id. 563, 55 Pac. 577 (asking held not sufficient on the facts); 1901, *Norris v. Crandall*, 133 id. 19, 65 Pac. 568 (questions held not specific enough); 1902, *Sinkler v. Siljan*, 136 id. 356, 68 Pac. 1024 (rule applied); *Fla.*: 1903, *Brown v. State*, — Fla. —, 35 So. 82 (question held sufficient on the facts, though no time was mentioned); *Ga.*: 1849, *Williams v. Turner*, 7 Ga. 351 (time, place, person, and other circumstances); 1854, *Wright v. Hicks*, 15 id. 167 (rejected on the facts); 1861, *Matthis v. State*, 33 id. 29 (time, place, and person); *Ill.*: 1853, *Gotloff v. Henry*, 14 Ill. 386 (time, place, and circumstances; yet not "every possible circumstance of identity," but such as will "direct the mind of a witness of ordinary apprehension to them"); 1855, *Galena & C. U. R. Co. v. Fay*, 16 id. 569 (time, place, and person, *semble*); 1864, *Root v. Wood*, 34 id. 286 (time and place); 1866, *Miner v. Phillips*, 42 id. 130 (person only named; excluded); 1867, *Winslow v. Newlan*, 45 id. 151 (time, place, and circumstances); 1872, *Northwestern R. Co. v. Hack*, 66 id. 242 (an omission in a former statement; the question whether he had omitted as alleged, held necessary); 1877, *Richardson v. Kelly*, 85 id. 493 (time and place); *Ind.*: 1860, *Joy v. State*, 14 Ind. 141 (time, place, and person, etc.); 1864, *Bennett v. O'Byrne*, 23 id. 605 (time sufficiently described on the facts); 1876, *Hilli v. Gust*, 55 id. 51 (time, place, and person); 1881, *McClivain v. State*, 80 id. 72 (time and place omitted; question excluded); 1898, *Roller v. Kling*, 150 id. 159, 49 N. E. 948 (excluded because the statement testified to was not called for in the same terms as the prior question so as to admit of an answer "Yes" or "No." This rule is entirely too strict; it would reduce the process of getting evidences to a mumbering of prearranged formulas); *Ia.*: 1852, *Glenn v. Carson*, 3 G. Gr. 529 (time and place); 1859, *State v. Ruhl*, 8 In. 451 (merely asking "what he had sworn to"; excluded); 1862, *Samuela v. Griffith*, 13 id. 109 (time, place, person, and specific subject); 1863, *Strunk v. Ochitree*, 15 id. 180; 1868, *Callanan v. Shaw*, 24 id. 454 (the witness was asked "what he thought he made oath to" before, excluded); 1871, *State v. Collins*, 32 id. 41 (time, place, and person); 1874, *Nelson v. R. Co.*, 38 id. 565 (admitted on the facts); 1876, *State v. Kinley*, 43 id. 295 (time, place, and person); 1876, *State v. McLaughlin*, 44 id. 83 (excluded because time was not mentioned, though person was); *Ky.*: 1900, *Heifrich L. & M. Co. v. Bland*, — Ky. —, 54 S. W. 728 (time, place, and person); *Md.*: 1867, *Higgins v. Curllon*, 28 Md. 138 (excluded, on the facts); 1873, *Pittsburg & C. R. Co. v. Andrewa*, 39 id. 335, 339, 354 (admitted on the facts); 1896, *Peterson v. State*, 83 id. 194, 34 Atl. 834 (time, place, and person); *Mich.*: 1852, *Smith v. People*, 2 Mich. 415 (time, place, and person); 1880, *Howard v. Patrick*, 43 id. 121, 126, 5 N. W. 84 (time and place not sufficiently mentioned); 1895, *People v. Considine*, 105 id. 149, 63 N. W. 196 (asking a stenographer to read from his minutes what the witness formerly testified about a certain transaction); *Minn.*: 1868, *State v. Hoyt*, 13 Minn. 142 (time, place, and person); 1887, *Jones v. State*, 65 id. 183 (time, place, and person); *Mo.*: 1870, *Spaunhorst v. Link*, 46 Mo. 198 (time, place, and person); 1886, *State v. Reed*, 89 id. 170, 1 S. W. 225 (time, place, and person); 1888, *State v. Parker*, 96 id. 393, 9 S. W. 728 ("time, place, etc."); *Nebr.*: 1890, *Wood River Bank v. Kelley*, 29 Nebr. 597, 46 N. W. 86 (time, place, and person); 1892, *Hanscom v. Burmond*, 35 id. 506, 53 N. W. 371 (same); *N. J.*: 1899, *Union S. N. Bank v. Simmons*, — N. J. Eq. —, 42 Atl. 489 (asking as to a part only will admit proof of that part only); *N. Y.*: 1847, *People v. Austin*, 1 Park. Cr. C. 159 (admitted, where all the circumstances were mentioned except the name of the person spoken to); 1855, *Patchin v. Ins. Co.*, 13 N. Y. 270 (substance of the statement suffices); 1871, *Sloan v. R. Co.*, 45 id. 127 (same; leaving it to the trial Court's discretion); 1881, *Hart v. Bridge Co.*, 84 id. 59 ("time, place, and persons to whom or in whose presence"); *N. C.*: 1903, *State v. Crook*, — N. C. —, 45 S. E. 564 ("the rule must not be ironclad, and must not be reduced to a petty technicality"; here, the exact time held not necessary); *Or.*: 1879, *State v. McDonald*, 8 Or. 117 (statute applied); 1882, *Sheppard v. Yocum*, 10 id. 408 (construing "persons present" to mean "person to whom the statement was made"); 1888, *State v. Hunsaker*, 16 id. 499, 16 Pac. 606 (statute applied); 1896, *State v. Ellsworth*, 30 id. 145, 47 Pac. 199 (time, place, and person; but person is unnecessary if the statement is

preliminary question on account of the witness' absence or decease, or some other circumstance rendering him now unavailable; may the question then be dispensed with and the self-contradiction be shown without further proviso? On this subject great difference of judicial opinion exists. It is to be observed that we are not dealing here with the case of an ordinary witness who has left the court-room *after* testifying and cannot now be found for recall; that case is regarded as governed by the general rule already examined; the witness is theoretically still available for recall (*post*, § 1036), and it is the impeacher's own fault that he was not detained in court.¹ We are here concerned with cases where the witness' testimony is not given to the court orally and in person; thus, as required by the Hearsay Rule (*post*, § 1396), it is solely because he is personally unavailable that his testimony can be presented in this shape. There are at least five distinct situations of this sort: 1. Deposition; 2. Testimony at a Former Trial; 3. Dying Declarations, Statements against Interest, etc.; 4. Statements of an Attesting Witness to a Document; 5. Proposed Testimony admitted by Stipulation to avoid a Continuance. In all five cases the testimony cannot be offered in chief unless the witness is personally unavailable. But there is a distinction between the first two and the last three; in the former the impeacher has had the benefit of cross-examination, or an opportunity for it, for otherwise the testimony would not be admissible (*post*, § 1371); while in the latter the impeacher has had no such opportunity, the statements coming in as exceptions to the Hearsay Rule or as Judicial Admissions. It must also be observed, as to the first two, that, while at the moment in question the witness is unavailable, yet at the time of taking the deposition or of the former trial the impeacher may or may not have been aware of the alleged contradictory statement, — a material circumstance in the problem. With these distinctions in mind, the arguments affecting each class of cases may be examined.

§ 1031. *Same*: (1) *Depositions*. The argument in favor of dispensing with the preliminary question is that, as the impeacher usually cannot know precisely what answers the deponent will give, he cannot be prepared at the

otherwise sufficiently particularized); 1898, *State v. Welch*, 33 *Id.* 33, 54 *Pac.* 213 (question held specific enough); 1898, *State v. Bartmess*, *ib.* 110, 54 *Pac.* 167 ("persons" need not be specified, in asking about former testimony); *S. C.*: 1881, *State v. White*, 15 *S. C.* 381, 390 (the place of making the statement must be mentioned); *S. D.*: 1896, *State v. Hughes*, 8 *S. D.* 338, 66 *N. W.* 1076 (not only time, place, and person, but also the specific statements; obscure); *Tenn.*: 1851, *Cheek v. Wheatly*, 11 *Humph.* 558 ("time and occasion"; "time, place, and person"); 1873, *Cole v. State*, 6 *Bart.* 289, 241 ("time, place, and person . . . and also the words or their substance," with other phrasings); *Tex.*: 1890, *International & G. N. R. Co. v. Dyer*, 76 *Tex.* 153, 13 *S. W.* 377 (time, place, and person); *Vt.*: 1879, *State v. Glynn*, 51 *Vt.* 579 (particularity of question is much in the Court's discretion);

Va.: 1902, *Gordon v. Fnnkhonser*, 100 *Va.* 675, 42 *S. E.* 677 (question naming time and person, but omitting place, held sufficient); *Wis.*: 1900, *Miller v. State*, 106 *Wis.* 156, 81 *N. W.* 1020.

The following rulings seem reasonable: 1876, *R. v. Mailloux*, 16 *N. Br.* 498, 508, 511 (pointing out that "he cannot be asked generally to relate a conversation with another person, in order to enable the cross-examining counsel to discover" some variance); 1868, *Callanan v. Shaw*, 24 *Ia.* 454, *supra* (similar).

Distinguish the question whether to the *other witness, testifying to the self-contradiction*, the question as to its tenor may be leading (*ante*, § 779).

¹ But even here, where the calling party has culpably dismissed the witness out of reach, the rule may be dispensed with; *post*, § 1086, note.

time of the deposition to inquire as to contradictory statements, and he will therefore be cut off absolutely and unconditionally from any sort of impeachment by self-contradiction, unless the present rule be dispensed with:

1847, *Davis, J.*, in *Downer v. Dana*, 19 Vt. 346: "The rule thus applied [of the necessity of calling attention] would impose on a party wishing the privilege of impeachment the necessity of attending, in person or by counsel, at the taking of every deposition to be used against him, within or without the State, which on any other account he might not be disposed to do. Besides, in many cases the deponent may be wholly unknown to him; he may have no knowledge of the matter to be testified to until actually given; the notice of the taking may be barely sufficient to enable him to reach the place perhaps hundreds of miles distant, in season to be present. It would be idle under such circumstances to expect a party to be prepared to go through with this preliminary ceremony. The result would be, he would be least able to shield himself against partial or false testimony precisely when such protection is most needed. It is true, the deponent, being absent from the trial, hears not the impeaching testimony and cannot be called upon to contradict or explain it. This may be an evil, but it is unavoidable from the nature of the case. It would be a worse evil to deny the right of impeaching depositions unless under regulations which would reduce the right to a nullity."

1872, *Agnew, J.*, in *Walden v. Finch*, 70 Pa. 463: "The practice has arisen out of regard to the witness himself, to enable him to explain any seeming discrepancy in his statements. Yet it must necessarily have its just boundary, or otherwise it leads to the sacrifice of the interests of the parties litigant. In some cases a Court would feel bound to require the witness intended to be contradicted to be first examined and his attention called to the supposed contradiction. Yet there are others where an unbending rule to this effect would work great hardship. Thus, where, as in this case, the witnesses have already been examined under a rule or a commission at a distant place preparatory to the trial, it would often be difficult to foresee, sometimes impossible to foreknow, the questions to be put to the witness on cross-examination in order to lay ground to contradict him. Indeed, in such cases unworthy witnesses might be purposely examined at a distance in order to prevent the ground from being laid. The names of the witnesses are seldom given who are examined under rules within the State, and even when examined under commissions the witnesses are not always named. It would be unjust to the party in such a case to deprive him of the opportunity of contradicting unworthy witnesses. We are therefore of opinion that those decisions of our own Court are to be preferred which hold that the question is one of sound discretion in the judge trying the cause upon the circumstances before him. Where the witnesses are all present, and the contradiction tends seriously to impair the credibility of the witness or to reflect upon his character, a Court would feel bound to give him the opportunity of explanation or denial before suffering his testimony to be impeached by counter-statements. Under different circumstances a Court would feel it proper to relax the rule."

The answer offered to this argument is (1) that practically the opponent does know beforehand, in the ordinary instance, what any important witness is expected to testify to, and he is therefore sufficiently able to learn in advance about self-contradictions, and (2) that, even conceding that an inconvenience may occur, yet this is far outbalanced by the abuses which would be possible if alleged self-contradictions could be brought into Court at a time when no adequate opportunity remains for denial or contradiction:

1855, *Daniel, J.*, in *Unis v. Charlton's Adm'r*, 12 Gratt. 495: "The principal reason assigned by the learned judge who delivered the opinion of the Court [in *Downer v. Dana*, *supra*] for refusing to apply the rule to depositions is that such a practice would

impose on a party wishing the privilege of impeachment the necessity of attending in person or by attorney at the taking of every deposition to be used against him, within or without the State, which on any other account he might be disposed to do. This argument *ab inconvenienti* is not wholly without show of reason when urged in behalf of the exercise of the privilege of impeachment by a party who has had no notice of the taking, or who, though notified, did not attend at the taking of a deposition which he seeks to discredit, but seems to me devoid of weight when extended to the case of a party who was present at the taking of the deposition, and had thus the same opportunity of cross-examining the witness and calling his attention to the imputed inconsistent statements that he would or might have had in case the witness had been examined in court. . . . The rule proceeds from a sense of justice to the witness; . . . these reasons, it is obvious, apply just as forcibly to depositions as to oral examinations in court. And indeed there are considerations which urge the application of the rule to the case of an impeachment of a witness who has given his testimony in the form of a deposition, which may not arise in an effort to discredit a witness who has been examined in court. In the latter case the witness usually remains in or about the court till the trial is concluded; and if an assault is made upon him by proof of inconsistent statements, he might, even before the adoption of the rule requiring him to be first examined as to such statements, be recalled and re-examined by the party in whose favor he had testified; and he may thus have an opportunity of repelling or explaining away the force of the assault; whereas the witness whose deposition has been taken is usually absent from the scene of the trial, and has no shield against attacks on his veracity other than that provided by the rule. . . . There are no peculiar considerations calling upon us to exempt this case from the operation of the rule; for it appears from the deposition that the plaintiff's counsel was not only present at the taking, but exercised on the occasion his privilege of cross-examining the witness."

1864, *Brinkerhoff, C. J.*, in *Runyan v. Price*, 15 Oh. St. 14: "It seems to me that a reason, in addition to any that I have yet heard stated, may be found in favor of our conclusion in the following considerations. 'Dead men tell no tales'; and if the rule be once established that the testimony of a deceased witness may be impeached by giving in evidence declarations alleged to have been made by him out of court differing from those contained in his testimony and when he has had no opportunity for explanation, when all opportunity for explanation by him has passed away, when few will have the motive and none the power to vindicate his integrity and truthfulness such as he would have if living, it seems to me that temptations to perjury and subornation would be not a little increased by the comparative impunity with which those crimes might be committed. Such declarations at best are the lowest kind of evidence, and the administration of justice will suffer little in any case by their exclusion; while, if admitted and they are falsely alleged against a dead witness, it would hardly be possible ever to disprove them."

It is hard to choose between these opposing considerations. The truth seems to be that either rule, if inflexible, will occasionally work hardship. It is best to take the middle path, and to leave the matter to the determination of the trial Court, based on the needs of each case. But it is not to be wondered at that the authorities are divided.¹

¹ 1847, *Holman v. Bank*, 12 Ala. 409 (Ormond, J.), says "the rule by the very terms in which it is proposed applies to the oral examination of witnesses; . . . it cannot in the nature of things apply to such a case as this [chancery depositions], because until the last deposition is taken it cannot be known that there will be any discrepancy between them"; while in *Howell v. Reynolds*, 12 id. 131, he had said "we can perceive no reason why a witness testifying in this

mode [deposition of a party answering interrogatories] should not be entitled to the same protection as if he had testified orally in the presence of the Court and jury"; the self-contradiction of the learned judge (commented on in *Doe v. Wilkinson*, *infra*) disappears when we observe that in the *Holman* case he had before him a Chancery suit, in which presumably the depositions were kept secret and then all "published" at once, and of which his remarks therefore were

§ 1032. **Same: (2) Testimony at a Former Trial.** Where the testimony to be impeached is that given at a former trial by a person now unavailable, the arguments for and against dispensing with the preliminary question are in effect the same as in the case of a deposition, — except that there is less reason for favoring the impeaching party, since he would have had a better opportunity upon a trial than at a deposition to learn of the contradictory statements. The precedents are few, but more harmonious in favoring the requirement.¹ It is not clear whether a given Court would necessarily

strictly true; so that his ruling in that case at least was unimpeachable); 1860, *Doe v. Wilkinson*, 35 *Id.* 470 (question indispensable); repudiating *Holman v. Bank*, *supra*; 1891, *Griffith v. State*, 37 *Ark.* 330 (question indispensable); 1895, *Ryan v. People*, 21 *Colo.* 119, 40 *Pac.* 777 (question indispensable); 1890, *Daggett v. Tolman*, 8 *Conn.* 171, 177 (question held indispensable, the deponent not having been cross-examined); 1849, *Johnson v. Kinsey*, 7 *Ca.* 430 (question indispensable); 1849, *Williams v. Chapman*, 11 *Id.* 470 (same); 1854, *Wright v. Hicks*, 15 *Id.* 167 (same); 1901, *Raleigh & C. R. Co. v. Bradshaw*, 113 *Id.* 862, 39 *S. E.* 555 (excluded, even for a contradictory utterance after the deposition was taken); 1878, *Greer v. Higgins*, 20 *Kan.* 421 (the contradiction was in another deposition taken two years before the other, in a related action; question held indispensable); 1858, *Fletcher v. Honley*, 13 *La. An.* 192 (a second commission was sent to call the attention of the deponent to contradictions, but he could not be found; admitted in view of this "seasonable, though fruitless effort"); 1898, *State v. Higgins*, 50 *Id.* 830, 23 *So.* 334 (question indispensable); 1803, *Matthews v. Dare*, 20 *Mt.* 269 (question indispensable); 1841, *Able v. Shields*, 7 *Mo.* 123, 124 (question indispensable); 1865, *Gregory v. Cheatham*, 36 *Mo.* 161 (question indispensable, even where the statement was subsequent to the deposition); 1838, *Davis v. Kimball*, 19 *Wend.* 441 (question held indispensable, even where the contradiction was posterior in time; the reversal of the judgment in 25 *Wend.* 260 does not seem to have affected this point); 1856, *Stacy v. Graham*, 14 *N. Y.* 498 (deposition *de bene*; here inconsistent statements, as well as a confession of the falsity of the deposition, were offered; the evidence being treated from both points of view; question held indispensable); 1864, *Runyan v. Price*, 15 *Oh. St.* 14 (question indispensable); 1851, *Hazard v. R. Co.*, 2 *R. I.* 62 (here the statute did not require notice and opportunity to cross-examine for depositions taken 100 miles distant; the Court said, "The question is whether this is an inflexible rule. . . . The defendant could not cross-examine the witness. . . . If he has no right to show that the witness has contradicted himself, he loses an important right without any fault of his"); 1879, *Weir v. McGee*, 25 *Tex. Suppl.* 20, 32 (question indispensable); 1840, *McKinney v. Neil*, 1 *McLean* 547 (deposition *ex parte*; "it was in the power of the defendant on reading the deposition, to move for a continuance on the

ground that he wished to take the deposition of the witness in regard to the statements, with a view of afterwards contradicting him"; question held indispensable); 1853, *Coural v. Griffey*, 16 *How.* 38, 45, 47 (question held indispensable); 1889, *Ayers v. Watson*, 132 *U. S.* 394, 401, 10 *Sup.* 116 (there had been four jury-trials of the case; the testimony of one Johnson had been twice taken by the defendants by deposition, and the plaintiffs had cross-examined him on the deposition; before the fourth trial he died; and upon the fourth trial the plaintiffs offered, as inconsistent with his former-trial deposition used by the defendants, another deposition of his, taken on a trial between other parties, many years before any of the above four trials. The Court do not definitely say that even where it is impossible to call attention to the prior statement, the omission to do so would be fatal, but they declare it fatal in this case where Johnson's deposition had been twice taken, "and no reference made to his former deposition, nor any attempt to call attention to it"); 1847, *Downer v. Dana*, 19 *Vt.* 338, *semble* (question not always necessary; see quotation *supra*); 1898, *Billings v. Ins. Co.*, 70 *Vt.* 477, 41 *Atl.* 516 (deposition; calling attention to inconsistent letter, not necessary); 1855, *Unis v. Charlton's Adm'r*, 12 *Gratt.* 495 (see quotation *supra*).

¹ 1901, *People v. Compton*, 132 *Cal.* 484, 64 *Pac.* 849 (question indispensable); 1895, *Sharp v. Hicks*, 94 *Ga.* 624, 21 *S. E.* 208 (question indispensable); 1883, *Craft v. Conn.*, 81 *Ky.* 252 (question indispensable; here the impeaching evidence was a confession of the falsity of the testimony); 1821, *Tucker v. Welsh*, 17 *Mass.* 164 (Parker, C. J.: "Suppose a witness who has once testified should afterwards acknowledge the falsity of his statements, and then die; the party interested in his testimony might upon another trial prove what he had once said upon the stand under oath; and shall not the other party be permitted to prove that what he said was a falsehood?"); 1865, *Hubbard v. Briggs*, 31 *N. Y.* 536 (question indispensable); 1892, *McCullough v. Dobson*, 133 *Id.* 124, 30 *N. E.* 641 (question indispensable, even where the contradiction is posterior in time); 1894, *Mattox v. U. S.*, 156 *U. S.* 237, 245, 15 *Sup.* 337, *Shiras, Gray*, and *White, J.J.*, *diss.* (declarations made after the former trial; question indispensable); 1897, *Carver v. U. S.*, 164 *Id.* 694, 17 *Sup.* 228 (recognizing the *Mattox* case *obiter*; question indispensable).

decide the question in the same way both for a deposition and for former testimony.

§ 1033. **Same:** (3) **Dying Declarations;** (4) **Attesting Witness, and other Hearsay Witnesses.** (3) When the testimony to be impeached is a *dying declaration*, or other statement exceptionally admitted without the test of cross-examination (*post*, § 1420), the situation of the impeacher is radically different. (a) In the first place, while for depositions and former testimony he has always theoretically — and usually in practice — had at least one opportunity to ask the preliminary question, yet here it is clear that he can never have had that opportunity; so that if the argument of hardship is to avail in his favor, there is here the extreme case of hardship. (b) Since by hypothesis the statements admitted have not been subjected to cross-examination, the law deprives the impeacher, if it insists on requiring the preliminary question, of two of his most important weapons of defence, at one and the same time, — cross-examination and prior self-contradictions. It has been apparent on all hands that this would be pushing the rule too far; and almost all Courts have agreed, therefore, that a self-contradiction may in this situation be offered, although the preliminary question has of course not been asked and can never be:

1802, *Grubb, J.*, in *State v. Lodge*, 9 *Houst.* 542, 33 *Ati.* 312: "The objection made always is that the accused is deprived of the opportunity of calling the attention of the person who supposed himself to be about to die to certain facts, which, if brought to his attention, he might modify his statement or make none at all; that there is no opportunity to test his judgment, the strength of his recollection, or his bias. But the law says that it insures justice in the greater number of cases, and that it is necessary to let it in, although it does deprive the defendant of testing the memory of the witness and his truthfulness by cross-examination. Then it is as though it says: 'Very well, if you are deprived of that opportunity of ascertaining if that witness was wrong, and of bringing any witness to contradict him, when we let in the dying declarations, without an oath, you ought to have the right to put in testimony of previous declarations, without laying the ground.' . . . Therefore, as dying declarations are admitted on the ground of necessity, ought not proof of contradictory or inconsistent statements by the deceased to be also admitted on the same ground?"¹

(4) *Attesting Witness, and other Hearsay Witnesses.* The production of an attested document, the attesting witness being unavailable, and the proof of his handwriting, in effect admits the hearsay attestation of the witness

¹ *Accord*: 1848, *Moore v. State*, 12 *Ala.* 764, 767 (point not raised); 1863, *People v. Lawrence*, 21 *Cal.* 368, 371; 1901, *People v. Amava*, 134 *id.* 531, 66 *Pac.* 794; 1884, *Battle v. State*, 74 *Ga.* 101, 104; 1898, *Dunn v. People*, 172 *Ill.* 582, 50 *N. E.* 187; 1900, *Green v. State*, 154 *Ind.* 655, 57 *N. E.* 837; 1850, *Nelms v. State*, 18 *Sm. & M.* 505; 1893, *State v. Shaffer*, 23 *Or.* 555, 560, 32 *Pac.* 545; 1836, *M'Pherson v. State*, 9 *Yerg.* 279 (point not raised); 1891, *Morelock v. State*, 90 *Tenn.* 528, 18 *S. W.* 258; 1897, *Carver v. U. S.*, 164 *U. S.* 694, 17 *Sup.* 228 (distinguishing the case of a contradiction of former testimony, because

there the benefit of cross-examination has been had; *Brewer and Peckham, JJ.*, dissenting). *Contra*: 1901, *Hamilton v. Smith*, 74 *Conn.* 374, 50 *Atl.* 884 (declarations of *J.*, deceased, not admitted to contradict other declarations of his already admitted under the Hearsay exception for boundary-statements; but the exclusion is placed on the principle of *post litem motam*, which however does not and was never before supposed to have any application to impeaching statements); 1870, *Wroe v. State*, 20 *Oh. St.* 469; 1900, *State v. Taylor*, 56 *S. C.* 360, 34 *S. E.* 939; *State v. Stuckey*, *ib.* 576, 35 *S. E.* 263.

that the document was properly executed (*post*, § 1505). This being so, the foregoing principle ought to apply, and a self-contradictory statement ought to be allowed to be shown, in spite of the fact that the preliminary question has not been and cannot be asked. This was the original English practice,³ although the rulings hardly avail as precedents, since the requirement of a preliminary question dates only from 1820; but the practice is theoretically and upon policy correct, and has been approved in this country:

1848, *Gibson, C. J.*, in *Hays v. Harden*, 9 Pa. St. 158: "I admit that there is force in this view of the case, and that such testimony calls for vigilance and strict scrutiny. But I cannot agree that this is a reason for the exclusion of such testimony altogether, thereby in many cases destroying the possibility of exposing fraud, forgery, and villainy of every description, so apt to be practised on persons of weak understandings, particularly when debilitated by sickness and disease. It is better that we should incur the risk mentioned than that we should sanction fraud and imposition. The remarks of Baron Parke [in *Stobart v. Dryden*] show a distrust of Courts and juries, and if pushed to an excess would be an argument against all testimony whatever, which we all know has been and will continue to be abused; but that would be a flimsy reason for excluding it altogether. . . . It is not difficult to see how easy it would be to spirit away a subscribing witness on the eve of trial, prove his handwriting, thereby giving full effect to his testimony, and then excluding all testimony of his repeated declarations that the bond or will was a forgery or a conspiracy to cheat or defraud. Establish this doctrine, and we shall not be without instances of attempts to baffle justice by removing the witness and thereby preventing the introduction of proof which the guilty know would destroy their claim."⁴

But this sound doctrine was later repudiated in England.⁴

Wherever any other statements are admitted, by exception to the Hearsay rule — for example, statements of *facts against interest* —, the same principle is applicable, and the requirement of prior asking should be dispensed with.

§ 1034. **Same: (5) Proposed Testimony admitted by Stipulation to avoid a Continuance.** Where by consent of the opponent, given in order to avoid a continuance, the proposed testimony of an absent witness is received, in the form of the party's affidavit of the tenor of the expected testimony (*post*, § 2595), it would seem that the rule of prior asking should be dispensed with,

³ 1761, *Wright v. Littler*, 3 Burr. 1244, 1255, Lord Mansfield, C. J. (alleged confession of forgery by the witness); 1808, *Durham v. Beaumont*, 1 Camp. 210, Ellenborough, L. C. J., mentioning a ruling of Heath, J. ("This confession [of the forgery of the will] only supplied the place of what might have been obtained from cross-examination, had the witness survived; and the propriety of admitting it was never questioned"); 1820, *Doe v. Ridgway*, 4 B. & Ald. 53, 55, per Bayley, J. (declarations as to a forgery of the instrument, admissible, because their benefit could have been had if he were alive).

⁴ *Accord*: 1842, *Loose v. Loose*, 2 Johns. 609, note by N. Hill, afterwards judge; 1855, *Reformed Church v. Ten Eyck*, 25 N. J. L. 40, 47; 1860, *Boylan v. Meeker*, 28 id. 274, 294; 1848, *Harden v. Hays*, 9 Pa. 151, 155 (quoted *supra*); 1831, *McElwee v. Sutton*, 2 Bail. 129

(that the witness "had frequently said, and even made affidavit, that the deed had been antedated in order to protect the property," admitted); 1846, *Smith v. Asbell*, 2 Strobb. 141, 145 (attesting witness out of State and examined by commission; self-contradiction received without prior asking; point not raised). *Left undecided*; 1878, *Bott v. Wood*, 56 Minn. 136, 139; 1890, *Headra's Will*, 119 N. Y. 615, 616, 23 N. E. 555.

⁴ 1836, *Stobart v. Dryden*, 1 M. & W. 615 (declarations of a deceased attesting witness M., whose handwriting had been proved, were offered as amounting to an acknowledgment of forgery; excluded, in an opinion whose fallacies are too radical to be worth refuting). *Accord*: 1864, *Rnnyan v. Price*, 15 Oh. St. 6 (contradictory declarations of a deceased attesting witness whose deposition had been used).

because here, as in the foregoing hearsay statements, there has been no opportunity for testing the witness by cross-examination.¹ Where, however (as by some statutes), the opponent is obliged to admit (as a condition of availing the continuance) that the proposed testimony is true, the self-contradiction would be excluded because all modes of impeachment are implicitly foregone by him.²

§ 1035. **Self-Contradiction contained in other Sworn Testimony; is the Preliminary Question here necessary?** Where the contradictory statement that is to be used is contained in a deposition or other sworn statement made at a prior time by the witness himself, it has been often argued, and sometimes decided, that the preliminary question is here unnecessary, because its authenticity cannot be denied by the witness and he needs no preparation for disproving it.³ This argument, however, loses sight of the double purpose of the preliminary question, i. e. not merely to allow preparation for disproof, but to allow an opportunity for explanations if the statement is admitted genuine. There is still just as much need for this opportunity to explain, whether the statement was made in a deposition or not. The doctrine has usually been repudiated.⁴

§ 1036. **Recall for putting the Question; Showing a Writing to the Witness.** (1) Where the impeacher is in danger of losing the use of his evidence by not having asked the preliminary question on cross-examination, the

¹ *Contra*: 1857, Pool v. Devens, 30 Ala. 678; 1900, Gafford v. State, 125 id. 1, 28 So. 406; 1867, State v. Shanahan, 22 Ia. 437; 1870, Williamson v. People, 29 id. 458; 1902, State v. Guy, 107 La. 578, 31 So. 1012; 1885, Fulton v. Hughes, 63 Miss. 61, 66; 1894, State v. Carter, 8 Wash. 272, 276, 36 Pac. 29. *Accord*: 1902, Hutnacher v. R. G. & E. Co., 63 S. C. 123, 40 S. E. 1029.

² 1881, Rhea v. Deaver, 85 N. C. 337, 339.

³ *Colo.*: 1888, Thompson v. Gregor, 11 Colo. 533, 19 Pac. 461 (deposition; here the wrong reason is given that the answer might incriminate by involving perjury); *Del.*: 1888, Rash v. Purnel, 2 Harringt. 448, 456 (former testimony at a probate issue, admitted; no asking mentioned); *Ga.*: 1849, Williams v. Chapman, 7 Ga. 469 (question not required for a deposition in the same cause; the Court also denied the necessity of asking in any case where the supposed self-contradiction was made under oath or even in writing; this theory, however, is inconsistent with Stamper v. Walker, 12 id. 454 (1853), and is not heard of again); 1853, Bryan v. Walton, 14 id. 196 (question not required for deposition in the same cause); 1860, Molyneux v. Collier, 30 id. 745 (same); 1886, Klug v. State, 77 id. 736 (question not required for the defendant's own testimony before a magistrate); Code 1895, § 5292 (asking required, "unless they are written statements made under oath in connection with some judicial proceedings"); 1890, Georgia R. & B. Co. v. Smith, 85 Ga. 530, 11 S. E. 859 (rule of asking applies to former testimony reported in a brief of evidence not read over or assented to by him); *Vt.*:

1859, Robinson v. Hutchinson, 31 Vt. 449 (question not required for a deposition).

⁴ *Ala.*: 1851, Powell v. State, 19 Ala. 581; 1860, Doe v. Wilkinson, 85 id. 471; 1863, Bradford v. Barclay, 89 id. 37; these three cases, repudiating Holman v. Bank, 12 id. 403 (1847), per Ormond, J., hold that the question is necessary even where the contradiction is in a deposition; but in the later cases (1842, Hester v. Lumpkin, 4 id. 512, *semble*; 1846, Carville v. Stout, 10 id. 802, *semble*; 1860, Doe v. Wilkinson, 85 id. 471) an exception is made for a deposition taken in the same suit and one of several, for here it is in effect merely part of the same oral examination; *Cal.*: 1872, People v. Devine, 44 Cal. 458 (question required for deposition before a magistrate in the same case); 1903, People v. Witty, 138 id. 576, 72 Pac. 177 (affidavit acknowledging the incorrectness of his deposition; asking required); *Ia.*: 1862, Samuels v. Griffith, 13 Ia. 106 (question required, even for deposition in the same case); 1865, State v. Ostrander, 18 id. 456 (question required for former testimony before a grand jury); 1867, State v. Shanahan, 22 id. 437 (question required for a deposition); 1871, State v. Collins, 32 id. 41 (same as Samuels v. Griffith); *La.*: 1850, Fletcher v. Fletcher, 5 La. An. 408 (deposition); *Miss.*: 1890, Hammond v. Dike, 42 Miss. 27, 44 N. W. 61 (question required for a deposition); *Nebr.*: 1892, Hanscom v. Burmood, 35 Nebr. 504, 506, 53 N. W. 371 (question required for former testimony); *Tenn.*: 1852, Nelson v. State, 2 Swan 237, 259 (before a committing magistrate; asking required); 1874, Titus v. State, 7 Baxt. 182, 187 (same).

witness may of course be recalled in order to be asked; but this recall, like all others (*post*, §§ 1867, 1899) is in the discretion of the trial Court,¹ — a discretion which will usually permit the recall where there has been nothing distinctly culpable on the part of the impeacher.

(2) Where the contradiction is contained in a *writing by the witness*, the writing is required, by the rule in *The Queen's Case* to be shown to the witness before he can be asked whether he uttered the statement contained therein. This rule, unsound both on principle and in policy, purports to rest upon the principle that documentary originals must be produced. It can therefore best be examined under that head (*post*, § 1259).

§ 1037. **Contradiction Admissible, no matter what the Answer to the Preliminary Question.** A notion that for a time obtained with some English judges before the principle of Self-Contradiction was thoroughly differentiated, and a notion not uncommon to-day at our Bar, is that the witness' answer to the preliminary question is the testimonial statement against which the impeaching contradictory statement is to be set off as inconsistent. Two fallacies, now generally discredited by the Courts, have cropped out as the result of this underlying notion.

One fallacy is that if the witness, when asked whether he did not say such and such a thing to the contrary, does not respond by some assertion — either by failing to remember or by otherwise evading the question —, then the contrary statement cannot be offered, because there is no assertion to contradict.¹ In truth, however, his answer to the preliminary question is wholly immaterial. He has already made on the stand an assertion A; we wish to show that he has elsewhere made the opposite assertion A'; and, before introducing the latter we must ask him whether he made it; this preliminary question is simply to give warning and lay the foundation required by the rule; the contradiction already exists (if at all) between the assertions A and A', and thus his answer to the preliminary question is of no consequence as forming a contradiction. It is the question alone that is essential; if the warning has been given, that is all that the law is concerned with:

¹ 1841, *State v. Marler*, 2 Ala. 46; 1874, *Hall v. State*, 51 id. 9, 14 (but not discretionary where the cross-examination has been suspended by consent); 1883, *Heli v. State*, 74 id. 420; 1890, *Richmond & D. R. Co. v. Vance*, 93 id. 144, 147, 9 So. 574; 1876, *People v. Kelth*, 50 Cal. 137, 139; 1896, *People v. Shaw*, 111 id. 171, 43 Pac. 593; 1903, *Bryan v. State*, — Fla. —, 34 So. 243; 1859, *State v. Ruhl*, 8 Ia. 447, 450; 1896, *State v. Goodhier*, 48 La. An. 770, 19 So. 755; 1904, *State v. Brown*, 111 La. —, 35 So. 818; 1900, *Cooper v. Hayward*, 79 Minn. 23, 81 N. W. 514 (here the witness was recalled to cure an insufficient inquiry already made); 1886, *State v. Reed*, 89 Mo. 171, 1 J. W. 225; 1853, *Com. v. Hart*, 21 Pa. 495, 502; 1899, *Ashton v. Ashton*, 11 S. D. 610, 79 N. W. 1001. If the recall has been made impossible by the act of the party first producing the witness, the rule

requiring asking may then properly be deemed dispensed with, on the theory of waiver: 1820, *Queen Caroline's Trial*, Linn's ed., III, 112, 119, 159 (a witness for the prosecution, not asked on cross-examination about a prior statement abroad by the prosecution; prior statement allowed to be proved, the recall for asking being made impossible by the prosecution's act).

Whether an accused taking the stand voluntarily may be thus recalled may involve a question of the waiver of the privilege against self-accrimination (*post*, § 2278).

² 1830, *Tindal, C. J.*, in *Pain v. Beeston*, 1 M. & Rob. 20; 1840, *Abinger, L. C. B.*, in *Long v. Hitchcock*, 9 C. & P. 619 ("They cannot call one man to contradict another unless that other swears positively").

1889, *Hemmingway, J.*, in *Billings v. State*, 52 Ark. 303, 12 S. W. 574: "[The cross-examination] is required in order that he may explain apparent contradictions and reconcile seeming conflicts and inconsistencies. If he cannot remember the fact, he is unable to do what the law affords him an opportunity to do. . . . The testimony is discredited because he affirms to-day what he denied yesterday; the legitimate effect of such contradiction cannot depend upon his power to remember it."

It follows that the mere failure of the witness to recollect, when asked the preliminary question, whether he made the other statement, does prevent the impeacher from offering it;² nor, for the same reason, does it matter whether in any other way his answer lacks in positiveness.³

Even where the witness admits having made the other statement, this does not prevent the opponent from offering it in evidence by his own witnesses;⁴ for he may prefer to have it clearly brought out and emphasized, and it would be unfair to restrict him to the unemphatic mode of proving it by the witness' admission and to subject him to the necessity of disputing whether the admission has been full and exact. The purpose of the question is not to prove the statement, but merely to warn that it will be proved; and there is no reason why an admission on the stand should here cut off the right to make

² Besides the following authorities, the statutes cited *ante*, § 1028, usually declare the rule: 1837, Parke, B., in *Crowley v. Page*, 7 C. & P. 789, whose ruling was accepted in subsequent practice ("If the rule were not so, you could never contradict a witness who said he could not remember"); 1877, *Payne v. State*, 60 Ala. 88; 1897, *Southern R. Co. v. Williams*, 113 Ill. 620, 21 So. 323; 1899, *Henson v. State*, 120 Ill. 318, 25 So. 23; 1889, *Billings v. State*, 52 Ark. 303, 12 S. W. 574; Fla. Rev. St. 1892, § 1102 (if the witness "does not distinctly admit that he has made such statement," it may be proved); 1846, *Sealy v. State*, 1 Kelly 218; 1860, *Ray v. Bell*, 24 Ill. 451; Ind. Rev. St. 1897, § 521; 1897, *State v. Clark*, 100 Ia. 47, 69 N. W. 257; 1868, *Lewis v. State*, 4 Kan. 309; 1895, *State v. Johnson*, 47 La. An. 1225, 17 So. 789; 1852, *Smith v. People*, 2 Mich. 415; 1892, *Pickard v. Bryant*, 92 id. 433, 52 N. W. 783; 1897, *Pringle v. Miller*, 111 id. 663, 70 N. W. 345; 1877, *Peck v. Ritchey*, 66 Mo. 119; 1860, *Nute v. Nute*, 41 N. H. 67; 1863, *Sanderson v. Nashua*, 44 id. 494; N. M. Comp. L. 1897, § 3024 ("If a witness . . . does not distinctly admit that he did make such statement, proof may be given that he did in fact make it"); 1902, *State v. Deal*, 41 Or. 437, 70 Pac. 532; 1867, *Gregg v. Jamison*, 55 Pa. 471; 1896, *State v. Kelley*, 46 S. C. 55, 24 S. E. 60; 1873, *Cole v. State*, 6 Baxt. 240; 1860, *Weir v. McGee*, 25 Tex. Suppl. 25, 32; 1879, *Johnson v. Brown*, 51 Tex. 63, 75; 1864, *Forde's Case*, 18 Gratt. 558; Va. St. 1899-1900, c. 117, § 2 (if the witness "does not distinctly admit that he has made such statement, proof may be given that he did in fact make it"). Suppose, however, that in the original assertion A (not in answer to the preliminary question) the witness is unable to recollect the details of an occur-

rence, then may a former assertion, giving the details in full, be offered as a Self-Contradiction? This is a question of what constitutes a Self-Contradiction, and is treated *post*, § 1042. The difference between that case and the present one is that here the witness merely cannot recollect whether he made the other assertion A' as to the occurrence; while there the witness does not recollect the occurrence at all, and the question is whether there is any assertion A to be set off against assertion A'.

³ 1902, *Sheldon v. Bigelow*, 118 Ia. 586, 92 N. W. 701 (evasion); 1902, *State v. Haworth*, 20 Utah 398, 63 Pac. 155 (refusal). *Contra*: 1903, *People v. Glaze*, 139 Cal. 154, 72 Pac. 965 (the question being asked and on objection an answer being forbidden by the Court, it was held that the foundation was not sufficient for subsequent testimony; this is erroneous).

⁴ 1840, *Lewis v. Post*, 1 Ala. 69; 1898, *Singleton v. State*, 39 Fla. 520, 22 So. 876, *semble* (with doubt); 1843, *Hathaway v. Crocker*, 7 Metc. 264; 1882, *Markel v. Mondy*, 13 Nebr. 322, 14 N. W. 409; 1895, *Fremont B. & E. Co. v. Peters*, 45 id. 356, 63 N. W. 791 (allowing the contradiction to be introduced immediately). However, many Courts have unwisely conceded that an admission by the witness does exclude further proof by the opponent: 1837, Parke, B., in *Crowley v. Page*, 7 C. & P. 789; 1860, *Ray v. Bell*, 24 Ill. 451; 1893, *Atchison T. & S. F. R. Co. v. Feehan*, 149 id. 202, 214, 36 N. E. 1036; 1897, *Swift v. Madden*, 165 id. 41, 45 N. E. 979; 1896, *State v. Goodbier*, 48 La. An. 770, 19 So. 755; 1884, *State v. Cooper*, 83 Mo. 698; 1903, *Farnard v. State*, — Tex. Cr. App. —, 73 S. W. 957; and the statutes cited *ante*, § 102, and *supra*, note 2 also imply this.

such proof, for it does not ordinarily in other respects (*post*, § 1058) have such an operation.

§ 1038. **Assertion to be Contradicted must be Independent of the Answer to the Preliminary Question.** The other consequence of the loose notion above mentioned is a confusion of the assertion A, which is to be contradicted — this may be called the primary assertion — with the answer to the preliminary question. Counsel sometimes attempt to contradict the latter instead of the primary assertion, forgetting that there must be some primary assertion independent of the answer to the preliminary question.¹ Thus, suppose the witness is asked (on cross-examination, perhaps): "Did the assailant have a wart on his face?" and answers "No"; this is his primary assertion A; he is then asked the warning question, "Have you not said to X at such a time and place that the assailant did have a wart on his face?" and answers "No"; the opponent then proves that the witness has asserted that there was a wart; this is the contradictory assertion A'. Now the contradiction lies between the assertions A and A'; he now says that there was no wart; he formerly said that there was one; the contradiction is clear and material. But suppose that the primary question above was omitted, and only the preliminary or warning question asked; the result is that an error appears (*i. e.* he now says that he did not *make a certain remark*, while others prove that he did make it). But this is an ordinary contradiction (*ante*, § 1000) and not a self-contradiction; moreover, it is upon a wholly collateral point, for the fact of his formerly making a remark about the wart is wholly immaterial, and the only thing that is material is the existence of the wart, and upon this point he has as yet on the stand made no assertion at all which could serve as the basis of a self-contradiction. The extrinsic testimony of his former remark is therefore inadmissible, because it involves no self-contradiction, and is merely on a collateral point in any case:

1896, *Whitfield, J.*, in *Williams v. State*, 73 Miss. 820, 19 So. 826: "Could the State, as a part of its case, have proven that Margaret Kelly said to Elsie Ross, 'I sent you word there was a plot to kill your husband, made three weeks ago,' by defendant and his brother? Clearly not. It was competent to prove there was a plot. It was competent to prove it by the acts or declarations of the defendant. It was competent to prove that Margaret Kelly heard the defendant's declarations evidencing the plots. And, had she been asked as to these matters, and denied, she could have been impeached by showing that she had elsewhere stated that she did hear defendant make such declarations. But to permit her to be contradicted by a statement that she *had said* to Elsie Ross that she had sent her word that there was a plot, etc., is in no possible view proper. The exact test here is, What was the fact embodied in her unsworn statement? This: That she had sent Elsie Ross word that there was a plot, etc.; had said to her that there was a plot, etc. Was this fact — her mere statement to Elsie Ross that there was a plot, etc. — a substantive fact, relevant to the guilt or innocence of this defendant, which the State could have proved as a part of its case in chief? Most certainly not."²

¹ The fallacy above described was committed by Totten, J., in *Cheek v. Wheatly*, 11 Humph. 558 (1851).

² *Accord*: 1898, *Naugher v. State*, 116 Ala. 463, 23 So. 26; 1863, *Dunn v. Dunn*, 11 Mich.

292 ("Did you not state so-and-so?"), put on cross-examination, the direct examination not having touched the subject; excluded); 1859, *Combs v. Winchester*, 39 N. H. 18 (the witness was asked on cross-examination whether he had

§ 1039. Preliminary Question not necessary for Expressions of Bias, for a Party's Admissions, or for an Accused's Confessions; Impeaching one's Own Witness. (1) The rule requiring a preliminary warning does not on principle apply to proof of expressions of bias, although many Courts so extend it.¹

(2) The rule applies only to the discrediting of a witness, and not to the use of a party's admissions, whether or not he is also a witness.²

(3) For the same reason the rule does not apply to an accused's confessions.³

(4) But it does apply to the impeachment of one's own witness, and not merely of the opponent's.⁴

4. What Amounts to a Self-Contradiction.

§ 1040. Tenor and Form of the Inconsistent Statement (Utterances under Oath, Admissions and Confessions, Joint Writings, Inconsistent Behavior).

(1) In the present mode of impeachment, there must of course be a real inconsistency between the two assertions of the witness. The purpose is to induce the tribunal to discard the one statement because the witness has also made another statement which cannot at the same time be true (*ante*, § 1017). Thus, it is not a mere difference of statement that suffices; nor yet is an absolute oppositeness essential; it is an inconsistency that is required. Such is the possible variety of statement that it is often difficult to determine whether this inconsistency exists. But it must appear *prima facie* before the impeaching declaration can be introduced. As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done. On a comparison of the two utterances, are they in effect

not said that he knew the carriage-bolt had not nut on it; whether or not it had was material, but the witness had not touched the subject on direct examination; his negative answer was not allowed to be contradicted); 1854, *Bearss v. Copley*, 10 N. Y. 93 (plea of negligent work to an action for wrongful discharge from employment; plaintiff's witness had not testified as to incompetency, but was asked on cross-examination whether he had not formerly stated that plaintiff was negligent; excluded, because no contradiction was involved, and what he formerly said was otherwise immaterial); 1898, *Reel v. State*, 39 Tex. Cr. 414, 46 S. W. 408; 1898, *Welch v. State*, — id. —, 46 S. W. 812; 1898, *Hoy v. State*, 39 id. 340, 45 S. W. 916. The Courts are perfectly clear on this point. The only error of which any traces appear is the supposition that the witness must have made his primary assertion upon the direct examination, and that unless he has there touched upon the subject the contradictory statement is not admissible. But this is not necessary. It is possible (though not usual), as in the illustration above used in the text, that the assertion to be contradicted may have been brought out on cross-examination; the only essential is that it should have dealt with a material, not a collat-

eral, matter; and many material assertions may first come out on cross-examination: 1884, *Sellers v. Jenkins*, 97 Ind. 430, 437; and cases cited *ante*, § 1020. It must be added that occasionally the answer to the preliminary question may be material, *i. e.* when the witness denies that he made a certain remark, this remark, in itself, may be independently material, and therefore its utterance may be shown. But this is rare, and in any case does not constitute a Self-Contradiction; it is merely the ordinary case of proving against the witness an error of fact on a material point. Thus, in proving former expressions of Bias, which the witness now denies having made, it is simply a case of proving a material fact, the fact of such expressions being otherwise admissible; hence it is not necessary to turn it into a case of Self-Contradiction by insisting that he should somewhere in the course of his testimony have asserted that he was not biased.

¹ Cases cited *ante*, § 953.

² Cases cited *post*, § 1051.

³ For the question whether an *inadmissible confession* may be used as a self-contradiction, see *ante*, § 816.

⁴ Cases cited *ante*, § 906.

inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?

1858, *Clifford, J.*, in *U. S. v. Holmes*, 1 Chff. 116: "Directness, in the technical sense, is not necessary to give the evidence that character, nor is it necessary that the contradictions should be complete and entire, in order to admit the opposing testimony. Circumstances may be offered to rebut the most positive statement, and it is only necessary that the testimony offered should have a tendency to explain, repel, counteract, or disprove the opposite statement in order to render it admissible."

1888, *C. Allen, J.*, in *Foster v. Worthing*, 146 Mass. 607, 16 N. E. 572: "It is not necessary, in order to make the letter competent, that there should be a contradiction in plain terms. It is enough if the letter, taken as a whole, either by what it says or by what it omits to say, affords some presumption that the fact was different from his testimony; and in determining this question, much must be left to the discretion of the presiding judge."¹

In most rulings, the circumstances of the cases are individual, and they have no value as precedents.²

(2) The form of the supposed contradictory assertion is immaterial. It may be oral or written; it may be an ordinary letter, or it may be a sworn statement, as, for example, a deposition.³

¹ The following cases illustrate the variety of circumstances: 1861, *Jackson v. Thomason*, 1 B. & S. 745 (several letters, taken together, amounting to a contradiction, though singly insufficient; admitted); 1888, *Miller v. White*, 15 Cau. Sup. 445, 452 (books of another firm, kept under the witness' direction, admitted); 1884, *Sellers v. Jenkins*, 97 Ind. 439 (the amount or degree of inconsistency is immaterial); 1868, *Brigham v. Clark*, 100 Mass. 431 (testimony that "L. C. & Co." was used as a firm name, contradicted by documents so signed for private debts; admitted); 1871, *Hook v. George*, 108 id. 327, 330 ("in their spirit and general purport the letters were in conflict;" admitted); 1886, *Hosmer v. Groat*, 143 id. 16, 8 N. E. 431 (the defendant having denied that L. was his agent, letters declaring him to be so were admitted, although not addressed to the plaintiff); 1869, *Tinklepaugh v. Rounds*, 24 Minn. 800 (inconsistency "in any material particular" is enough); 1848, *Weatherhead v. Sewell*, 9 Humph. 272, 283 (the declarations of an attesting witness that the will did not follow the draft-instructions, not received to contradict his attestation in the Probate Court, which could only have involved testimony that the document was signed or acknowledged).

² 1861, *People v. Williams*, 18 Cal. 190, 193; 1898, *People v. Collum*, 122 id. 186, 54 Pac. 589; 1822, *Treat v. Browning*, 4 Conn. 410, 418; 1892, *U. S. v. Cross*, 20 D. C. 390; 1897, *Harrison v. Langston*, 100 Ga. 394, 28 S. C. 162; 1860, *Thompson v. State*, 15 Ind. 473; 1880, *Case v. Burrows*, 54 Ia. 682, 7 N. W. 130 (where it was doubtful where the cattle referred to were the same ones); 1878, *Kennedy v. Com.*, 14 Bush 357; 1880, *Munshower v. State*, 55 Md. 19; 1863, *Hamilton W. Co. v. Goodrich*, 6 All. 197; 1871, *Snow v. Moore*, 107 Mass. 512; 1890, *Bennett v. Ins. Co.*, 43 Minn. 48, 44 N. W. 794;

1896, *Swift v. Withers*, 63 id. 17, 65 N. W. 85; 1852, *Martin v. Farnham*, 25 N. H. 195; 1860, *Nute v. Nute*, 41 id. 67; 1855, *Patchin v. Ins. Co.*, 13 N. Y. 270; 1878, *Furst v. R. Co.*, 72 id. 545; 1836, *Radford v. Rice*, 2 Dev. & B. 43; 1826, *Lamb v. Stewart*, 2 Oh. 230, (377); 1822, *Stahle v. Spohn*, 8 S. & R. 323; 1862, *Travis v. Brown*, 43 Pa. 18 (admitting where doubtful); 1874, *Schlater v. Winpenny*, 75 id. 325; 1859, *Hall v. Simmons*, 24 Tex. 227; 1816, *Evans v. Eaton*, Pet. C. C. 388.

³ There is no conceivable reason to the contrary, and it is hard to see why this point should have had to be decided so often; for additional instances of the use of sworn statements, see the succeeding notes (but distinguish the question *ante*, § 1034, whether here the preliminary warning is necessary); 1820, *R. v. Hunt*, 1 State Tr. N. s. 171, 250 (whether he gave the same evidence before the Ministry as he gave at the trial; allowed on cross-examination); 1872, *People v. Devine*, 44 Cal. 458 (deposition); 1889, *People v. Buahton*, 80 id. 160, 161, 22 Pac. 127, 549 (deposition); 1892, *Lewis v. State*, 91 Ga. 168, 170, 16 S. E. 986 (defendant's unsworn statement on former trial); 1869, *R. v. Apuna*, 3 Haw. 166, 170 (prior sworn statement in writing, admitted); 1894, *Southern K. R. Co. v. Painter*, 53 Kan. 414, 418, 36 Pac. 731 (though the deposition is not filed nor admissible); 1895, *People v. Kennedy*, 105 Mich. 434, 63 N. W. 405 (preliminary deposition); 1888, *State v. Jones*, 29 S. C. 201, 228, 7 S. E. 296 (affidavit; testimony at an inquest); 1890, *Chicago M. & St. P. R. Co. v. Artery*, 137 U. S. 519, 11 Sup. 129 (here the railroad company had sent its claim agent, after the injury to certain employees, to examine the others present at the time, and had secured written statements; one of these was shown to and acknowledged by one of these employees who took the stand for the plaintiff).

(3) The contradictory utterance may be a party's *admissions*, and are usable in either character.⁴ Whether the *confessions* of an *accused*, when inadmissible as such, may be used against him on the stand as self-contradictions, has been a matter of controversy.⁵ But a witness' confessions of perjury ought undoubtedly to be received, under the present principle.⁶

(4) The utterance may be in the form of a *joint statement* by the witness, signing a document with other persons.⁷ If the statements did not accurately represent his own belief, he may absolve himself by explanation (*post*, § 1044).

(5) The inconsistency may be found expressed, not in words, but in *conduct* indicating a different belief.⁸

This sort of evidence is sought frequently to be used against *value-witnesses* and is perhaps not sufficiently favored by the Courts.⁹

§ 1041. **Opinion, as Inconsistent.** A common difficulty is to determine whether some broad assertion, offered in contradiction, really assumes or implies anything specifically inconsistent with the primary assertion.¹ The

and was inconsistent with his testimony; held improperly excluded by the Court below; 1861, *Thayer v. Gallup*, 13 Wis. 541 (even one not used because of the witness' personal attendance). In *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 354 (1873), the impeaching witness was examined on a foreign commission, and by a majority opinion the impeaching testimony was declared admissible; why there should have been any doubt about it does not appear.

⁴ Cases cited *post*, § 1051.

⁵ Cases cited *ante*, § 816.

⁶ Cases cited *ante*, § 959.

⁷ 1839, *Attorney-General v. Bond*, 9 C. & P. 189 (a joint affidavit, only the part by the witness can be used); 1834, *Smith v. R. Co.*, 137 Mass. 61 (a written statement signed by a physician-witness, though also signed by a physician employed by the opponent, admitted); 1889, *Phillips v. Marblehead*, 148 id. 329, 19 N. E. 547 (value-testimony; to contradict, the record of the selectmen, awarding damages for the same land, and signed by the witness with the other selectmen, was excluded, because the recorded damages did not necessarily represent his individual opinion of the amount proper); 1900, *Healey v. R. Co.*, 176 id. 440, 57 N. E. 703 (time-book turned in by a foreman, though not made by him, admissible); 1891, *Dawson v. Pittsburgh*, 159 Pa. 317, 323, 28 Atl. 171 (witness to betterment; report of viewers, of whom he was one, received). The following distinction seems sound: 1899, *Becker v. Cain*, 8 N. D. 615, 80 N. W. 805 (counsel's argument before jury in a prior litigation, as to ownership of wheat, not admissible to impeach him testifying as plaintiff claiming ownership).

⁸ 1798, *DeSailly v. Morgan*, 2 Esp. 692 (contradicting the teacher of a school, who testified to the good moral influence in the school, by a letter of his own to a former pupil containing many immoral passages); 1899, *Huff v. State*, 106 Ga. 432, 32 S. E. 348 (rape complainant's

attempts to settle the prosecution, admissible on cross-examination); 1875, *Wallace v. R. Co.*, 110 Mass. 91 (that a plaintiff who had testified that he was confined to the house by an injury for six months was within that time seen walking the streets); 1896, *Lewis v. Gaslight Co.*, 105 id. 411, 43 N. E. 178 (an expert testifying to the proper mode of work was allowed to be asked about other occasions when he had done it differently); 1896, *Bonnemort v. Gill*, 143 id. 493, 43 N. E. 299 (witness to a testator's incapacity; the witness' former treatment of him as capable of business admitted, but not as necessarily and always contradictory). Further illustrations of this kind of evidence will be found *ante*, §§ 273-291, where many of the instances would be equally available against a witness.

⁹ 1869, *Swan v. Middlesex*, 101 Mass. 174, 179 (a witness who thought cutting off the front of an estate would improve the value of it, asked what would induce him to allow taking his own frontage; held irrelevant); 1873, *Miller v. Smith*, 112 id. 472, 475, 476 (here a witness had testified that a horse was worth \$9,000, and on cross-examination the question whether he would give \$3,000 for it was held to be a proper matter for the judge's discretion); 1833, *Daniels v. Conrad*, 4 Leigh 402 (that he had offered the same land for sale at a value lower than his estimate on the stand; admitted, "though it might not be as strong as the evidence of his declarations [of actual value], because he might be asking a lower price than he really thought the property worth"). Compare the cases cited in the next section.

¹ Sundry illustrations: 1892, *Young v. Brady*, 94 Cal. 130, 29 Pac. 489 (assumpsit for money loaned; defendant's statement that he was thankful for certain services of the plaintiff and would reimburse him, excluded); 1859, *Robinson v. Hutchinson*, 31 Vt. 449 (witness to a will's execution; a statement that it was "a sort of boy's will," admitted); 1891, *State v. Coella*, 3 Wash.

usual case of this kind is that of a general statement upon the merits of the controversy, which is now offered against a witness who has testified to a specific matter. Thus, A testifies for the prosecution that he saw the defendant near the scene of the alleged arson; it is offered to show that he has elsewhere declared that he is sure that the defendant is innocent; is this admissible? The usual answer of some Courts is that the declaration should be excluded because it is mere opinion (*post*, § 1918). This is unsound, (1) because the declaration is not offered as testimony (*ante*, § 1018), and therefore the Opinion Rule has no application, and (2) because the declaration in its opinion-aspect is not concerned, and is of importance only so far as it contains by implication some contradictory assertion of fact. In short, the only proper inquiry can be, Is there within the broad statement of opinion on the general question some implied assertion of fact inconsistent with the other assertion made on the stand? If there is, it ought to be received, whether or not it is clothed in or associated with an expression of opinion. As a matter of precedent, the rulings vary more or less in the results reached.² All Courts, however, concede that expert opinions, as well

107 (witness to good character of the defendant; prior statements as to fear of being killed by defendant and his friends, excluded).
 * *Eng.*: 1831, *Elton v. Larkins*, 5 C. & P. 89, 390 (that a witness for defendant had said before trial "the defendants had not a leg to stand on"; admitted by Bosanquet, J., at the first trial, but rejected by Tindal, C. J., at the second, because it was not a contradiction of any matter of fact but only concerned a matter of judgment); *Can.*: 1856, *Gilbert v. Gooderham*, 6 U. C. C. P. 41, 45 (action on a contract of sale, the defendant denying the contract; a broker G. testified to the circumstances of the transaction and to his saying that he considered the bargain closed; a question whether before trial he had said there was no bargain was asked and excluded, because as an opinion it was not admissible; the test being whether such statements were otherwise admissible); *Ala.*: 1898, *Luther v. State*, 118 Ala. 88, 24 So. 43 (that the opponent's witness had said he was afraid not to testify for the opponent, allowed); *Fla.*: 1901, *Myers v. State*, 43 Fla. 500, 31 So. 275 (witness to defendant's admissions, not allowed to be cross-examined to expressions of opinion as to defendant's guilt; citing *Com. v. Mooney*, *Mass.*, *infra*, now doubted in its own jurisdiction); *Ga.*: 1901, *Central of Ga. R. Co. v. Trammell*, 114 Ga. 312, 40 S. E. 259 (fire caused by a locomotive; to contradict a witness to facts tending to negative the setting of fire by the engine, the witness' expression that "the C. railroad burnt it" was admitted); *Ind.*: 1851, *Rucker v. Beaty*, 3 Ind. 71 (opinion as to motives of the party, excluded on the facts); 1885, *Welch v. State*, 104 id. 349, 3 N. E. 850 (testimony that defendant had not confessed; evidence that witness had said he knew defendant was guilty and had offered to bet that he was, excluded, as mere opinion); 1893, *Pence v. Waugh*, 135 id. 143, 156, 34 N. E. 860 (whether he continued busi-

ness transactions with the testator; allowed to be asked of a witness testifying to insanity; distinguishing *Staser v. Hogan*, 120 id. 216, 21 N. E. 911, 22 N. E. 990, where the question whether the witness "would have taken a note" from the alleged insane person was disallowed); 1900, *Stevens v. Leonard*, 154 id. 67, 56 N. E. 27 (attesting a will implies a statement of sanity; hence, the attester testifying to the testator's insanity discredits by its inconsistency with the attestation; see *post*, § 1511); *Kan.*: 1886, *State v. Baldwin*, 36 Kan. 14, 12 Pac. 318 (a witness to the accused's innocent bearing; question whether he had not said he thought the accused impressed him as guilty, admitted); *Ky.*: 1898, *Franklin v. Com.*, 105 Ky. 237, 48 S. W. 986 (one testifying to defendant's planning of the crime; prior statement that he knew defendant had nothing to do with it, admissible); 1900, *Ross v. Com.*, — id. —, 55 S. W. 4 (that the defendant had a bad case, and that it might go hard with him, excluded); *Me.*: 1870, *State v. Kingsbury*, 58 Me. 241 (a statement that "he never would have done it if it had not been for others," admitted against one testifying in the defendant's favor); *Md.*: 1880, *Munshawer v. State*, 55 Md. 11, 18 (murder; witness testifying to defendant's presence, etc., not allowed to be discredited by confession of his own guilt; plainly erroneous, so far as it was an assertion of his exclusive guilt); *Mass.*: 1863, *Emerson v. Stevens*, 6 All. 112 (a statement that the defendant-witness "had a right, if he saw fit" to commit the trespass denied, admitted); 1872, *Com. v. Mooney*, 110 Mass. 100 (testimony for prosecution as to details of a search of premises burned; former expression of belief in the defendant's innocence, excluded); 1873, *Com. v. Wood*, 111 id. 410 (by an eye-witness exonerating the defendant; a former statement that the defendant was guilty, admitted); 1896, *Handy v. Canning*, 166 id. 107, 44 N. E. 118 (owner-

as other opinions ordinarily admissible, if inconsistent with those expressed on the stand, are receivable.³

§ 1042. **Silence, Omissions, or Negative Statements, as Inconsistent;**

(1) **Silence, etc., as constituting the Impeaching Statement.** A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of evidence (*post*, § 1071). There may be explanations, indicating that the person had in truth no belief of that tenor; but the

ship of a piano was in issue; the plaintiff's statements that she was not owner, admitted; "the test, in such a case as the present, for the purpose of contradicting the testimony of a witness, is whether, by common experience, different statements would mean different positions taken as to fact foundations, rather than as to the law conclusions"; 1902, *Whipple v. Rich*, 180 id. 477, 63 N. E. 5 (witness to a street accident, testifying that there was no obstruction of defendant's view, allowed to be contradicted by his statement that the defendant was not to blame; "the question is whether the specific facts testified to lead so directly to a conclusion that it is obviously unlikely that a man will believe a contrary conclusion if he believes the specific facts"; *Conn. v. Mooney* doubted); *Mich.*: 1864, *Beaubien v. Cicotte*, 12 Mich. 487 (a physician's opinion of a testator's sanity contradicted by his former opinion that the will was not worth a snap of the fingers; allowed); 1882, *People v. Stackhouse*, 49 id. 78, 13 N. W. 364 (an expression of suspicion upon the general guilt of the defendant, for whom the witness testified; excluded); 1895, *McClellan v. F. W. & B. I. R. Co.*, 105 id. 101, 62 N. W. 1025 (an inconsistent opinion as to negligence, admitted, *Hooker and Graut, J.L., diss.*); *Mo.*: 1881, *State v. Talbott*, 73 Mo. 347, 360 (the question of Mnushower's case, *Ml.*, left undecided); *Nebr.*: 1897, *Johnston v. Spencer*, 51 *Nebr.* 198, 70 N. W. 982 (false representations in a sale; a witness to the conditions of the business sold; whether he had said that this suit for false representations was an outrage, excluded as opinion); 1883, *Zimmerman v. Bank*, 59 id. 23, 80 N. W. 51 (ownership of a note; that witness had inconsistently asserted ownership, admitted); *N. H.*: 1860, *Nute v. Nute*, 41 N. H. 71 (an opinion on the merits of the case, where the implication was indefinite, excluded); 1862, *City Bank v. Young*, 43 id. 460 (an opinion on the merits of the case, excluded); *N. Y.*: 1857, *People v. Jackson*, 3 *Park. Cr.* 597 (the prosecuting witness in a larceny case had said he did not think the defendant would do anything wrong; admitted); 1863, *Patchin v. Ins. Co.*, 13 N. Y. 270 (opinion as such is not excluded); 1874, *Schell v. Plumb*, 55 id. 599 ("an opinion expressed by a witness upon the merits is inadmissible," because, apparently, it does not necessarily involve an assertion as to the particular fact testified to; here "the plaintiff ought to have \$1,000" was held to involve such an assertion); 1880, *Mayer v. People*, 80 id. 377 (false representations; a witness for the defendant, cor-

roborating his claim, asked whether he had not said that the defendant had been guilty of a great wrong, had acted like thieves; held proper, two judges dissenting); *S. D.*: 1897, *State v. Davidson*, 9 S. D. 564, 70 N. W. 879 (mere opinion excluded; here, that a witness to disprove motive had said that he was convinced the defendant had killed the deceased); *Tenn.*: 1871, *Sellers v. Sellers*, 2 *Heisk.* 430 (attesting witness' declarations of testator's insanity, admitted, as contradicting his attestation); 1897, *Saunders v. R. Co.*, 99 *Tenn.* 130, 41 S. W. 1031 (matter of opinion as to the fault of an injured party, excluded); *U. S.*: 1858, *U. S. v. Holmes*, 1 *Cliff.* 116 (the witness had said on board ship, "I believe the captain is crazy," but, before the trial, that the captain "was no more crazy than he was"; admitted); 1903, *Chicago & N. W. R. Co. v. De Clow*, — C. C. A. —, 124 *Fed.* 142 (that he "hoped the plaintiff would not report" a certain jar of the train, admitted, to impeach a conductor who had testified denying the jar); *Wis.*: 1903, *Lowe v. State*, — *Wis.* —, 96 N. W. 417 (assault with intent to kill; defence, insanity; witness' prior contradictory statement as to defendant's insanity, held admissible).

³ 1872, *People v. Donovan*, 43 *Cal.* 165 (former opinion as to sanity); 1851, *State v. Windsor*, 5 *Harringt.* 512, 526; 1881, *Guiteau's Trial*, D. C., 11, 1237 (an expert witness for the prosecution on the issue of insanity was allowed to be discredited by the following postal card sent by him to the counsel for the defence before being called by the prosecution: "Accept my congratulations on the manner in which you have thus far directed the defence. It may not be popular, but it is right and just"); 1831, *Ware v. Ware*, 8 *Greenl.* 44, 55 (physicians testifying to a testator's insanity were discredited by former statements that the will could not be broken on the ground of insanity); 1893, *Liddle v. Bank*, 158 *Mass.* 15, 32 N. E. 954 (physician's inconsistent opinion); 1898, *Silverstein v. O'Brien*, 165 id. 512, 43 N. E. 497 (a witness who valued property as worthless, asked as to former expressions imputing high value to it); 1864, *Beaubien v. Cicotte*, 12 *Mich.* 487 (a physician's opinion as to a testator's sanity); 1863, *Sanderson v. Nashua*, 44 N. H. 494 (experts in general); 1898, *Brooks v. R. Co.*, 156 N. Y. 244, 50 N. E. 945 (contrary opinion of a physician at a former trial); 1897, *Krider v. Philadelphia*, 180 *Pa.* 78, 36 *Atl.* 405 (the official assessment of property at a smaller value, to contradict the assessor as a witness to its value).

conduct is *prima facie* an inconsistency. There are several common classes of cases: (1) Omissions in legal proceedings to assert what would naturally have been asserted under the circumstances;¹ (2) Omissions to assert anything, or to speak with such detail or positiveness, when formerly narrating, on the stand or elsewhere, the matter now dealt with;² (3) Failure to take the stand at all, when it would have been natural to do so.³ In all of these

¹ 1895, *Charlea v. State*, 36 Fla. 691, 18 So. 869 (voluntary dismissal of a previous suit through apparent inability to prove what the party now asserts; admitted); 1899, *Merritt v. State*, 107 Ga. 675, 34 S. E. 361 (assault with intent to rape said to have been witnessed by woman's father; his failure to complain that day or to appear as complainant in the warrant sworn out next day, admitted); 1868, *Clemisut v. Kimball*, 98 Mass. 536 (the wife's misconduct pleaded in an action against the husband for necessities; to contradict the defendant's testimony that he had been informed of adultery with P. in 1865, testimony was received that he had in 1867 filed a divorce-libel charging adultery with specified persons but not with P.); 1876, *State v. Wright*, 75 N. C. 439 (testimony that the prosecutrix, on applying for a warrant, "made various and contradictory statements," excluded, as too indefinite); 1877, *Snyder v. Com.*, 85 Pa. 519, 521 (charging and testifying to the murder of the witness' infant daughter by his defendant, her father; a former complaint by her, after the time in question, admitted, in which incestuous adultery and rape only were charged, and not murder); 1897, *Mullen v. Ins. Co.*, 182 id. 150, 37 Atl. 968 (failure to assert a claim now alleged, admitted); 1862, *Nye v. Merriam*, 85 Vt. 441, 445 (that the defendant by his counsel at the trial below defended the suit upon grounds wholly inconsistent with his present testimony); 1858, *Conkey v. Post*, 7 Wis. 137 (omission in the Court below to object to a note on the ground now claimed, namely, alteration). Compare the cases cited *post*, §§ 1066, 1072.

² 1678, *Coleman's Trial*, 7 How. St. Tr. 1, 25 (one of the chief weaknesses in the testimony of the notorious perjurer Oates was that at his original information to the Council he failed to state facts which he afterwards testified to on the trials of his various victims; each time bringing out new facts before unmentioned); 1901, *People v. Bishop*, 134 Cal. 682, 66 Pac. 976 (witness' hesitation in giving former testimony on the same subject; allowed to be shown on the facts); 1889, *Babcock v. People*, 13 Colo. 519, 22 Pac. 817 (failure to mention important matters at a prior examination, admitted); 1896, *Miller v. State*, 97 Ga. 653, 25 S. E. 366, *semble* (a supposed eye-witness; that he did not disclose the assailant's identity when it would have been proper to do so, admitted); 1855, *Com. v. Hawkins*, 3 Gray 464 ("alleging a fact at one time which he denied at another, or stating it in two ways inconsistent with each other" is admissible, but not "a mere omission to state a fact, or stating it less fully [at a former examination], unless the attention of the

witness was particularly called to it at the former examination"); 1873, *Hayden v. Stone*, 112 Mass. 848, 352 (testimony that C. claimed ownership; former silence by witness when an appraiser of C.'s estate he should have mentioned C.'s claim, admitted); 1875, *Ferry v. Breed*, 117 Mass. 165 (Morton, J.: "If a witness has made a previous statement of the transaction in regard to which he testifies, under such circumstances that he was called upon as a matter of duty or interest to state the whole truth as to the transaction, it might be competent to put such previous statements in evidence, to show that he then omitted material parts of the transaction to which he now testifies"); 1885, *Brigham v. Fayerweather*, 140 id. 412, 416, 5 N. E. 265 (excluding a former failure of the witness to make the assertion he made on the stand, because the former occasion did not call for an expression on the subject); 1888, *C. Allen, J., in Foster v. Worthing*, 146 id. 607, 16 N. E. 572 ("Declarations or acts or omissions to speak or to act when it would have been natural to do so if the fact were as testified to, may be shown by way of contradiction or impeachment of the testimony of a witness, when they fairly tend to control or qualify his testimony"); 1890, *Bonnenmort v. Gill*, 165 id. 498, 43 N. E. 299 (former omission to testify to the fact, admitted); 1869, *State v. Staley*, 14 Minn. 117 (failure by an accused taking the stand to deny the truth of his confession, admitted); 1895, *Alward v. Oaks*, 63 id. 190, 65 N. W. 271 (a letter to the party detailing the facts which the witness would testify to, but omitting a vital fact asserted on the stand, admitted); 1899, *Barrett v. R. Co.*, 157 N. Y. 663, 52 N. E. 659 (omission of a material fact in a former narration, admitted); 1890, *State v. Morton*, 107 N. C. 890, 12 S. E. 112 (silence when other persons were accused, admitted to impeach a purporting eye-witness of the defendant's act); 1888, *U. S. v. Ford*, 33 Fed. 864, *semble* (an omission to mention a matter on a prior examination, admitted); 1862, *Briggs v. Taylor*, 35 Vt. 68 (same). But, on the principle of § 1072, *post*, silence in a court room during legal proceedings is usually not admissible: 1899, *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310 (listening to another witness without interruption); 1903, *Horan v. Byrnes*, — N. H. —, 54 Atl. 945 (witness' former silence at a trial when testimony was given as to her utterance of the biased expression in question, excluded).

³ This will depend much on circumstances: 1855, *Brock v. State*, 26 Ala. 106 (a mother and a sister of the defendant, though present at the preliminary examination, failed to testify in his

much depends on the individual circumstances, and in all of them the underlying test is, Would it have been natural for the person to make the assertion in question?

§ 1043. *Same*: (2) *Silence, etc., as constituting the Testimony to be Impeached.* It ought to follow that, where the witness *now* claims to be unable to recollect a matter, a former affirmation of it should be admitted as a contradiction. But Courts have usually forbidden this, because the improper effect is apt to be to give a testimonial value (*ante*, § 1018) to the former statement; its aspect as a mere contradiction being naturally overshadowed.¹ This is well enough as a caution. But the unwilling witness often takes refuge in a failure to remember,² and the astute liar is sometimes impregnable unless his flank can be exposed to an attack of this sort.³ An absolute rule of prohibition would do more harm than good, and the trial Court should have discretion. In general, the risk (above noted) of permitting a testimonial value to be given to the extrajudicial assertion is greater for a witness examined by a party calling him, while the necessity for using them to expose a false witness is greater for the opponent of the witness; and the usual practice should follow this line of distinction.

behalf, which, however, they afterwards did at the trial; excluded); 1895, *Com. v. Smith*, 163 Mass. 411, 40 N. E. 189 (Allen, J.: "The judge ruled, in effect, that, where a defendant now testifies that he is innocent of a criminal charge, the fact that he has heretofore refused to answer in relation to the subject, on the ground that his answers might tend to criminate him, may be considered as bearing upon the credibility of his present testimony. The defendant in such case now says that he is innocent. He formerly did not say that he was innocent, but that he would not answer lest he might criminate himself. This fact, though open to explanation, has some tendency to throw a doubt upon the truth of his present testimony, and thus has some bearing upon one material question; namely, the truthfulness of the witness"); 1896, *People v. Wirth*, 108 Mich. 307, 66 N. W. 41 (that a witness for the defendant saw the defendant bound over and did not at the time tell what he now tells, namely, that another person was the guilty one, admitted). Compare the cases cited *post*, § 1072.

For the bearing of the *privilege against self-crimination*, as prohibiting the use of the *accused's* silence against him, see *post*, § 2272.

¹ 1788, *Warren Hastings' Trial*, *Lords' Journal*, Feb. 29, April 10 (a question as to former affirmative testimony of a witness who now "disclaimed all knowledge of any matter so interrogated", excluded); 1820, *The Queen's Case*, 2 B. & B. 299 (when a witness testifies that he does not know or that he does not remember the occurrence of a certain fact, the fact that he formerly mentioned the alleged matter in a conversation is not admissible);

1898, *People v. Dice*, 120 Cal. 189, 52 Pac. 477 (former statement of what he now fails to remember, excluded); 1899, *Rickerson v. State*, 106 Ga. 391, 33 S. E. 639 (denial of a fact which the party thought the witness would affirm is not the subject of self-contradiction); 1895, *Saylor v. Com.*, — Ky. —, 33 S. W. 185 (testifying that he knows nothing; former assertion of something, excluded); 1897, *Stevenson v. Com.*, — id. —, 44 S. W. 634 (testimony that he was not present at an affray; former statement that he did see the defendant shoot the deceased, excluded); 1872, *State v. Reed*, 60 Me. 550 (here the matter was first referred to on cross-examination, and the witness could not recollect details; former detailed statements were excluded); 1838, *Stockton v. Demuth*, 7 Watts 41 (a positive affirmation, not admitted against one who failed to recollect). No prior contradictions, of course, can be received where the testimony contradicted has been struck out: 1876, *Mayo v. Mayo*, 119 Mass. 290.

² Compare *Majocchi's "non mi ricordo,"* quoted *ante*, § 975.

³ The following cases illustrate this view: 1897, *People v. Turner*, 118 Cal. 324, 50 Pac. 537 (a more positive identification, admitted); 1860, *Hastings v. Livermore*, 15 Gray 10 (a former petition signed, showing a knowledge of a fact denied on the trial, though the witness said he did not know its contents, admitted); 1860, *Nute v. Nute*, 41 N. H. 67 (the present statement was merely that the witness did not recollect a fact, and the former one affirmed it; admitted).

5. Explaining away the Inconsistency.

§ 1044. In general. In accordance with the logical principle of Relevancy (*ante*, § 34), the impeached witness may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it. The contradictory statement indicates on its face that the witness has been of two minds on the subject, and therefore that there has been some defect of intelligence, honesty, or impartiality on his part; and it is conceivable that the inconsistency of the statements themselves may turn out to be superficial only, or that the error may have been based not on dishonesty or poor memory but upon a temporary misunderstanding. To this end it is both logical and just that the explanatory circumstances, if any, should be received:

1843, *Gilchrist, J.*, in *State v. Winkley*, 14 N. H. 491: "Their effect upon his credibility might have been destroyed by evidence that they were made in an ironical manner and tone, by showing that they were connected with other remarks in such a way that they ought not to impair his credit, or that he could not have been supposed to be serious in making them."

1874, *Danforth, J.*, in *State v. Reed*, 62 Me. 146: "The force of a contradictory statement must depend very materially upon the circumstances under which it was made and the influences at the time bearing upon the witness. It would therefore seem to be self-evident that witnesses so situated should be permitted to make such explanation as might be in their power. The first impulse of the mind in such a case is to inquire how this happened, what reason can be given, and more especially what can the party implicated say in excuse or extenuation. To refuse the opportunity to explain would be in effect to condemn a party without a hearing, and without that information which in many cases would be material to a correct judgment."¹

§ 1045. Putting in the Whole of the Contradictory Statement. In making this explanation, it is obvious that in theory all that is allowable, where

¹ *Accord: Eng.*: 1754, Canning's Trial, 19 How. St. Tr. 385 (explaining why a witness stayed away from the first trial); 1840, *R. v. Woods*, 1 Cr. & Dix 439 (the witness had contradicted himself as to seeing the deceased before the murder; he was allowed to explain that his former statement was made in fear of being involved in the case); *U. S. v. Ala.*: 1853, *Campbell v. State*, 23 Ala. 44, 76; 1860, *Lewis v. State*, 35 id. 384, 386 (that the witness' master had threatened to whip him unless he told the story offered in contradiction); 1895, *State v. Henry*, 107 id. 22, 19 So. 23 (in this State the singular doctrine that one may not testify to his own state of mind (*post*, § 1966) is held not to affect such explanations); *Cal.*: 1895, *People v. Dillwood*, — Cal. —, 39 Pac. 433 (motive for change of testimony); 1898, *People v. Shaver*, 120 id. 354, 62 Pac. 651; 1898, *People v. Lambert*, ib. 170, 52 Pac. 307; (*Id.*: 1896, *Miller v. State*, — Ga. —, 25 S. E. 366 (former silence, explained as the result of advice by others); 1898, *Huff v. State*, 104 id. 521, 30 S. E. 808 (that he had before sworn falsely in fear of threats, allowed); *Ida.*: 1895, *Douglas v. Douglas*, 4 Ida. 293, 38 Pac. 935; *Ind.*: 1878, *Jones v. State*, 64 Ind. 473,

482 (threats by defendant to witness before her prior statement, admitted); *Ky.*: 1899, *Louisville & N. R. Co. v. Alumbaugh*, — Ky. —, 51 S. W. 18; *Mass.*: 1871, *Blake v. Stoddard*, 107 Mass. 111 (that after making the contrary erroneous statement in answer to interrogatories he went to his counsel and informed him of the error, admitted); *Minn.*: 1871, *Jaspers v. Lano*, 17 Minn. 296, 305 (even though the witness originally denied the statement); *Mont.*: 1896, *Du Vlivier v. Phillips*, 18 Mont. 370, 45 Pac. 554 (circumstances under which a letter was written, admitted); *Nebr.*: 1895, *Fremont B. & E. Co. v. Peters*, 45 Nebr. 356, 63 N. W. 791; *N. Y.*: 1848, *Clapp v. Wilson*, 5 Den. 286, 288; *N. C.*: 1886, *State v. Garland*, 95 N. C. 672 (seduction; the fact that the prior declarations of the prosecutrix were made on the occasion of a formal visit of investigation from a church-elder, admitted); *Or.*: 1903, *State v. Howard*, — Or. —, 72 Pac. 880 (reasons for making a contradictory affidavit); *S. C.*: 1887, *State v. Jacobs*, 28 S. C. 30, 37, 4 S. E. 799; *Wis.*: 1888, *Norwegian Plow Co. v. Hanthorn*, 71 Wis. 534, 37 N. W. 825. Compare the same rule for Admissions, *post*, § 1058.

the witness wishes to show that the true significance of the former statement has been distorted by a fragmentary repetition of it, is the addition of such other parts of the statement as explain its true significance,—and not the entire conversation or writing, which may contain portions wholly irrelevant for the legitimate purpose of explanation. Such is the rule in England.¹ But in this country it is common to say that *the whole of the conversation*,² or of the *former testimony or the deposition*,³ may be received. There is much to be said in favor of this looser doctrine, (1) because it affords a simpler test and avoids a continuous and petty wrangle over the various parts of the conversation or deposition, and (2) because the possible disadvantage of introducing some irrelevant matter may well be borne by the party who provoked this result by attempting to introduce a fragmentary portion. However, the whole subject is more fully developed by the Courts in dealing with the general principle of Completeness, and the judicial explanations quoted under that head (*post*, §§ 2113–2118) will throw light on the probable practice upon the present subject.

§ 1046. *Joining Issue as to the Explanation.* When the self-contradiction is not upon a collateral point (*ante*, § 1020), either party may introduce other witnesses upon the issue whether the utterance was made; this is involved in the nature of the case.¹ But whether additional testimony may be intro-

¹ 1820, Abbott, C. J., for all the judges, in *The Queen's Case*, 2 B. & B. 294 (admitting "all which had constituted the motive and inducement and all which may show the meaning of the words and declarations," but not any other things which may have been said at the same time; see the quotation *ante*, § 952); 1838, Denman, L. C. J., in *Prince v. Samo*, 7 A. & E. 627 (admitting "everything said" at the time "that could in any way qualify or explain the statement as to which he had been cross-examined," but not "all that he said at the same time"; in this opinion, a part of the foregoing opinion, so far only as it bore on party's admissions, was repudiated; see the quotation *post*, § 2115).

² 1853, *Nelson v. Iverson*, 24 Ala. 14; 1879, *Washington v. State*, 63 id. 192 (like *State v. Winkley*, *infra*); 1862, *Wilhelmi v. Leonard*, 13 Ia. 335 ("whole of the conversation"); 1843, *State v. Winkley*, 14 N. H. 491 (instead of the question to the impeached witness being confined to a specification of the original remarks, and asking categorically whether he made them, it may ask, "What did you say at the time?" thus bringing out the whole of the conversation; the theory being that by detailing the whole "he makes a denial in substance of having used the expressions in question"); 1900, *State v. Saidell*, 70 id. 174, 46 Atl. 1083 (the whole, "so far as it explained or qualified the matters inquired about," allowed); 1875, *Tilton v. Beecher*, N. Y., "Official" Report, II. 313 (crim. con.; Mr. Samuel Wilkeson, a witness for the defendant, was discredited by testimony that he had admitted that the publication of the charges of crim. con. would "knock

the life of Christ higher than a kite," meaning Mr. Beecher's book; but explained that what he had really said was that this result would occur "if these imputations were true"); 1868, *State v. Pulley*, 63 N. C. 9 (the witness an accomplice testifying for the State); 1896, *Emery v. State*, 92 Wis. 146, 65 N. W. 848. Compare the cases cited *post*, § 2115.

³ 1896, *Lowe v. State*, 97 Ga. 792, 25 S. E. 676 (all of the former testimony containing the alleged contradiction); 1857, *State v. Phillips*, 24 Mo. 485 (the whole was read); 1875, *Prewitt v. Martin*, 59 id. 333 (same); 1881, *State v. Talbot*, 73 id. 358 (taking a modified view); 1892, *Wilkerson v. Eilers*, 114 id. 245, 251, 21 S. W. 514 (after cross-examination to contradictions in a deposition, the whole may be read, even though the cross-examiner read none); 1896, *State v. Punahon*, 133 id. 44, 34 S. W. 25 (of an accused before the coroner); 1890, *State v. Jackson*, 9 Mont. 513, 24 Pac. 213; 1885, *Whitman v. Morey*, 63 N. H. 448, 454, 2 Atl. 899 (other parts of a deposition); 1898, *Huntley v. Terr.*, 7 Okl. 60, 54 Pac. 314 (self-contradictions in former testimony; the whole of the witness' testimony may be read in explanation); 1820, *Harrison v. Rowan*, 3 Wash. C. C. 583. Compare the cases cited *post*, §§ 2103, 2115, where the principle of Completeness is considered in general.

¹ 1881, *R. v. Whelan, Ire.*, 14 Cox Cr. 595. *Contra*: 1901, *State v. Jackson*, 106 La. 413, 31 So. 52 (defendant having cross-examined a witness as to making an affidavit against him, the affidavit was not allowed to be used to show that the witness had not made it; the opinion ignores settled principles).

duced as to the *correctness of the explanation* given by the witness is doubtful, as a matter of precedent; convenience would seem usually to require its exclusion.³

³ 1864, *Reemer v. Kerr*, 23 U. C. Q. B. 557 (the witness was contradicted by his own deposition before a magistrate, and explained that he was at that time confused, that he had not papers to refer to which he needed, and that not all that he said was reported; the opponent's testimony to disprove these excuses was excluded; *Draper, C. J.*: "If he offers explanations why his statements conflict, they are neither relevant to the issue tried, nor do they alter the fact that he has contradicted himself

on oath, and any evidence as to the truth of his explanations, and not as to the fact in issue, to which his evidence relates, must be collateral and cannot be received"); 1896, *State v. Goodier*, 48 La. An. 770, 19 So. 755 (disproof of the witness' explanation rejected); 1876, *Dufrene v. Weisc*, 46 Wis. 297 (explanation by a third witness on behalf of the impeached witness excluded). See the treatment of a similar question as to Explanations of Bias, *ante*, § 952.

SUB-TITLE II (continued): TESTIMONIAL IMPEACHMENT.

Topic VI: ADMISSIONS.

CHAPTER XXXV.

1. General Theory.

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- § 1076. Nominal and Real Parties: Representative Parties (Executor, Guardian, etc.); Stockholders; Joint Parties; Confessions of a Co-defendant; Other Parties to the Litigation.
- § 1077. Privies in Obligation; Joint Promisor; Principal and Surety; etc.
- § 1078. Same: Agent; Partner; Attorney; Deputy-Sheriff; Husband and Wife; Interpreter.
- § 1079. Same: Co-Conspirator; Joint Tortfeasor.
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- § 1082. Same: Grantor, Vendor, Assignor, Indorser; (1) Admissions before Transfer; (a) Realty; Admissions against Documentary Title; Transfers in Fraud of Creditors.
- § 1083. Same: (b) Personality; New York rule.
- § 1084. Same: (c) Negotiable Instruments.
- § 1085. Same: (2) Admissions after Transfer; Realty and Personality in general.
- § 1086. Same: Transfers in Fraud of Creditors.
- § 1087. Same: Other Principles affecting Grantor's Declarations as to Property, discriminated.

1. General Theory.

- § 1048. Nature of Admissions. (1) Just as a witness' testimony is discredited when it appears that on another occasion he has made a statement inconsistent with that testimony (*ante*, §§ 1018 ff.), so also the party is dis-

credited when it appears that on some other occasion he has made a statement inconsistent with his present claim. This is the simple theory upon which a party's admissions — of the informal sort, which might better be termed "quasi-admissions"¹ — are every day received in evidence on behalf of his opponent. The witness speaks in court through his testimony only, and hence his testimony forms the sole basis upon which the inconsistency of his other statement is predicated. But the party, whether he himself takes the stand or not, speaks always through his pleadings and through the testimony of his witnesses put forward to support his pleadings; hence the basis upon which may be predicated a discrediting inconsistency on his part includes the whole range of facts asserted in his pleadings and in the testimony relied on by him. Thus, in effect, and broadly, *anything said by the party may be used against him as an admission*, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony.

(2) It follows that the subject of an admission is *not limited to facts against the party's interest at the time*. No doubt the weight of credit to be given to such statements is increased when the fact stated is against the person's interest at the time; but that circumstance has no bearing upon their admissibility. On principle, it is plain that every prior statement of the party, exhibiting an inconsistency with his present claim, tends to throw doubt upon it, whether he was at the time speaking apparently in his own favor or against his own interest. For example, a plaintiff who now claims a debt of \$100 is clearly discredited by having made a demand a month ago for only \$50, even if at the time the debtor conceded only \$25 and thus put the demandant in the position of making an assertion purely in his own favor and for the aggrandizement of his claim. If the principle upon which admissions were received rested at all upon the disserving quality of the fact asserted at the time of assertion, all such statements would be as certainly rejected when offered by the opponent as they would be when offered by the party himself in his own favor. Nevertheless the fallacy is sometimes committed of placing the admissibility of such statements on that untenable ground.² That it is a fallacy, in the fullest sense, is to be seen not only by reflecting upon the principle involved, but also by observing that no Court ever yet excluded an opponent's admission because of such a limitation. Daily practice and unquestioned tradition are here unmistakable. Sometimes, too, the Courts have expressly negated the fallacy in question:

1856, *Pollock, C. B.*, in *Darby v. Ouseley*, 1 H. & N. 1: "The distinction is this: If a party has chosen to talk about a particular matter, his statement is evidence against himself."

¹ These are to be distinguished from the solemn, or judicial, admissions, as noted post, § 1057.

² The following are typical passages: 1794, L. C. J. Eyre, in *Thomas Harley's Trial*, 24 How. St. Tr. 1093 ("the presumption upon which declarations are evidence [against a defendant] is that no man would declare anything against himself unless it were true"); 1849, Bell, J., in *Truby v. Seybert*, 12 Pa. St. 101, 104 ("a man's acts, conduct, and declarations wherever made, provided they be voluntary, are admissible against him, as it is fair to presume they correspond with the truth; and it is his fault if they do not.")

1898, *Hamersley, J.*, in *State v. Willis*, 71 Conn. 293, 41 Atl. 820: "Admissions are not admitted as testimony of the declarant in respect to any facts in issue; . . . They are admitted because conduct of a party to the proceeding, in respect to the matter in dispute, whether by acts, speech, or writing, which is clearly inconsistent with the truth of his contention, is a fact relevant to the issue."³

(3) The logical basis, therefore, of the use of admissions is twofold. In the first place, all admissions furnish, as against the party, the same discrediting inference as that which may be made against a witness in consequence of a prior self-contradiction; the nature of this inference, both in its strength and in its weakness, has been already examined (*ante*, § 1018), and need not be here reconsidered. In the next place, those admissions which happen to state a fact that was at the time against the party's interest have an additional and testimonial value, independent of the contradiction and similar to that which justifies the Hearsay exception for statements of facts against interest (*post*, § 1049); this element adding to their probative value, but not being essential to their admissibility. This double evidential utility explains the proposition, sometimes judicially sanctioned, that an admission is *equivalent to affirmative testimony* for the party offering it.⁴ Such a theory is partly correct, partly incorrect. It certainly cannot be true of admissions in general; their effect, like that of a witness' self-contradictions, is merely destructive. But it may be true of such admissions as state facts against the party's interest at the time of stating them; such admissions fulfil the requirements of the Hearsay exception applicable to such statements (*post*, § 1457), except that the declarant is not deceased or otherwise unavailable. If it could be conceded that the opponent is, as such, now practically unavailable for the purpose of obtaining sincere testimony, then the Hearsay exception would be entirely satisfied, and with accuracy it could be said that the statements of the opponent are equivalent to independent testimony, and not merely to self-contradictions.

§ 1049. **Admissions, distinguished from the Hearsay exception for Statements of Facts against Interest; Death not necessary.** The use of the admissions is on principle not obnoxious to the Hearsay rule; because that rule affects such statements only as are offered for their independent assertive value after the manner of ordinary testimony (*post*, § 1362), while admissions are receivable primarily because of their inconsistency with the party's present claim and irrespective of their credit as assertions; the offeror of the admissions, in other words, does not necessarily predicate their truth, but uses them merely to overthrow a contrary proposition now asserted. Just as the Hearsay rule is not applicable to the use of a witness' prior self-contradiction,

³ *Accord*: 1882, *State v. Anderson*, 10 Or. 448, 453 (the admissibility "does not in any manner depend upon the question whether they were for or against his interest at the time they were made or afterwards"); 1899, *State v. Mowry*, 21 R. I. 376, 43 Atl. 871 (defendant's exculpatory story on a charge of murder).

⁴ 1867, *Rhodes, J.*, in *Hall v. The Emily Banning*, 33 Cal. 525 ("when given in evi-

dence, they tend, as does other competent evidence, to prove the fact in issue to which they relate"); 1879, *Bartlett v. Wilbur*, 53 Md. 485, 497 (they "may be offered to prove the truth of the matters admitted"); 1876, *Taylor, J.*, in *Warder v. Fisher*, 48 Wis. 344, 4 N. W. 470 ("are received also for the purpose of establishing the truth of the unsworn contradictory statements themselves").

tions (*ante*, § 1020; *post*, § 1792), so it is not applicable to the use of an opponent's admissions.

Nevertheless, because most statements used as admissions do happen to state facts against interest, judges have been found who, misled by this casual feature, have treated admissions in general as obnoxious to the Hearsay rule, and therefore as entering under an exception to that rule.¹ That this is a mere local error of exposition and in no sense represents a rule anywhere obtaining may be seen from two circumstances: first, that the limitation of the Hearsay exception to facts against pecuniary or proprietary interest (*post*, §§ 1461, 1476) has never been attempted to be applied to admissions; secondly, that the further requirement of the Hearsay exception, namely, that the declarant must first be accounted for as deceased, absent from the jurisdiction, or otherwise unavailable (*post*, § 1456), has never been enforced for the use of a party's admissions.²

§ 1050. **Admissions, distinguished from Confessions; Admissions under Duress.** A confession is one species of admission, namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge (*ante*, § 821). The peculiarity of confessions in evidence is that they are subjected to an additional limitation when offered in criminal cases, — the limitation that they must have been made without any inducement calculated to destroy their trustworthiness (*ante*, § 822). The reason why such a limitation should be especially recognized for that species of admissions has already been examined; it is enough here to repeat that the rule for confessions does not apply to confessions made under duress and offered in a civil case, even when the confession was originally made in a criminal case (*ante*, § 816). What remains to note is that, since a confession is merely one sort of an admission, all other admissions are usable against the accused in a criminal case precisely as against a party in a civil case (*ante*, § 821); *i. e.* so long as they have satisfied the confessional rule, or fall without its scope, they are to be tested, like other admissions, by the ensuing principles common to all admissions.

§ 1051. **Admissions, distinguished from Testimonial Self-Contradictions; Prior Warning not necessary.** An admission is logically useful against the party in the same way as a prior inconsistent statement against a witness (*ante*, §§ 1018, 1048), and its admissibility rests upon that ground. It follows that certain deductions from this principle have a parallel application to the present sort of evidence, — notably in respect to implied admis-

¹ *E. g.* in *Terry v. Rodahan*, 79 Ga. 278, 293, 5 S. E. 38 (1887), and in the cases cited *ante*, § 1048, note 2.

² 1834, *Woolway v. Rowe*, 1 A. & E. 114 (declarations of a former proprietor admitted against the plaintiff; "the fact of his being alive at the time of the trial," held not to exclude them); 1846, *Payson v. Good*, 3 Kerr N. Br. 272, 279; 1819, *Guy v. Hall*, 3 Murph.

150; and also cases quoted *post*, § 1080. The contrary seems never to have been sanctioned except in *Gibbiehouse v. Stong*, 3 Rawle 436 (1832), *Kennedy, J., diss.* The confusion is perhaps a natural one in dealing with an ancestor's declarations of defect of title, where upon either principle the statement might be receivable; the difficulties are particularly analyzed, *post*, §§ 1082-1087.

sions (*post*, § 1060) and to explanations of the admissions (*post*, § 1058). But there are two respects in which the distinction between a witness' self-contradictions and a party's admissions becomes important.

(1) The rule requiring that the witness must have been *warned when on the stand*, and asked whether he had made the statement about to be offered as a self-contradiction (*ante*, §§ 1025 ff.), has always been understood not to be applicable to the use of a party's admissions, *i. e.* they may be offered *without a prior warning to the party*.¹ The historical origin of this rule is plain enough; for until the middle of the 1800s the opponent was neither competent nor compellable to take the stand as a witness in common-law trials (*ante*, § 577; *post*, § 2217), and hence it was impossible to ask him about his utterances; a requirement to that effect would have excluded all admissions. Since parties have been made competent and compellable, this obstacle no longer exists in full force. But nevertheless the rule has persisted, and on two sufficient grounds, first, because the opponent may not in fact take the stand, and thus no opportunity for asking him would arise, and, secondly, because the only object of requiring the warning is to provide a fair opportunity of explanation before the witness' departure, whereas a party is in theory present during the trial, and has in fact ample opportunity to protect himself by taking the stand for any explanations which he may deem necessary after hearing the testimony to his alleged admissions. It may be added that in chancery practice, where the opponent was compellable to testify upon a bill of discovery, and thus the reason of the original rule was in part lacking, there was a practice which to some extent assimilated the rule for witnesses, *i. e.* the party's oral admissions, though received in evidence, would not be acted on as the basis of a decision unless they had been specifically inquired about beforehand in the interrogatories appended to the bill (*post*, § 1856).

¹ 1837, *Andrewa v. Askey*, 8 C. & P. 7; 1874, *Day*, Common Law Procedure Acts, 4th ed., 277 (the statute of 1854 does not apply to admissions); 1877, *Collins v. Muck*, 31 Ark. 694 (even where the party is also a witness); 1892, *Rose v. Otis*, 18 Colo. 59, 63, 31 Pac. 493 (same); 1893, *State v. Brown*, Del., 1 Penneville 286, 40 Atl. 933; 1897, *Belt v. State*, 103 Ga. 12, 29 S. E. 451 (larceny; the prosecutrix not being a party, prior asking is necessary before using inconsistent statements); 1894, *Coffin v. Bradbury*, — *Ida.* —, 35 Pac. 715, 722; 1897, *Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208; 1897, *Eddings v. Boner*, 1 Ind. T. 173, 38 S. W. 1110; 1896, *State v. Forsythe*, 99 Ia. 1, 68 N. W. 446; 1900, *Bullard v. Bullard*, 112 id. 423, 84 N. W. 513; 1894, *Southern K. R. Co. v. Painter*, 53 Kan. 414, 418, 36 Pac. 731; 1896, *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; 1903, *White v. Collins*, — *Minn.* —, 95 N. W. 765; 1901, *McBlain v. Edgar*, 65 N. J. L. 634, 48 Atl. 600 (even where also a witness); 1899, *Churchill v. White*, 58 Nebr. 22, 78 N. W. 369 (even where also a witness);

1902, *Dunafon v. Barber*, — *id.* —, 92 N. W. 198; 1900, *Drury v. Terr.*, 9 Okl. 398, 60 Pac. 101, *semble*; 1874, *Brubaker v. Taylor*, 78 Pa. 87 (even where also a witness); 1876, *Kreiter v. Bomberger*, 82 id. 59, 61 (same); 1895, *State v. Freeman*, 43 S. C. 105, 20 S. E. 974 (even where also a witness); 1898, *Hart v. Pratt*, 19 Wash. 560, 53 Pac. 711. *Contra*: 1882, *Nutter v. O'Donnell*, 6 Colo. 253, 260 ("the rule is the same whether the witnesses sought to be contradicted are parties to the suit or third persons"); 1889, *State v. Young*, 99 Mo. 666, 681, 12 S. W. 879 (rule applicable to defendant testifying; *Ray, C. J.*, and *Black, J.*, *diss.*); 1881, *State v. White*, 15 S. C. 381, 391 (asking not required for admissions as such, even when the party takes the stand; otherwise, if the statements are offered to impeach him as witness).

It is to be noted that this exemption from asking is properly applied even where the party is also a witness; *i. e.* where his statement plays the double part of a party's admission and a witness' self-contradiction.

(2) A further practical difference between a party's admissions and a witness' self-contradictions remains to be noticed. The statements of a *third person*, *i. e.* vicarious admissions, may often be used against the party as admissions, — for example, admissions by a predecessor in title. But this use is subject to definite limitations (*post*, §§ 1069-1087). Hence, if such a person has taken the stand as a witness, his prior inconsistent statements may be available to discredit him as a witness, although they might have failed to satisfy the rule for admissions of a predecessor;² conversely, they may satisfy the latter rule but not the former, even against a party.³

§ 1052. **Admissions, distinguished from Conduct indicating a Consciousness of Guilt (Flight, Fraud, Spoliation of Documents, Withholding of Evidence, and the like).** (1) Admissions are statements, *i. e.* assertions in words, and it is their inconsistency with the party's other assertions that discredits the latter. Hence *conduct cannot of itself be treated as an admission*. Yet the various sorts of conduct, which indicate a guilty consciousness and are undoubtedly receivable in evidence, are sometimes spoken of as admissions. The truth is that they are just what they seem to be, namely, acts, not assertions, and that their use in evidence is strictly a circumstantial one by way of inference from the conduct to the mental state beneath it, and from that to some ulterior fact. This kind of evidence, and the theory of it, has already been considered in detail (*ante*, §§ 265-293). What has led them to be by some judges described as admissions is the casual feature that in most instances they are receivable only as against a party to the cause, *i. e.* subject to the limitation peculiar to admissions. The reason for this is that otherwise their unrestricted use would lead to a substantial evasion of the Hearsay rule. For example, if after an affray one of the participants, A, takes flight and one of the bystanders, B, pursues and arrests him, A's flight is circumstantial evidence of his consciousness of guilt and thus of actual guilt, while B's pursuit is no less a circumstance evidencing B's belief in A's guilt and thus similarly of the fact of guilt. Yet to admit B's belief as circumstantial evidence would be at least no better than to admit B's extrajudicial assertion of A's guilt, which would clearly be prohibited by the Hearsay rule. Therefore in general the conduct of third persons, so far as it is a means of arguing to their belief, and thus to the fact believed, is excluded. Nevertheless, there are exceptional instances enough, in which such conduct is admitted, to in-

² 1895, *Joseph v. Furnish*, 27 Or. 260, 41 Pac. 424 (where a vendor on cross-examination was asked as to statements made by him after the sale of chattels; these statements being in themselves inadmissible as admissions by one out of possession, but being also contradictory to his direct testimony as to the facts of the sale, and for the latter purpose only admissible); 1897, *Vogt v. Baldwin*, 20 Mont. 322, 51 Pac. 157 (similar ruling for statements of an assignor testifying).

³ 1878, *Wellace v. Souther*, 2 Can. Sup. 598, 604 ("whether it contradicts a previous statement [on the stand] or not," the party's state-

ment is receivable); 1902, *State v. Deal*, — Or. —, 70 Pac. 534. So, too, the rule against impeaching one's own witness may forbid using self-contradictions against the opponent called as a witness (*ante*, § 906), and yet the same statements may serve as admissions; 1871, *Gibbs v. Linabury*, 22 Mich. 479 (where to prove the execution of a note the defendant was called; he testified that he could not swear to the writing, and the plaintiff then testified that the defendant had admitted the signature's genuineness on the stand at the trial below; held proper, as an admission).

dicates that on principle such evidence has a genuine circumstantial use, and that its prohibition is the indirect result of the policy of the Hearsay rule, and not of logical necessity. Those rules of exception have been already fully considered (*ante*, §§ 268-272). It is enough here to note that the various sorts of conduct which are thus received against a party are not on principle to be classed as admissions, but as conduct affording circumstantial inferences. The chief types of such conduct, already considered in the above-cited sections, may here be rehearsed for reference' sake: Demeanor during trial (§ 274); Refusal to undergo a superstitious test (§ 275); Flight, escape, resistance, or concealment (§ 276); Falsehood, fraud, fabrication and suppression of evidence, bribery, spoliation (§ 278); Precautions against injury, repairs of a machine or highway after an injury (§§ 282, 283); Failure to prosecute or to make claim (§ 284); and Failure to produce witnesses or documents (§§ 285-291).

(2) From the foregoing use of conduct circumstantially is to be distinguished the use of *silence* as embodying a genuine admission. When *by a party's silence an assent is given* to the assertion of a third person, that assertion is thereby adopted by the party, and therefore may be used against him as his own statement and admission. It is the statement, however, that constitutes the admission; the conduct merely effects its adoption. Such admissions, forming one variety of vicarious admissions, may be later examined in detail (*post*, § 1071).

§ 1053. **Admissions, as not subject to rules for Testimonial Qualification; Personal Knowledge; Infancy.** (1) The primary use and effect of an admission is to discredit a party's claim by exhibiting his inconsistency in other utterances. It is therefore immaterial whether these other utterances would have been independently receivable as the testimony of a qualified witness. It is their inconsistency with the party's present claim that gives them logical force, and not their testimonial credit. In particular, *personal knowledge*, as indispensable to a witness (*ante*, § 656), is here not required. If the party, for example, now claims that his contract, made by an agent in France, entitles him to a cargo of silk, his statement last month that his contract called for a cargo of wine would discredit his present claim, even though it may be apparent that in neither case could he speak from personal knowledge. The conflict of claims is the significant circumstance, and the element of personal knowledge merely increases or lessens that significance. Since a party may make a claim and file averments of pleading without regard to personal knowledge of the facts, it is fallacious to exact, in his contrary admissions, an element of personal knowledge which is not required for the original advancement of his claim. Such a requirement is repudiated in the better judicial view:

1860, *Stephens, J.*, in *Kitchen v. Robbins*, 29 Ga. 713, 716: "Are no admissions good against a party, unless founded on his personal knowledge? The admissions would not be made except on evidence which satisfies the party who is making them against his own interest, that they are true, and that is evidence to the jury that they are true. Ad-

missions do not come in on the ground that the party making them is speaking from his personal knowledge, but upon the ground that a party will not make admissions against himself unless they are true. The fact that he makes them against his interest can be reasonably explained only on the supposition that he is constrained to do so by the force of the evidence. The source from which a knowledge of the facts is derived, is a circumstance for the jury to consider, in estimating the value of the evidence, but that is all."¹

(2) On the same principle, the admissions of an *infant* party would be receivable.² Theoretically, the admissions of a *lunatic* party would stand upon the same footing, although the weight to be given them might be *nil*. The practical result of conceding this much upon principle would be that at any rate there would be no occasion for putting into force the detailed rules about testimonial capacity (*ante*, §§ 492-509).

§ 1054. Admissions, excluded as evidence of certain facts; (1) Contents of Documents; (2) Execution of Attested Documents. For the purpose of proving certain classes of facts, the use of admissions has by some Courts been forbidden.

(1) In evidencing the *contents of a document*, it has sometimes been thought that the opponent's admissions — at least, his oral admissions — should not be received until the original had been accounted for as lost or otherwise unavailable. This view, from time to time advanced in early English rulings,

¹ *Accord*: 1836, *Bishop of Meath v. Marquess of Winchester*, 3 Bing. N. C. 183, 203 (case stated for counsel, made by a predecessor of the present bishop, conceals facts ranging 60 years before, received, though personal knowledge of the facts could be based on his part; here the facts consisted chiefly of documents preserved, and the party had at any rate "with such, the best means of knowledge"); 1874, *Bulley v. Bulley*, L. R. 9 Ch. App. 739, 747, 751 (recital in a deed "sent to be executed for the purpose of making a good title," received; but treated as having little weight, because it concerned a matter happening 120 years before, of which the party could have no personal knowledge); 1860, *Kitchen v. Robbins*, 29 Ga. 713, 716 (see quotation *supra*); 1901, *Wasey v. Ins. Co.*, 126 Mich. 119, 85 N. W. 459; 1847, *Sparr v. Wellman*, 11 Mo. 230, 234 ("where a party believes a fact upon evidence sufficient to convince him of its existence, his declaration of the existence of that fact, if against his interest, is evidence against him"); 1899, *Reed v. McCord*, 160 N. Y. 330, 54 N. E. 737 (if not merely in form an admission that he had heard of the fact); 1835, *Miller v. Denman*, 8 Yerg. 237 ("whether he derives the facts admitted from his own knowledge or from information is perfectly immaterial"; but the Court wrongly declares that the source of the assertion cannot even affect the credit to be given by the jury to the admission); 1867, *Shaddock v. Clifton*, 22 Wis. 114, 118; 1870, *Chapman v. R. Co.*, 26 id. 294, 302; *Contra*: 1801, *Chambre, J.*, in *Roe v. Ferrars*, 2 B. & P. 542, 548 ("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 not so as to admit facts "stated by way of hearsay only"); 1897, *Folk v. Schaeffer*, 180 Pa. 613, 37 Atl. 104 (admission of liability by a partner, who had no personal knowledge, excluded in a suit against the firm); *Undecided*: 1825, *Rees v. Bowen*, 1 McCl. & Y. 389, 391. But the principle does not require the reception of an admission in form merely concedes that *some one else* is making; for here the fact admitted would itself be merely a hearsay statement (according to the distinction noted *ante*, § 664); 1842, *Lord Trimblestown v. Kennis*, 5 Cl. & F. 749, 780, 784 (statement by a party's predecessor that he had heard his grandmother make a certain statement, held not receivable; Lord Brougham doubting); 1857, *Stephens v. Vroman*, 16 N. Y. 381, 383; 1899, *Reed v. McCord*, N. Y. (cited *supra*).

Note that under the present principle a party's account-books are always receivable against him, even though for lack of personal knowledge they might not be admissible under the Hearsay exception for regular entries (*post*, §§ 1530, 1557).
² 1845, *O'Neill v. Read*, 7 Ir. L. Rep. 434 (admissions of facts tending to show that goods were necessaries, received; but the Court, rather curiously, declined to term the statements "admissions"); 1902, *Chicago C. R. Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997, *semble*; 1899, *Atchison T. & S. F. R. Co. v. Potter*, 60 Kan. 808, 58 Pac. 471 (infant's admissions receivable if the trial Court regards him as intelligent, even though he is incompetent to take an oath); 1827, *Mather v. Clark*, 2 Aik. 209, 210.

was definitely repudiated in *Slatterie v. Pooley* in a forceful opinion by Baron Parke; but has nevertheless obtained some vogue in the courts of this country. Its reasoning, and the state of the law, are examined elsewhere (*post*, §§ 1255-1257), in dealing with the rule requiring the production of documentary originals. That the fact of *loss* of the original may be evidenced by admissions has not been doubted (*post*, § 1196).

(2) In evidencing the *execution* of an *attested document*, the opponent's admissions were, by the orthodox common law, held inferior to the proof of the attesting witness' signature, and were not receivable until the latter was shown to be unattainable; though some American Courts declined to accept this result. The reason for it, and the state of the law, are elsewhere examined (*post*, §§ 1296-1300), in dealing with the attesting-witness rule. Apart from that rule, it has not been doubted that the execution of an ordinary *unattested document* may be evidenced by admissions (*post*, § 2132).

(3) In Louisiana, a peculiar rule obtains that, if the *signature* of a document is disowned in the opponent's pleading, his admission will not be received to prove it.¹

§ 1055. **Admissions, as insufficient for proof of certain facts:** (1) **Marriage;** (2) **Divorce;** (3) **Criminal Cases.** In proving certain kinds of facts, a few rules have grown up which do not forbid the use of the party's admissions, but merely declare them insufficient without additional evidence; these are rules of quantity, not of relevancy.

(1) There has been some recognition of a rule that, upon certain issues, the fact of *marriage* is not sufficiently evidenced by admissions alone (*post*, § 2086).

(2) In a proceeding for *divorce*, the rule adopted from the civil law obtains universally, that the opponent's admissions are not alone sufficient proof; the danger of collusion furnishing the reason for the rule (*post*, § 2067).

(3) In criminal cases, a rule prevails in many jurisdictions that the *accused's confession* is not alone sufficient to found a conviction upon (*post*, § 2070).

§ 1056. **Admissions, as distinguished from Estoppels, Warranties, Contracts, and Arbitrations; Admissions made to Third Persons or after Suit Begun.** An admission, of the sort here concerned, is nothing but a piece of evidence, discrediting the party's present claim and tending to prove the fact of its incorrectness. It is therefore to be distinguished from those statements of the party which become in themselves the foundation of independent rights for other persons, by virtue of some doctrine of substantive law,—in other words, from binding *estoppels*, *warranties*, and *representations*. Thus, if A claims that his boundary line runs to an oak tree, and B admitted this, B's extrajudicial admission of the boundary's location is merely evidence for the truth of the other facts on which A rests his claim. But if B has made his statement to A under such circumstances that A was justified in acting on it and has since built up to the line he claimed, B's concession may by estoppel

¹ 1835, *Plicque v. La Branche*, 9 La. 560, 562 (handwriting); 1849, *Segond v. Roach*, 4 La. (under C. C. P. § 325, providing for proof of An. 54 (rule not applicable to a lost document).

become the foundation for a new right for A, wholly irrespective of the validity of the grounds of his original claim. Here the field of substantive law, not that of evidence, is concerned. The statement or representation of B may, however, have been precisely the same in both cases, and it is A's reliance and action thereon that bring into effect the doctrine of the substantive law. Thus, the so-called "admission" being a common feature in both instances, there has been some tendency¹ to confound in one treatment the two wholly distinct things. There is, however, no ground for this confusion. It is simple enough to keep apart the evidential thing and the doctrine of substantive rights:

1800, *Bell, C. J., in Corser v. Paul*, 31 N. H. 24, 31: "There is a class of admissions which may be either express or implied from allence, or acquiescence, which are conclusive. Such are admissions which have been acted upon, or those which have been made to influence the conduct of others, or to derive some advantage to the party, and which, therefore, cannot be denied without a breach of good faith. As if, for example, in the present case, the defendant had stood by and seen this note offered to the bank for discount; and, being aware of what was doing, had been silent; or if, before the discount he had been spoken to by any of the officers of the bank in relation to the note, and, being aware of the facts, had forborne to deny the signature — by these tacit admissions he would be forever concluded to deny the note to be his, in case the bank discounted it. This is but an application of the same principle that is applied in the case of deeds of real estate, that he who stands by, at the sale of his property by another person, without objecting, will be precluded from contesting the purchaser's title."

So also a representation may become a *warranty* or other contract, and thus give rise to substantive rights, although, apart from such rights, the same representation might have been spoken of as a mere evidential admission; the occasional use of the term "admission" in such a connection (as, for example, when it is said that the indorsement of a bill of exchange admits — *i. e.* warrants — the genuineness of all prior indorsements²) must not be allowed to mislead us. So, too, the question whether a party has by his conduct assented to a contract³ or to the possession of land, and has thus effected a change in his substantive rights, has no connection with the present evidential question (*post*, § 1073) whether by silence he has adopted another person's statement so as to make it his own admission. Again, the award of an *arbitrator* revises and concludes the parties' rights by virtue of their contractual assent to the award, and hence the tenor of the parties' statements in submitting the matter to arbitration must be examined;⁴ but this has no concern with the question (*post*, § 1062) whether a statement made to the arbitrators, where the arbitration has failed, is to be excluded as evidence, on the ground that it is an admission made in the course of an effort to compromise.

¹ Notably in *Greenleaf, Evidence*, §§ 207 ff.

² 1809, *Critchlow v. Perry*, 2 Camp. 182.

³ 1820, *Batturs v. Sellers*, 5 H. & J. 117, 119 (a buyer's silent acquiescence in the seller's writing of the former's name makes the latter the agent to write it, so as to satisfy the Statute of Frauds).

⁴ 1794, *Kingston v. Phelps*, Peake 227 (in-

surance policy; defendant's consent to arbitration, held to make the award receivable; but in this case it was rejected, as the plaintiff himself had not consented to the submission); 1800, *Gregory v. Howard*, 3 Esp. 113 (arbitrator to settle accounts, received to prove the parties' admissions, on a plea that the claim sued for had been included in the settlement).

All these modes in which a party's statements become the basis of contractual or estoppel rights have no bearing on their use as mere evidence.

It may be added that, in consequence, it is immaterial, when an opponent's statement is offered as an admission, that it was *uttered to a third person* and not to the other party to the cause.⁵ Evidentially it is still an inconsistent statement and therefore receivable. If, on the other hand, it were put forward as the basis of an estoppel right, because acted upon by the other party to the cause, there would be ground for claiming that it must have been made to him directly or else he would not have been justified in relying upon it; and such would be the usual requirement, for purposes of estoppel.

For the same reason, it is no objection to an admission that it was made *after suit begun*.⁶

§ 1057. **Quasi-Admissions, as distinguished from Solemn or Judicial Admissions.** The law of evidence has suffered, in its most vital parts, from an ailment almost incurable, — that of confusion of nomenclature. The term "admissions" exhibits this misfortune in one of its notable aspects. There are two principles, not at all connected, which for a century or more have had to be discussed by the aid of a single and common term. One of these principles is the subject of the present consideration; it authorizes the receipt of any statement by an opponent, as evidence in contradiction and impeachment of his present claim. Such statements, here referred to in the loose and usual phraseology as "admissions," should better, with a view to discrimination and clearness, be designated Quasi-Admissions.

The true Admission, in the fullest sense of the term, is another thing, and involves a totally distinct principle. It concerns a method of escaping from the necessity of offering any evidence at all. The former is an item in the mass of evidence; the latter is a *waiver relieving the opposing party from the need of any evidence*. The former is involved in the subject of the present Book, "What Facts are admissible as Evidence"; the latter is concerned with the subject of Book IV, "Of what Propositions no Evidence need be offered"; and is dealt with elsewhere (*post*, §§ 2588-2595). An Admission, in the latter and correct sense, is a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence, by conceding for the purposes of litigation that the proposition of fact claimed by the opponent is true. The principal questions that arise in construing its principle are: What sort of a formal act is necessary; who may effectively do that act; what classes of facts may be thus disposed of; and how far, in time, is that act effective? With this genuine Admission we are not here further concerned, except in noting the distinction mentioned in the ensuing section, and also in considering (*post*, § 1066) the use of prior pleadings as

⁵ 1792, *R. v. Neville*, Peake 91 (nuisance; defendant's bond to the parish where he formerly resided, acknowledging his trade to be a nuisance, received, subject to explanation, "as it shall appear that this place is more or less like that where he before resided"); 1794, *Grant v. Jack-*

son, Peake 203 (action on a bill of exchange; a defendant's admission in an answer in chancery to a bill by other creditors, received); 1853, *Chapman v. Twitchell*, 37 Me. 59, 62.

⁶ 1782, *Morris v. Vanderen*, 1 Dall. 64, 66; 1823, *Marshall v. Sheridan*, 10 S. & R. 268.

quasi-admissions. Throughout the present discussion the term "admissions" will be understood to signify the ordinary or quasi-admission; the term "judicial admission" will be used to signify the formal waiver of proof.

§ 1058. Same: Admissions not Conclusive; Explanations; Prior Consistent Claims; Putting in the Whole of the Statement. (1) A quasi-admission, of the present sort, being nothing but an item of evidence, is therefore *not in any sense final or conclusive*. The opponent, whose utterance it is, may none the less proceed with his proof in denial of its correctness; it is merely an inconsistency which discredits, in a greater or less degree, his present claim and his other evidence. No one would ever have entertained doubts on this point,¹ had not the two doctrines noticed in the preceding sections tended, by their superficial resemblance to the present doctrine, at certain points to produce confusion, — namely, the doctrines of estoppel and of judicial admission. An estoppel, *i. e.* a representation acted on by the other party, by creating a substantive right does oblige the estopped party to make good his representation, — in other words, but inaccurately, it is conclusive. So, too, but for an entirely different reason, a judicial admission is conclusive, in the sense that it formally waives all right to deny, for the purposes of the trial, *i. e.* it removes the proposition in question from the field of disputed issues. But statements which are not estoppels or judicial admissions have no such quality, and on principle cannot have. This has always been conceded by the judges, in modern times, and the only instances in which any apparent contradiction may be found are those in which questions of estoppel (with which we have here nothing to do) were under discussion:

1829, *Bayley, J.*, in *Heane v. Rogers*, 9 B. & C. 577, 586 (referring to an admission of the title of an assignee in bankruptcy): "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him. But we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction; but as to third persons he is not bound."

1834, *Parke, B.*, in *Ridgway v. Philip*, 1 C. M. & R. 415: "An admission does not estop the party who makes it; he is still at liberty, so far as regards his own interest, to contradict it by evidence."

¹ The following utterance shows how obscurely the true principle was once conceived by eminent judges: 1803, Sir W. Grant, M. R., in *Fairlie v. Hastings*, 10 Ves. Jr. 123, 127: "A party is bound by his own admission, and is not permitted to contradict it."

² *Accord*: 1797, *Loveridge v. Botham*, 1 B. & P. 49 (attorney's bill, followed by a second bill increasing the charge and adding new items; the Court, while at first confusedly speaking of the former as both "conclusive" and "presumptive" evidence, ended by declaring that "if errors or omissions in the former bill could be proved, they ought to be allowed for"); 1849, *Newton v. Belcher*, 12 Q. B. 921, 924 (mistake of law as to liability, allowed to be shown);

1849, *Newton v. Liddiard*, *ib.* 925 (same; the rule "is applicable to mistakes in respect of legal liability as well as in respect of fact"); 1892, *Bush v. Barnett*, 96 Cal. 202, 205, 31 Pac. 2; 1844, *Gilbert v. Porter*, 2 Kerr N. Br. 390, 394; 1846, *Payson v. Good*, 3 *id.* 272, 279; 1877, *Raymond v. Cummings*, 17 N. Br. 544 (book-account entries); 1852, *Carter v. Bennett*, 4 Fla. 283, 301, 342 (admission by a "solemn oath of record," setting up a defence, held open to explanation); 1847, *Solomon v. Solomon*, 2 Ga. 18, 30 (mistake of law may be shown); 1901, *Phoenix Ins. Co. v. Gray*, — *id.* —, 38 S. E. 992; 1903, *Nicholson v. Snyder*, — *Mil.* —, 55 Atl. 484 (party's answer in bankruptcy); 1860, *Corser v. Paul*, 41 N. H. 24, 31; 1896,

Distinguished from the foregoing principle another question, once in great vogue, and already here treated (*ante*, §§ 525-531), namely, whether the principle *nemo allegans suam turpitudinem audiatur* would exclude the testimony of one who came forward to testify to his own prior falsity. So far as such a doctrine was ever recognized (and it is now wholly repudiated), it rested on the ground of moral obliquity, and applied to all witnesses alike, and not merely to parties, who indeed at that time were not qualified to testify at all.²

(2) It follows that an opponent whose admissions have been offered against him may offer any evidence which serves as an *explanation* for his former assertion of what he now denies to be the fact.⁴ This may involve the showing of a mistake,⁵ or the evidencing of circumstances which suggest a different significance to the words. The modes of explaining away a witness' self-contradictions (*ante*, § 1044) suggest analogies here.

(3) But such explanations must of course not violate other and independent principles of evidence. In particular, the rule against *opinion-testimony* (misguided as it is) may be construed to forbid the party to testify to his real meaning and intention in making the statement.⁶ Moreover, an explanation which attempts to rehabilitate the party by showing that he has, at still other times, made *claims consistent* with his present one is perhaps obnoxious to the general principle which forbids a witness' credit to be restored in this manner.⁷

(4) In this place, moreover, there often comes into application the general principle of Completeness, which permits the *remainder of any utterance* to be put in evidence by the other party, in order to present the full and correct significance of the fragment which the first party may have offered. This principle affects admissions as well as all other kinds of verbal utterances, and is elsewhere examined, in its bearing upon a party's admissions (*post*, §§ 2099, 2113, 2115).

The effect of this principle is sometimes difficult to distinguish from that of the Verbal Act doctrine (*post*, § 1772). The latter is concerned with the Hearsay rule, and defines the classes of utterances to which that rule is not

Welch v. Ricker, 69 Vt. 239, 39 Atl. 200 (account-book entries, as to the person charged); 1902, Laffam v. Missisquoi Pulp Co., 74 id. 125, 52 Atl. 526.

Distinguish the effect of the *parol evidence rule*, *post*, §§ 2413, 2430, which forbids showing a mistake in a formal act constituting a substantive right.

² The following case illustrates the mingling of these two questions: 1829, Freeman v. Walker, 6 Greenl. 68, 71 (master's action for wages; whether defendant's allegation in a petition to the Federal authorities, relating to the master's misconduct, was disputable by him in this case, not decided).

⁴ 1867, Reid v. Warner, 17 Low. Can. 487 (handwriting); 1858, Smith v. Gifford, 33 Ala. 172; 1880, Dabney v. Mitchell, 66 id. 495, 505

(account filed); 1897, Posey v. Hanson, 10 D. C. App. 497, 508 (affidavit by one who could not read); 1896, Smith v. Mayfield, 163 Ill. 447, 45 N. E. 157 (the amount agreed to be due the admittant); 1870, Janvrin v. Fogg, 49 N. H. 346; 1897, Holmes v. W. R. E. Co., 20 R. I. 289, 38 Atl. 946 (words spoken jocularly, not an admission; here, of an agent); 1903, Boyer v. St. Louis, S. F. & T. R. Co., — Tex. —, 76 S. W. 441 (assessors' books).

⁵ *Ante*, note 2.

⁶ 1897, Sutter v. Rose, 169 Ill. 66, 48 N. E. 411 (letter admitting knowledge, not allowed to be explained by writer's intention). This application of the rule is examined *post*, §§ 1954, 1963-1972.

⁷ The cases are considered under that head, *post*, § 1133.

applicable, &c. it serves to remove the objection which that rule would otherwise interpose. The various sorts of statements which it thus serves to exempt from the Hearsay rule are elsewhere summarized (*post*, §§ 1777-1789); but it may here be noted that *any statement* of the opponent, *made at the time of certain conduct* of his which has been adduced as equivalent to an admission, may be offered in evidence so far as it presents the true complexion of his conduct and takes from it the quality of an admission.³

2. What Statements are Admissions

§ 1060. **Implied Admissions; Sundry Instances.** Whether from a certain express utterance some further statement is to be implied as necessarily included, or whether in certain conduct the utterance of a certain statement may be implied, is so much a question of the circumstances of each particular instance as hardly to become the legitimate subject of precedents. There are rulings recorded, but they depend upon no common principle.¹

§ 1061. **Hypothetical Admissions; (1) Offer to Compromise or Settle a Claim; General Principle.** Whether an *offer to compromise* a claim, or to settle it by a partial or complete payment, amounts to an admission of the truth of the facts on which the claim is based and is therefore receivable in evidence, is a question which has given rise to prolonged discussion and to varied but often unsatisfactory attempts at explanation. The solution is a simple one in its principle, though elusive and indefinite in its application; it is merely this, that a concession which is hypothetical only can never be

¹ 1846, *Yarborough v. Moss*, 9 Ala. 382, 387 (claim of interpleader to slaves attached by the defendant as creditor of T.; claimant had delivered the slaves to the sheriff when attached, and was allowed to prove what he then said: "If the plaintiff insists on this delivery for any purpose as evidence [by admissions], he is bound to take it with all the explanatory declarations and circumstances, as they constitute a part of the transaction itself. . . . If the entire declaration was received, it might appear that the claim of title would be perfectly consistent with the delivery"); 1860, *Yates v. Shaw*, 24 Ill. 308 (boundary dispute, the planting of a hedge by defendant on the line claimed by plaintiff, having been received as an admission, defendant's declarations of the line's incorrectness, while planting, received to explain away that inference).

² 1818, *Dickinson v. Coward*, 1 B. & Ald. 677, 679 (assumpsit by assignee in bankruptcy; defendant's attendance to make claim and pay balance, at a meeting of the bankruptcy commissioners, held sufficient; L. C. J. Ellenborough "I take it to be quite clear that any recognition of a person standing in a given relation to others is *prima facie* evidence, against the person making that recognition, that that relation exists"); 1833, *Storr v. Scott*, 6 C. & P. 241 (charging A, held receivable as an admission that credit was given to A, not to B); 1898, *Turrentine v. Grigby*, 118 Ala. 380, 23 So. 666 (an unsigned note,

to show indebtedness, admitted); 1889, *White v. Merrill*, 82 Cal. 14, 17, 22 Pac. 1129 (admission by defendant that a verdict against him at a former trial was just, received); 1869, *Byerson v. Abington*, 102 Mass. 525, 526, . . . plaintiff's statements, after a prior trial of an action for the same personal injury, when warned by a friend for walking off so fast, that "It was all over now" and that "he knew how to play it on the judge," held admissible); 1898, *Bertha Mineral Co. v. Morrill*, 171 Mass. 107, 50 N. E. 534 (direction on goods sent, together with bill, etc., received as an admission as to whom credit was given); 1899, *Manning v. Lowell*, 178 Id. 100, 53 N. E. 160 (value of land taken by eminent domain; owner's prior valuation given to assessor, admitted; price accepted by owner at attempted sale by him, admitted); 1897, *Banking House v. Darr*, 139 Mo. 660, 41 S. W. 227 (oath to a tax-list received as an admission; compare the cases of assessors' books, cited *post*, § 1640); 1852, *Neailey v. Greenough*, 25 N. H. 325, 331 (a statement, when served with a writ, that he was "surprised this claim had not been paid" and had "meant to have sent on the money to pay it" is an admission of every fact essential to the claim). See also the citations, *post*, § 1071; and *ante*, §§ 1040-1042, for analogous instances.

For admissions by using or approving a witness' testimony or deposition, see *post*, § 1075.

treated as an assertion representing the party's actual belief, and therefore cannot be an admission; and, conversely, an unconditional assertion is receivable, without any regard to the circumstances which accompany it. But, before considering the bearing of this solution, it is necessary to dispose of some inadequate theories that have been judicially given some prominence:

(a) It has in Massachusetts been formally propounded, and has elsewhere sometimes been suggested, that there is a *privilege* protecting as confidential all overtures of settlement made to the opposing party, — and this upon a principle analogous to that of the privileges for confidential communications (*post*, §§ 2885–2396):

1845, *Dewey, J.*, in *Dickinson v. Dickinson*, 9 Metc. 471, 474: "The rules of evidence exclude, to some extent, and under certain circumstances, the declarations and admissions of a party. Thus, the more fully to protect the rights of parties litigating, all their communications with counsel are held to be privileged. Evidence of this character has always been excluded, and the rule has been so broad as to exclude all admissions thus made. Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money, or other valuable consideration, with a view to a compromise of the matter in controversy. It must be permitted to men endeavor to buy their peace, without being prejudiced by a rejection of their offers. Hence, evidence of such offers or proposals is irrelevant, and they are not to be taken as admissions of the legal liability of the party making them. But here a distinction exists between the cases of an offer to pay money to settle a controversy, and an admission of particular facts, connected with the case, made by a party pending a negotiation for a compromise. The more convenient rule might have been that which is applicable to communications between client and attorney, excluding, as testimony, everything communicated in this relation; which rule, if applied here, would exclude every admission made during the interview which was had for such compromise. To some extent this rule was attempted to be introduced, excluding all admissions of the parties, even admissions of particular facts, where it appeared that they were expressly stated at the time 'to be made without prejudice.' But the exception was soon introduced, that the evidence was competent where it was the admission of a collateral fact."

This theory is consistent enough with the general theory of privileged communications (*post*, § 2285), namely, that expeditious and extrajudicial settlements are to be encouraged and that privacy of communication is necessary in order to encourage them. In policy, however, it may be doubted whether the recognition of such a privilege is in fact necessary in order to foster private settlement, or whether in fact the good that might be done by the diminution of litigation under such a privilege would be greater than the justice that is effected by the free use of the evidence made available through denying the privilege. At any rate, whatever the arguments of policy, the further and vital objection remains that the supposed privilege does not fit the rule of law as it is everywhere accepted and applied. Nowhere but in Massachusetts has this theory been definitely advocated; and even by its own expounders it is conceded not to explain the actual rule of law.

(b) Another theory, resting apparently on some notion of *contract*, is that an express reservation of secrecy (by the words "*without prejudice*") assimi-

lates the offer to a contractual offer, so that if the terms are not accepted the offer is null and can have no evidential effect:

1871, *Mellish, L. J.*, in *Re River Steamer Co.*, L. R. 6 Ch. App. 822, 832: "If a man says his letter is without prejudice, that is tantamount to saying, 'I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all.' It appears to me, not on the ground of bad faith, but on the construction of the document, that when a man says in his letter it is to be without prejudice, he cannot be held to have entered into any contract by it if the offer contained in it is not accepted."

1889, *Lindley, L. J.*, in *Walker v. Wilsher*, L. R. 23 Q. B. Div. 335: "What is the meaning of the words 'without prejudice'? I think they mean, without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."

It is hardly necessary to point out that the analogies of a contract-right can have no bearing on the probative use of such statements; since, conceding that an unaccepted offer amounts to nothing contractually, there may none the less remain for it an evidential value, over and above its defeated contractual purpose. Moreover, the practical objection to this theory is that, like the foregoing one, it does not adequately explain the rule of law; for, by general consensus, offers of compromise which do not contain the express words "without prejudice," may still be inadmissible in evidence, and conversely. Nevertheless, a professional tradition, especially among attorneys and solicitors in England, long enshrined the rule of thumb that a letter headed by the shibboleth "without prejudice" was safe from subsequent use as an admission, and that this phrase was necessary to protect it;¹ and this tradition has helped to cloud the discussion and to confuse the long line of rulings.

(c) The true reason for excluding an offer of compromise is that it *does not* ordinarily proceed from and *imply a belief that the adversary's claim is well founded*, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered; in short, the offer implies merely a desire for peace, not a concession of wrong done:

1823, *Bayley, J.*, in *Thomson v. Austen*, 2 Dowl. & Ry. 358, 361: "The essence of an offer to compromise is that the party making that offer is willing to submit to a sacrifice and to make a concession."

1839, *L. C. Cottenham*, in *Tennant v. Hamilton*, 5 Cl. & F. 133: "Money paid upon a complaint made, paid merely to purchase peace, is no proof that the demand is well

¹ The following amusing anecdote illustrates the inveteracy of this notion: 1840, *Law and Lawyers*, II, 305: "Mr. Chitty relates an anecdote of a young attorney who had been carrying on a correspondence with a young lady, in which he had always, as he thought, expressed himself with the greatest caution. Finding, however, that he did not perform what he had led the lady to believe that he would,

she brought an action for breach of promise of marriage against him. When his letters were produced on the trial, it appeared that he had always concluded — 'this *without prejudice*, from yours faithfully, C. D.' The judge facetiously left it to the jury to determine whether these concluding words, being from an attorney, did not mean that he did not intend any prejudice to the lady, and the jury found accordingly."

founded. . . . [If the defendant had so paid money here], that would be no evidence of the damage : it is money paid to buy peace and to stop a complaint. It is very often a wise thing, however unfounded a complaint may be, for parties to pay a sum of money in order to quiet the party making the complaint."

1853, *Thomas, J.*, in *Harrington v. Lincoln*, 4 Gray 563, 567 : "Peace is of such worth that a reasonable man may well be presumed to seek after it even at the cost of his strict right and by an abatement from his just claim. The offer which a man makes to purchase it is to be taken, not as his judgment of what he should receive at the end of litigation, but what he is willing to receive and avoid it. . . . If the plaintiff had made the offer of compromise in open town-meeting, proof of it would have been excluded."

By this theory, the offer is excluded because, as a matter of interpretation and inference, it does not signify an admission at all. There is no concession of claim to be found in it, expressly or by implication. It would follow, then, conversely, that if a plain concession is in fact made, it is receivable, even though it forms part of an offer to compromise; and this much has long been well understood:

1828, *Richardson, C. J.*, in *Sanborn v. Neilson*, 4 N. H. 501, 509 : "The reason why a mere offer of money or other thing by way of compromise is not to be evidence against him who makes it, is very plain and easily understood, — such an offer neither admits nor ascertains any debt, and is no more than saying that so much will be given to be rid of the controversy. But where the offer has been grounded upon an express admission of a fact, and that fact afterwards comes to be controverted between them, there seems to be no ground on which the evidence of the offer can be excluded. Thus if A sue B for \$100, and B offer to pay \$20, this offer shall not be received as evidence, because it may have been made mere for the sake of peace where nothing was due. But in such a case, if B admit expressly that \$20 are due, and offer to pay that sum, then it seems to us that both the admission and the offer are evidence. We are, therefore, of opinion, that the offer made by the defendant in this case was, under the circumstances, admissible in evidence."

So, then, it is apparent that the *occasion of the utterance* is not decisive; that is, it may or may not have been accompanied by a reservation or an injunction of secrecy; and it may or may not have occurred during negotiations for a settlement or a compromise. What is important is the *form* of the statement, whether it is *hypothetical* or *absolute*. If, making all implications from the context and the circumstances, the statement assumes the adversary's claim to be well grounded for the mere purpose of discussing a settlement which will avoid litigation, then nothing is actually admitted in any true sense; and therefore the party making it is in none the worse condition for having omitted the phrase "without prejudice," nor for having offered the full amount of the claim without any pretence of compromise. If on the other hand, the statement is absolute, so far as appears, it is not saved by any cabalistic phrase nor by its occurrence in the course of compromise-negotiations. This solution of the question is amply elucidated in the following passages:

1822, *Hosmer, C. J.*, in *Hartford Bridge Co. v. Granger*, 4 Conn. 142, 148 : "The law on this subject has often been misconceived; and it is time that it should be firmly established. It is never the intendment of the law to shut out the truth; but to repel any

inference which may arise from a proposition made, not with design to admit the existence of a fact, but merely to buy one's peace. If an admission, however, is made, *because it is a fact*, the evidence to prove it is competent, whatever motive may have prompted to the declaration. In illustration of this remark, it may be observed, that if A offer to B ten pounds, in satisfaction of his claim of an hundred pounds, merely to prevent a suit, or purchase tranquillity, this implies no admission that any sum is due; and therefore, testimony to prove the fact must be rejected, because it evinces nothing concerning the merits of the controversy. But if A admit a particular item in an account, or any other fact, meaning to make the admission as being true, this is good evidence, although the object of the conversation was to compromise an existing controversy. The question to be considered, is, what was the view and intention of the party in making the admission; whether it was to concede a fact hypothetically, in order to effect a settlement, or to declare a fact really to exist. There is no point of honor guarded by the Court, nor exclusion of evidence lest it should deter from a free conversation. But testimony of admissions or declarations taking facts for granted, not because they are true, but because good policy constrains the temporary yielding of them to effectuate a greater good, is not admissible; truth being the object of evidence."

1889, *Doe, C. J.*, in *Colburn v. Graton*, 66 N. H. 151, 156, 28 Atl. 95: "The preliminary question always is, not merely whether an admission of a fact was made during a settlement or negotiation, but whether a statement or act was intended to be an admission. It is a question, not of time or circumstances, but of intention. On that question the time and circumstances may be material evidence. . . . An offer of payment, whether accepted or rejected, is evidence, when the party making it understood it to be and made it as an admission of his liability. It is not evidence when he made it for the purpose of averting litigation, not intending to admit his liability. . . . An entire claim may be paid to avoid a law suit, the payer intending to admit nothing but his desire for peace. . . . 'Compromise' generally signifies a settlement in which there is a concession on both sides. Used in that sense, the word does not describe all cases in which peace is bought without an admission of liability, and is not an adequate statement of the law."

1901, *Schmucker, J.*, in *Pentz v. Ins. Co.*, 92 Md. 444, 48 Atl. 139: "He was then asked what offer of settlement he had made, and the Court, upon the objection of the defendant, excluded the question. The word 'settlement,' as ordinarily used, may mean a compromise for peace's sake of a claim the validity of which is denied, or it may signify the payment of a claim to the extent to which it is conceded to be due. If the witness in the present case, by the use of the expression 'settlement,' meant it in the strict sense of a claim under the policy, although no loss was admitted, evidence of the compromise was not admissible. If, on the contrary, he meant, as his previous answers seem to indicate that he did, that there was a conceded loss under the policy, which he wished to settle, the dispute being merely as to the amount of the loss, the evidence was admissible. . . . as sufficient evidence to go to the Court sitting as a jury, from which he might infer that the refusal to pay a greater amount of loss was upon other grounds than failure to furnish proof of loss, and that, therefore, there had been a waiver by the defendant of such proof. If the answer of the witness had been that the defendant had offered to settle the loss under the policy by payment of an amount which was admitted [by him] to be due, it would have been admissible."

(d) Certain discriminations must of course be made: (1) When the question of costs or of laches arises, and depends upon whether an offer of payment before trial had been made, the fact of such an offer may be evidenced, as made relevant by the rule of costs.³ (2) The payment of money into court

³ 1862, *Williams v. Thomas*, 2 Dr. & Sm. 1849, *Collier v. Nokes*, 2 C. & K. 1012; 1852, 29, 37 (costs); 1889, *Walker v. Wilsher*, L. R. Romilly, M. R., in *Jones v. Foxall*, 15 Beav. 23 Q. B. D. 335 (costs; see citation post, § 1062); 388, 397 (to "account for the lapse of time").

before trial is a procedure sometimes employed to narrow the issues in a cause and to affect the ultimate burden of costs. This procedure has no concern with the present matter of evidence.³ (3) An offer of compromise from an *unauthorized person* cannot amount to an admission of the party himself.⁴ Supposing it to be an admission in terms, then the question whether it can be used depends on whether the person making it is (upon the principles of §§ 1069-1087, *post*) one whose admissions may be used to affect the party. (4) When an offer has been *accepted*, it may, of course, be proved as the basis of a contract sued upon.⁵

§ 1062. *Same; State of the Law in various Jurisdictions.* The correct solution of theory (noted in § 1061 (c)) seems to be fairly well accepted to-day, although the precedents within some jurisdictions, and particularly the long line of precedents in England, are difficult to reconcile.¹ The only

³ See *Brown v. People*, 3 Colo. 115 (1876). But so far as the payment into court is a *conditional admission* in the nature of an offer to settle, it should not be made known to the jury; and such an express provision sometimes occurs in statutes: Eng. Rules of Court 1883, Ord. 22, R. 22; Rule 9 of Nov. 1893; N. Sc. Rules of Court 1900, Ord. 22, R. 17.

⁴ 1877, *State v. Jaeger*, 66 Mo. 173 (offer from defendant's wife).

⁵ 1884, *Vardon v. Vardon*, 6 Ont. 719, 723; 1884, *Securities Co. v. Richardson*, 9 id. 182.

¹ The rulings are as follows (and compare the cases cited under self-contradiction, *ante*, § 1040, and conduct evidencing consciousness of guilt, *ante*, §§ 282, 284). *England*: 1718, *Turton v. Benson*, 1 P. Wms. 496, 497 (bond; a ruling that "Mr. Turton's offers made and not accepted signified nothing; that Lord Cowper had often said a man should not be bound by an offer made during a treaty which afterwards broke off, or upon terms that were not accepted," was approved by L. C. Parker); 1716, *Harman v. Vanhatten*, 2 Vern. 717 (bond; an offer to surrender it, on the opponent's making up certain money, disregarded by L. C. Harcourt; "it was but *nudum pactum*, a voluntary offer, and on condition that the money was then paid, and it was not complied with"); 1750, *Baker v. Paine*, 1 Ves. Sr. 456, 459 (L. C. Hardwicke: "The offers by defendant are material; though, generally speaking, offers by the parties by way of compromise are not to have much weight in the merits of the case, nor to be made use of"); 1790, *Slack v. Buchanan*, Peake 5 (L. C. J. Kenyon said that he had hitherto not received admissions made under a reference, but acknowledged that he had gone too far; in future, he would "reject none but such as are merely concessions for the purpose of making peace and getting rid of a suit"); 1794, *Walbridge v. Kennison*, 1 Esp. 143 (during a treaty for settlement, the defendant, being asked as to his handwriting on a bill, "admitted that it was his"; L. C. J. Kenyon received this, since, though "any admission . . . obtained while a treaty was depending, on the faith of it," was inadmissible, yet the identity of handwriting "stood

on a different foundation; it was matter no way connected with the merits of the cause and which was capable of being easily proved by other means"); 1800, *Gregory v. Howard*, 3 Esp. 113 ("facts admitted before arbitrators" can be proved by them); 1809, *Cumming v. French*, 2 Camp. 106, note (on demand for settlement, the drawer of a bill offered to give another bill; held, that this was a conditional offer of compromise, and not an acknowledgment of liability); 1823, *Thomson v. Ansten*, 2 Dowl. & R. 358 (the plaintiff said to the witness "he was so anxious to get out of the law that he would refer the question in dispute to the witness as arbitrator," and asked him to tell this to the defendant, to get him to compromise, at same time admitting the receipt of money on account, held on the facts "not to have originated in any desire to compromise," and therefore to be admissible); 1827, *Doe v. Evans*, 3 C. & P. 219 (abstract of title used in an arbitration, held to be not virtually a part of a compromise, but an ordinary admission); 1828, *Lofts v. Hudson*, 2 Man. & Ry. 481 (agreement to pay a litigated claim and two-thirds of the costs, held by a majority, to be a compromise, and at any rate not such an admission of liability as to allow recovery of the one-third costs in a suit on the original claim); 1830, *Wayman v. Hilliard*, 7 Bing. 101 (on a demand of £40, defendant "offered to give £17"; Bosanquet, J.: "There has been no acknowledgment of defendant here; the defendant merely makes an offer to purchase peace"; and so it was held not to support an action upon an account stated); 1830, *Cory v. Bretton*, 4 C. & P. 462 (letter declaring at the opening that it was "not to be used in prejudice of my rights or in any future arrangement," excluded; Tindal, C. J.: "It is clearly a conditional statement"); 1830, *Wallace v. Small*, 1 M. & M. 446 (defendant's admission of the contract, while refusing to raise his offer of payment, received, because "not said to be without prejudice," and thus unrestricted "as to confidence"); 1830, *Watts v. Lawson*, ib. 447, note (similar); 1835, *Thomas v. Morgan*, 2 C. M. & R. 496, Exch. (on demand for compensation for injury done by the defendant's

phrasing that calls for special notice is that introduced in certain earlier New York and Massachusetts cases, and made popular by Professor Green-

dogs, he said: "If they had done it he would settle for it"; held, that this was "a fact to go to the jury, yet it ought to have little or no weight at all with them, for the offer may have been from motives of charity, without any admission of liability at all"; 1838, *Healey v. Thatcher*, 8 C. & F. 388 (Gurney, B., excluded a letter beginning "without prejudice" and offering to accept satisfaction); 1842, *Paddock v. Forrester*, 3 Man. & Gr. 903, 919 (trespass; letter of plaintiff, demanding compensation, but written as an "offer without prejudice, in case it is not agreed to," held inadmissible; and the answer thereto excluded also, though it did not contain such a reservation; *Tindal, C. J.*: "It is of great importance that parties should be left unfettered by correspondence which has been entered into upon the understanding that it is to be without prejudice"); 1846, *Jardine v. Sheridan*, 2 C. & K. 24 (statement made to the opponent's attorney, "with the object of obtaining a compromise," excluded); 1852, *Hoghton v. Hoghton*, 15 Beav. 278, 315, 321 (letters written, after dispute begun, with a view to compromise and "without prejudice," excluded; *Romilly, M. R.*: "Such communications made with a view to an amicable arrangement ought to be held very sacred"; even if the correspondence contained "any admission affecting the plaintiff's rights, I should disregard such admissions made solely with a view to compromise"; 1852, *Jones v. Foxall*, ib. 388, 396 (*Romilly, M. R.*, excluded "offers made without prejudice," as being merely an attempt "to convert offers of compromise into admissions"); 1862, *Williams v. Thomas*, 2 Dr. & Sm. 29, 37 (defendant's offer "without prejudice" to compromise, made before bill filed, held available by defendant to affect the costs; but "it could not be used against him"); 1871, *Re River Steamer Co.*, L. R. 6 Ch. App. 822, 831 (offer made "without prejudice," said *obiter* to be insufficient to revive a debt barred by statute; see quotation, *supra*); 1872, *Richards v. Gellstly*, L. R. 7 C. P. 127, 131 (false representations as to a ship's equipment; complaints of the plaintiff's fellow-passengers, followed by settlement by the defendant, excluded); 1886, *Walker v. Wilsher*, L. R. 23 Q. B. Div. 335 (letters written "without prejudice" during proposals for settlement, excluded, on an issue of probable cause affecting costs; *Williams v. Thomas* doubted); 1893, *Re Daintrey*, 2 Q. B. 116 (letter by debtor to creditor offering to compound the debt and declaring himself unable to pay and about to suspend if no composition could be made, headed "without prejudice"; held admissible, not being an offer of terms of settlement in a dispute or negotiation); *N. Br.*: Cons. St. 1877, c. 37, § 131 (no unaccepted offer to suffer judgment "shall be evidence against the party, making the same," in that or any other action); 1890, *Stewart v. Muirhead*, 29 N. Br. 273, 279 (an offer of a specific sum in settlement is admissible, unless stated to be confidential or without prejudice); *Ont.*: 1856, *Burns v. Kerr*, 13 U. C. Q. B. 468 (letters stated to be "without prejudice," not admissible; with some hesitation); 1869, *Clark v. G. T. R. Co.*, 29 id. 186, 147 (defendant's letter proposing without prejudice a submission of the plaintiff's injuries to experts, and agreeing to abide their decision, and the answer accepting the offer, received on the facts, to rebut the imputation of bad faith, on behalf of the plaintiff); 1883, *York Co. v. Toronto G. R. & C. Co.*, 3 Ont. 584, 593 (offers made without prejudice, held inadmissible); 1886, *Pirie v. Wyld*, 11 id. 422, 427 ("all communications made under the words 'without prejudice' are inadmissible"); 1887, *Hartney v. Ina Co.*, 13 id. 581 (letter offering a settlement, admitted, the reservation "without prejudice" here applying only to the waiver of conditions of the policy; but here the objection was not properly taken); *Alabama*: 1896, *Feilman v. Assur. Co.*, 108 Ala. 180, 19 So. 540 (offer of compromise, excluded); *Alaska*: C. C. P. 1900, §§ 480, 683 (like Or. Annot. C. 1892, §§ 520, 856); *California*: C. C. P. 1872, § 997 (offer to allow judgment to be taken for a specified sum; "if the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial"); C. C. P. § 2078 ("an offer of compromise is not an admission that anything is due"); 1896, *Rose v. Rose*, 112 Cal. 341, 44 Pac. 658 (offer by a husband to his wife to divide the property, describing it as community property; that statement admitted, not being affected by the compromise-concessions); *Colorado*: St. 1893, p. 303, § 1 (written offer to allow judgment in justice's court, if not accepted, inadmissible); C. C. P. 1896, § 281 (unaccepted offer to allow judgment, not admissible); 1890, *Patrick v. Crowe*, 15 Colo. 543, 554, 25 Pac. 985 (propositions of compromise are inadmissible; otherwise of the admission "of any independent fact" in the course of negotiations); 1894, *Kutcher v. Love*, 19 id. 542, 544, 36 Pac. 152 (an admission made without reservation during compromise negotiations is receivable); 1899, *Chicago B. & Q. R. Co. v. Roberts*, 26 id. 329, 57 Pac. 1076 (offer of compromise, inadmissible); 1899, *Thomas v. Carey*, ib. 485, 58 Pac. 1093 ("unaccepted offer of compromise," inadmissible); *Connecticut*: 1822, *Hartford Bridge Co. v. Granger*, 4 Conn. 142, 148 (an admission, intended distinctly as such, is receivable though made in the course of an attempt to compromise; see quotation *supra*; *Peters, J.*, diss.); 1824, *Fuller v. Hampton*, 5 id. 416, 418, 426 (similar); 1836, *Straushan v. East Haddam*, 11 id. 507, 512 (authority to agent to pay a certain sum on receiving a release, held not admissible); *Georgia*: 1833, *Hicks v. Thomas, Dudley* 218 (if an admission made "not with a view of avoiding a suit or to buy one's peace against a doubtful claim, but from a consciousness of the truth of the fact," it is receivable; hence the motive is important); 1853, *Molyneux v.*

leaf's treatise, in the form that a "distinct" or "independent admission of a fact" is receivable. This inadequate expression (made more misleading by

Coller, 13 Ga. 406, 414 ("the condition, tact or express, that no advantage will be taken of the admission, it being made with a view to and in furtherance of an amicable adjustment, is the test of this rule of evidence"); 1854, *Parker v. Waiden*, 16 id. 27, 30 (letter held not an offer of compromise, on the facts); 1859, *Lucas v. Parsons*, 27 id. 593, 629, 631 (reply of a party when rejecting a compromise, admitted); *Coffe* 1895, § 5194 ("admissions or propositions made with a view to compromise," are inadmissible); 1869, *Frain v. State*, 40 Ga. 529, 534 (under the Code; an offer to pay, if the case was settled, excluded); 1873, *McElrath v. Haley*, 48 id. 641, 647 (the Code "enlarges the common-law rule, which did not exclude the admission of distinct facts"); 1878, *Tufts v. Du Bigon*, 61 id. 322, 326 (offer of compromise, excluded); 1879, *Seales v. Shackelford*, 64 id. 170, 172 ("Independent statements of truth," even "though made while the parties were trying to settle," are admissible); 1893, *Keaton v. Mayo*, 71 id. 649, 652 ("any fact admitted as true without such reference to compromise would be admissible," but not facts "admitted as an inducement to reach such settlement or compromise"); 1894, *Sasser v. Sasser*, 73 id. 275, 283 (defendant's refusal to settle, admitted); 1854, *Mayor v. Minor*, ib. 484, 489 (offer of money to prevent rebuilding of a dam alleged to be a nuisance, excluded); 1885, *Hatcher v. Bowen*, 74 id. 840 ("offer to pay a debt with a mule, not made pending any negotiations to compromise," received); 1893, *Akers v. Kirke*, 91 id. 590. S. E. 366 (admissions after an offer of settlement but independent of it, received); 1891, *Emery v. Atlanta R. E. Exchange*, 88 id. 321, 331, 14 S. E. 556 ("It is not only propositions [to settle], but also 'admissions' made with a view to compromise, which are not proper evidence"); 1900, *Teasley v. Bralley*, 110 id. 497, 35 S. E. 782 (an offer of settlement, conceding a demand upon certain terms, and not as a part of a compromise, admitted); *Idaho*: Rev. St. 1887, § 4870 (unaccepted offer to allow judgment, not admissible); 1883, *Sebree v. Smith*, 2 Ida. 329, 16 Pac. 915 (unaccepted offer of settlement, held inadmissible); *Illinois*: 1874, *Barker v. Bushnell*, 75 Ill. 220, 222 (offer to settle for less than the value in controversy, excluded); *Indiana*: Rev. St. 1897, §§ 527, 523 (unaccepted offer to allow or to confess judgment, according to statute, not to be used in evidence); 1844, *Wilt v. Bird*, 7 Blackf. 253 (an admission "constituting in itself the point yielded for the sake of peace" is to be excluded, but not "an independent fact admitted to be true"); 1857, *Cates v. Kulllogg*, 9 Ind. 508 (admission made during a settlement may be receivable, unless made "not because the fact is so, but expressly or clearly for the sake and as a part of the compromise"); 1867, *Pattison v. Norris*, 29 id. 165 (obscure); 1878, *Board v. Verberg*, 63 id. 107, 111 (offer to release for a certain sum, ex-

cluded); 1878, *Dailey v. Coons*, 64 id. 545, 547 (offer to pay half the claim, excluded); 1888, *Binford v. Young*, 115 id. 174, 176, 16 N. E. 142 (*Wilt v. Bird*, approved); 1888, *Louisville N. A. & C. R. Co. v. Wright*, ib. 378, 390, 16 N. E. 145, 17 N. E. 584 (same); *Iowa*: Code 1897, §§ 3817-3819 (unaccepted offer to confess judgment, not to be considered); 1890, *State v. Lavin*, 80 Ia. 555, 558, 46 N. W. 553 (an offer by way of compromise is inadmissible; but an "admission of particular facts, though made during a treaty of compromise," is receivable); 1896, *Kassing v. Walter*, — id. —, 65 N. W. 832 (offer of compromise, inadmissible); 1897, *Hondeck v. Ins. Co.*, 102 id. 303, 71 N. W. 354 (similar); 1903, *Rudd v. Dewey*, — id. —, 96 N. W. 973 (offer of compromise, not containing an admission of fact, excluded); *Kansas*: 1879, *Central B. U. P. R. Co. v. Butman*, 22 Kan. 639, 642 (admissions contained in a letter offering to compromise, received); *Kentucky*: 1827, *Evava v. Smith*, 5 T. B. Monr. 363 ("offers of anns, prices, or payments, made during an attempt to compromise," are not receivable; otherwise, of an acknowledgment of facts made pending a negotiation for settlement); 1900, *Tyler v. Hamilton*, 108 Ky. 120, 55 S. W. 920 (statute applied); 1900, *Kelley v. Combs*, — id. —, 57 S. W. 476 (statute applied); 1902, *Illinois C. R. Co. v. Manion*, — id. —, 67 S. W. 40 (independent admission, made in an offer of compromise, admissible); C. C. P. 1895, § 640 (offer to confess judgment for a money claim "shall not be deemed to be an admission of the cause of action or amount to which the plaintiff is entitled, nor be given in evidence upon the trial"); *Louisiana*: 1812, *Delogny v. Rentoul*, 2 Mart. La. 175 ("Proposals made while a compromise is on the carpet do not bind; but conversations in which a fact is disclosed may be admitted"); 1841, *Agricultural Bank v. Bark Jane*, 19 ia. 1, 11 ("I am willing either to sell the ship at a low price, or charter her, so as to pay what I may be indebted to the bank," admitted); 1896, *State v. Wright*, 43 La. An. 1525, 21 So. 160 (offers to compromise are "generally" excluded); *Maine*: 1852, *Cole v. Cole*, 33 Me. 542, 545 (conversation had for "ascertaining the claims really existing," and not "to purchase peace," received); *Maryland*: 1859, *Reynolds v. Manning*, 15 Md. 510, 526 (an offer to compromise is inadmissible, even though not expressly said to be confidential or without prejudice); 1897, *Caledonian F. I. Co. v. Traub*, 86 id. 86, 96, 37 Atl. 782 (offer to settle, "not by way of compromise, but in settlement of what was conceded" to be due, received); 1901, *Peutz v. Ina. Co.*, 92 id. 444, 48 Atl. 139 (mere authority to agent to compromise, not followed by any act of offering, excluded; see quotation *supra*); *Massachusetts*: 1824, *Marsh v. Gold*, 2 Pick. 284, 290 ("when parties are treating about a compromise, admissions of particular facts" are receivable); 1826, *Gerrish v. Sweetser*, 4 id. 374, 377 (same prin-

its occasional rendering as "the admission of any independent fact") is merely an attempt to phrase one aspect of the correct theory already noted

clude applied; the exclusion "seems confined to the mere offer of compromise"; 1845, Dickinson v. Dickinson, 9 Metc. 471, 474 ("the admission by a party of any independent fact is admissible, though made under a treaty of compromise"; here the parties were discussing a settlement, the plaintiff said, "I demanded the colt, you recollect," and the defendant answered "Yes," and this was received); 1851, Snow v. Batchelder, 8 Cush. 513, 516 (during a conversation, had in order to offer a settlement, defendant "said he owed the note"; held admissible); 1855, Harrington v. Lincoln, 4 Gray 563, 567 (rule applied); Emerson v. Boynton, 11 id. 395 (rule applied); 1875, Durgin v. Sumers, 117 Mass. 55, 61 (rule applied); the offer of compromise admitted "only so far as it contained independent statements of facts"; 1878, Draper v. Hatfield, 124 id. 53, 56 (rule applied); Pub. St. 1882, c. 167, § 76, Rev. L. 1902, c. 173, § 87 (no unaccepted tender of default and damages under §§ 65, 66, to be evidence in the same or another action); 1903, Higgins v. Shepard, 182 id. 364, 65 N. E. 803 (ordinary offer of compromise, excluded); Michigan: 1878, Campau v. Dubois, 39 Mich. 274, 279 ("offers in negotiations for compromise" are inadmissible); 1887, Manistee N. Bank v. Seymour, 64 id. 59, 70, 31 N. W. 140 ("all admissions not expressly made to make peace, and all independent facts admitted during negotiations for settlement" are receivable); 1895, Pelton v. Schmidt, 104 id. 345, 62 N. W. 552 (offers of compromise, inadmissible); 1898, Fox v. Barrett, 117 id. 162, 75 N. W. 440 (similar); 1899, Phillips v. U. S. Benef. Soc'y, 120 id. 142, 79 N. W. 1 (correspondence with a view to settlement, excluded); Minnesota: Gen. St. 1894, §§ 4976, 5405 (offer to allow judgment, if refused, not admissible); § 5406 (tender of damages, not admissible); 1900, Person v. Howe, 79 Minn. 238, 82 N. W. 480 (offer of payment, admitted on the facts); Missouri: 1863, Ferry v. Taylor, 33 Mo. 323, 333 ("an offer to pay a debt in property instead of money is in no sense an offer of compromise"); Rev. St. 1899, §§ 751, 752 (unaccepted offer to allow judgment or liquidate damages, not admissible); Montana: C. C. P. 1895, § 3414 (like Cal. C. C. P. § 2078); Nebraska: 1888, Kierstead v. Brown, 23 Nebr. 595, 612, 37 N. W. 471 (admissions in letters written in response to a proposition of compromise, held not receivable); 1890, Eldridge v. Hargreaves, 30 id. 638, 647, 46 N. W. 923 (offer to pay a smaller sum in settlement, excluded); 1891, Olson v. Peterson, 33 id. 358, 363, 50 N. W. 155 (offer of a sum in settlement of a lustrarily claim, excluded); 1896, Cullen v. Rose, 47 id. 638, 66 N. W. 639 (offers of compromise, inadmissible); 1897, Hanover F. I. Co. v. Stoddard, 52 id. 745, 73 N. W. 291 (same); 1897, Wright v. Morse, 53 id. 3, 73 N. W. 211 (same). Comp. St. 1899, § 8157 (offer to allow judgment in action for money; if not accepted, not admissible on trial); New Hampshire: 1828, Sanborn v. Neilson, 4 N. H. 501, 508 ("an admission of particular facts made during a treaty for a compromise" is receivable, as also an offer of settlement founded thereon; see quotation *supra*); 1833, Hamblett v. Hamblett, 6 id. 333, 343 (preceding case approved; an admission made by one rejecting an offer of compromise is receivable); 1845, Rideout v. Newton, 17 id. 71, 73 (Sanborn v. Neilson approved; an offer of part payment, made after advice to offer it if his signature to the note was genuine, here rejected); 1853, Downer v. Button, 26 id. 339, 345 (an offer of settlement, made because "he was too poor to pay more," excluded); 1856, Bartlett v. Hoyt, 53 id. 151, 153, 165 (whether a statement was an independent admission or an offer of compromise may be submitted to the jury as a question of fact; clearly unsound); 1862, Eastman v. Antoskeag Mfg. Co., 44 id. 143, 154 (general principle approved); 1862, Perkins v. Concord R. Co., ib. 223, 225 (same); 1870, Coffin v. Plymouth, 49 id. 173 (that the defendant had paid the claim of another person injured in the same accident, admitted, by a majority); 1872, Plummer v. Currier, 52 id. 287, 296 (prior cases approved); 1872, Grimes v. Krene, 52 id. 330, 334 (highway injury; defendant's payment in satisfaction to another person injured in the same occurrence, received as an admission, no aspect of a compromise appearing; "it is the simple case of a claim made and a yielding to it"); 1878, Gray v. Kollinsford, 58 id. 253 (an unqualified offer to pay a claim for damages is receivable; preceding cases approved); 1889, Colburn v. Groton, 66 id. 151, 156, 28 Atl. 95 (whether an offer or a payment was intended to be an admission of a liability or an effort to avoid controversy is a question of fact, depending on intent, to be determined by the trial judge; see quotation *supra*); 1896, Wason v. Burnham, 68 id. 553, 44 Atl. 698 (conversation in course of making a settlement of claims, admitted); 1899, Jenness v. Jones, 68 id. 475, 44 Atl. 607 (offer of compromise, inadmissible, but "any independent admission, though made in the course of negotiations for a compromise," receivable); 1899, Greenfield v. Kennett, 69 id. 419, 45 Atl. 233 (offers of compromise are inadmissible, and the finding of fact is not reviewable); 1902, Smith v. Morrill, 71 id. 409, 52 Atl. 928 (Colburn v. Groton approved; whether a statement is an admission or a mere offer of compromise depends upon the intent); New Jersey: 1899, Richardson v. International Pottery Co., 63 N. J. L. 248, 43 Atl. 692 (offer of compromise held admissible, unless expressly stated to be without prejudice or unless due to opponent's suggestion of compromise; no precedents cited); New York: 1816, Mount v. Bogert, Anthon 259 ("an admission of a fact independent of the compromise" is receivable); 1816, Tomb v. Sherwood, 13 John. 288 (offer to settle for a smaller sum, excluded as "a mere peace-offering"); 1825, Murray v. Coeter, 4 Cow. 617,

(in § 1061 (c)), *i. e.* to declare that unqualified statements conceding the

635, per Colden, Sen. (like *Sanborn v. Nelson*, N. H., quoted *supra*, § 1061); 1831, *Hyde v. Stone*, 7 Wend. 354, 357 (offer to pay, if a release was given, held not an offer of compromise, on the facts); 1837, *Mead v. Degolyer*, 16 Id. 638, 644, per Cowen, J. (an admission of a fact, made in the course of a treaty of compromise is receivable); 1846, *Marvin v. Richmond*, 3 Denio 58 (admission made during a negotiation for settlement, received; repudiating *Williams v. Thorp*, 8 Cow. 201); 1864, *Bartlett v. Tarbox*, 1 Abb. App. Cas. 120, 122 (admission of a distinct fact during a negotiation for settlement, held receivable; otherwise of an offer for the purpose of effecting a settlement); 1886, *White v. Old Dominion S. S. Co.*, 102 N. Y. 661, 6 N. E. 289 ("The law excludes such admissions as appear to have been made tentatively or hypothetically, but admits those only which concede the existence of a fact"; here an admission during a negotiation for compromise was held to be in effect hypothetical only); 1888, *Brice v. Bauer*, 108 Id. 428, 433, 15 N. E. 695 (on the facts, "even the offer of a sum by way of compromise is held to be admissible, unless stated to be confidential or made without prejudice"; preceding cases not cited); 1895, *Tennant v. Dudley*, 144 Id. 504, 39 N. E. 644 (offer of compromise, held inadmissible); *North Carolina*: 1846, *State v. Jefferson*, 6 Ired. 307 (rape; the husband's offer of compromise in the wife's presence, excluded); *North Dakota*: Rev. C. 1895, §§ 5639-5642 (unaccepted offer to allow judgment or assess damages, inadmissible); *Ohio*: 1875, *Sherer v. Piper*, 26 Oh. St. 476 (the mere fact of an offer of compromise, as well as its terms, held inadmissible); Rev. St. 1898, § 5142 (offer to confess judgment, made under statute, not admissible); *Oklahoma*: Stats. 1893, § 4422 (offer to confess judgment in money-action, not to be "deemed an admission of the cause of action or the amount," "nor to be given in evidence upon the trial"); *Oregon*: C. C. P. 1892, § 856 ("An offer of a compromise is not an admission that anything is due; but admissions of particular facts, made in negotiation for compromise, may be proved, unless otherwise specially agreed at the time"); § 520 (substantially like Cal. C. P. § 987); *Pennsylvania*: 1846, *Sailor v. Hertzog*, 2 Pa. St. 182, 183 (issue of title by adverse possession; occupant's offer to hold under the claimant, held, on the facts, to be a "direct confession of a fact," and not "an offer to buy peace without regard to the title"); *Rhode Island*: 1874, *Daniele v. Woonsocket*, 11 R. I. 4 (land-damages; plaintiff's offer of settlement, excluded as "privileged"); 1901, *Draper v. Horton*, 22 R. I. 592, 48 Atl. 945 (admission of amount due, with offer to pay it without costs, receivable); *South Carolina*: C. C. P. 1893, § 386 (offer to allow judgment, according to statute, not to be receivable if unaccepted); 1899, *Robertson v. Blair*, 56 S. C. 96, 34 S. E. 11 (statements "made in the course of negotiations looking to a compromise," inadmissible); *South Dakota*:

Stats. 1899, §§ 6472-6475 (like N. D. Rev. C. §§ 5639-5642); *Tennessee*: 1872, *Stroug v. Stewart*, 9 Heisk. 137, 142 (demand of settlement by payment of a certain sum in compromise within four days, with the alternative of forfeiting all advantages under the contract, excluded); *United States*: 1876, *Home Ins. Co. v. Baltimore W. Co.*, 93 U. S. 527 ("offer of compromise," held inadmissible); 1879, *West v. Smith*, 101 Id. 263, 273 (the rule "is not that an admission made during or in consequence of an effort to compromise is inadmissible, but that an offer to do something by way of compromise, as to pay sums of money, allow certain prices, deliver certain property, or make certain deductions, and the like shall be excluded; these cannot be called admissions, as they were made to avoid controversy and to save the expenses of vexatious litigation"); *Utah*: Rev. St. 1898, § 3217 (unaccepted offer to allow judgment, inadmissible); *Vermont*: 1850, *Stanford v. Bates*, 22 Vt. 546 (a mere offer of settlement is not receivable; otherwise of "a distinct admission of a fact," though made "during a negotiation for a settlement"); 1877, *Doon v. Ravey*, 49 Id. 293, 296 (an admission which is a part of a treaty of compromise is privileged; but an admission made because "it is a fact," though during a treaty, is receivable); 1895, *Neal v. Thornton*, 67 Id. 221, 31 Atl. 296 (offer of compromise, held inadmissible; good opinion); *Virginia*: 1797, *Baird v. Rice*, 1 Call 18, 26, per Pendleton, P. ("Propositions on either side, made by parties in a treaty for compromising their differences, if that treaty be not effectual, are not to operate as evidence in a future contest in court"); 1817, *Williams v. Price*, 5 Munf. 507, 538 (unaccepted offer tending to a compromise, excluded); 1835, *Brown v. Shields*, 6 Leigh 440, 446, 452 (letter held on the facts not to be an offer of compromise, and to contain distinct admissions; Tucker, P., diss.); *Washington*: 1900, *Loug v. Pierce Co.*, 22 Wash. 330, 61 Pac. 142 (an offer made on the faith of a compromise is inadmissible; whether it was so made is a question for the jury; the latter part of the ruling is erroneous); *Wisconsin*: 1839, *Johnson v. Wilson*, 1 Pinn. 65, 70 ("admissions made by one party to another while mutually engaged in effecting a compromise of their difficulties," held inadmissible); 1860, *State Bank v. Dutton*, 11 Wis. 371 (statements made "in negotiating for a settlement," excluded); 1902, *Collins v. State*, 115 Id. 596, 92 N. W. 266 (offer to settle a prosecution by restoring the money, admitted); 1903, *Pym v. Pym*, — Id. —, 98 N. W. 429 (settlement in compromise, held admissible, though not conclusive); *Wyoming*: Rev. St. 1887, § 2529 (offer to confess judgment, made according to statute, is not to be "given in evidence or mentioned on the trial").

For additional instances sometimes verging upon this principle, see *post*, § 1070 (admissions by reference).

opponent's claim are receivable in spite of their occurrence as a part of an attempt to compromise. Interpreting it in the light of the expositions already quoted, no inconsistency appears. Its only effect has been, apparently, to lead to a stricter application of the principle, in certain courts, resulting in a more liberal reception of evidence; for the judges affecting that phrase seem inclined — as in Massachusetts — to give little weight to the general hypothetical nature of discussions attending a compromise-negotiation, and to admit every statement not in itself distinctly conditional.

§ 1063. **Same:** (2) **Admissions in Pleadings;** (a) **Attorney's Admissions, in general.** Whether pleading in another suit is receivable as an admission is a question that has led to surprising variety of opinion. Before examining the state of the controversy, it is worth while to notice some related matters of principle which have a bearing upon it; and, in doing this, something must be anticipated of doctrines which more properly belong later.

(a) In the first place, an *attorney* is not a person whose admissions may be used against the party-client, except so far as concerns the *management of the litigation*; and this principle applies equally to the quasi-admissions here concerned and to the solemn admissions already discriminated (*ante*, § 1057). The reason for this limitation is that the attorney's admissions can affect his client so far only as he has authority to act as agent in his client's place (on the principle of § 1078, *post*). That authority, so far as it is to be implied from the mere general appointment as attorney, and has not been enlarged in the particular case, extends only to the management of the cause. Yet, conversely, all his admissions during that management, including the utterances in the pleadings, do affect the client:

1846, *Wilde, C. J.*, in *Watson v. King*, 3 C. B. 608: "The attorney is not the agent of the client for the purpose of making admissions, except in the cause and for the purpose of the cause. All that appeared here was (the defendant having been proved to have held the premises at a certain rent) that one of the plaintiff's witnesses heard the plaintiff's attorney say that there was an agreement in writing. That clearly was no evidence at all to affect the plaintiff."

1849, *Bell, J.*, in *Truby v. Seybert*, 12 Pa. St. 101, 105: "The concessions of attorneys of record bind their clients in all matters relating to the trial and progress of the cause. . . . [But] it has been ruled that what an attorney says in the course of casual conversation, relating to the controversy, is not evidence. The reason of the distinction is found in the nature and extent of the authority given; the attorney being constituted for the management of the cause in Court, and in England for nothing else."¹

¹ *Accord: England: 1807, Young v. Wright*, 1 Camp. 139 (attorney's admission that the bill was for accommodation, excluded; judicial admissions, "with intent to obviate the necessity of proving it," are presumed to be by authority; "but it is clear that whatever the attorney says in the course of conversation is not evidence in the cause"); 1815, *Marshall v. Cliff*, 4 id. 133 (attorney's undertaking, before suit begun, to appear in any suit against defendant; his then authority presumed, from his now being attorney of record, so as to receive an admission of owner-

ship contained in the undertaking); 1817, *Parkins v. Hawkshaw*, 2 Stark. 239, *Holroyd, J.* (defendant's attorney's admission as to the execution of a deed, excluded; "matter of conversation with an attorney could not be received in evidence against a client"); 1825, *Colledge v. Horn*, 3 Bing. 119 (statements by counsel, in the client's presence, in an address to the jury at a former trial; undecided, but it was assumed that apart from express authority or from assent by silence — *post*, § 1071 —, the statement was inadmissible; *Best, C. J.*: "I cannot allow that

§ 1064. Same: (b) **Common-Law Pleadings in the Same Cause, as Judicial Admissions.** (1) The pleadings in a cause are, for the purposes of use in that suit, not mere ordinary admissions (*ante*, § 1057), but judicial admissions (*post*, § 2588); i. e. they are not a means of evidence, but a waiver of all controversy (so far as the opponent may desire to take advantage of them) and therefore a limitation of the issues. Neither party may dispute beyond these limits. Thus, any reference that may be made to them, where the one party desires to avail himself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings. This much being generally conceded, it follows that a party may at any and all times invoke the language of his opponent's pleading as rendering certain facts indisputable; and that, in doing this, he is on the one hand neither required nor allowed to offer the pleading in evidence in the ordinary manner, nor on the other hand forbidden to comment in argument without having made a formal offer. He is merely advocating a construction of the judicial act of waiver of proof, and no rule of evidence is involved:

1889, *Vann, J.*, in *Tisdale v. R. Co.*, 116 N. Y. 416, 419, 22 N. E. 700: "The object of pleadings is to define the issue between the parties, and when an issue of fact is tried before a jury they cannot appreciate the evidence, as it is given, unless they know the nature of the issues to be decided. Hence it is customary and proper for counsel, in opening, to tell the jury what the issues are as well as what they expect to prove. In some States the case is ordinarily opened by reading the pleadings. The pleadings are before the Court, not as evidence, but to point out the object to which evidence is to be directed. While a party sometimes formally reads in evidence the pleading of his adversary, or

the counsel is the agent of the party"; 1832, *Wagstaff v. Wilson*, 4 B. & Ad. 339 (letter threatening legal proceedings, but written before action begun, excluded); 1845, *Doe v. Richards*, 2 C. & K. 216 (statements relating to a demand for possession, made before action brought by the person now attorney of record, excluded for lack of other evidence of authority; on offering evidence of the person being attorney at the prior time, *Patteson, J.*, still doubted whether the attorney's admission was receivable); 1846, *Watson v. King*, 3 C. B. 608 (see quotation *supra*); 1845, *Petch v. Lyon*, 9 Q. B. 147, 154 (admissions which were "merely a loose conversation" and not "said as an admission of a disputed fact in the cause," held not sufficient); *Ga.*: 1903, *Cable Co. v. Parantha*, — *Ga.* —, 45 S. E. 787 (conversation of one attorney with the other, after levy made, not admitted on the facts); *Kan.*: 1903, *Missouri & K. Tel. Co. v. Vandevort*, — *Kan.* —, 72 Pac. 771 (admission in an opening speech at a prior trial, received); *Mass.*: 1861, *Currier v. Silloway*, 1 All. 19 (attorney's agreement as to the amount of the verdict and admitting payment, received); 1864, *Saunders v. McCarthy*, 8 id. 42 ("mere matters of conversation," out of court, not relating to the suit, excluded); 1878, *Lord v. Bigelow*, 124 Mass. 185, 189 (attorney's offer, in another cause, to prove certain facts by the testimony of the party then on the stand,

received as an agent's admission); 1887, *Johnson v. Russell*, 144 id. 409, 412, 11 N. E. 670 (attorney's agreement as to a verdict, excluded on the facts); 1888, *Pickert v. Hair*, 146 id. 1, 4, 16 N. E. 79 (conversation "relating to a fact in controversy, but not an agreement relating to the management and trial of a suit, or an admission intended to influence the procedure," held inadmissible); 1893, *Loomis v. R. Co.*, 159 id. 39, 34 N. E. 82 (attorney's letter to the defendant, stating the circumstances of the alleged injury, held admissible; this ruling confirms the preceding doctrine as to the authority of an attorney under his retainer for litigation merely, and proceeds upon his authority in this case "to present and collect a claim," — a palpably sound distinction, which may at any time come into play where the latter sort of authority is in fact given; *Lathrop, J.*, and *Field, C. J.*, dissent).

The attorney's authority may be delegated to a clerk: 1831, *Taylor v. Willans*, 2 B. & Ad. 845, 855 (malicious prosecution; affidavit, as to bail, by the attorney's clerk, admitted; "if an attorney leaves the conduct of a cause to his clerk, what the latter does therein binds the party, as much as the act of the attorney himself"); 1832, *Standage v. Creighton*, 5 C. & P. 406 (offer of payment to stop litigation; managing clerk's statement received, "if the clerk had the management of the cause"); 1903, *Lord v. Wood*, — *Id.* —, 94 N. W. 842 (attorney's clerk).

some part thereof containing a distinct and unconditional admission, no legal advantage is gained thereby, as the admissions, properly so-called, contained in an adverse pleading admit of no controversy and require no proof. . . . It is the duty of the Court, in charging the jury, to state the issues of fact raised by the pleadings. While this is commonly done in a summary way by stating the precise questions of fact to be decided, no reason is perceived why it may not be done by reading and analyzing the pleadings, when they are not complicated, and thus pointing out the issues and the position of the respective parties. It is evident, therefore, that the established practice does not require that the contents of the pleading should be concealed from the jury, as improper evidence is required to be kept from their attention. On the contrary, as the pleadings mark the boundaries within which the proof must fall, counsel upon either side are permitted to point out where they claim those boundaries are, before they introduce their evidence. So, when summing up, they restate the issues in order to logically apply the evidence to them. If they do not agree as to the construction of the pleadings, a question of law is presented, and it becomes the duty of the Court to construe them, to determine their legal effect and meaning, and to instruct the jury accordingly. In this case the answer was modified, but not superseded, by the stipulation, and in order to state the issues and point out what was admitted and what denied, it was necessary to construe the complaint, answer, and stipulation together. While the stipulation narrowed the issues to the injury inflicted upon the plaintiff and the amount of damages sustained by her, as it was alleged in the complaint, and not denied by the answer as modified, that she was precipitated with the falling bridge and train a distance of about thirty feet into the bed of the feeder, this became an admitted fact. Important to be known by the jury, as it bore directly upon the extent of the injury. The fright naturally caused by being thrown that distance, amidst the crash of the breaking bridge and falling train, was also important. Was it not within the discretion of the trial Court to permit counsel, in summing up for the plaintiff, to call the attention of the jury to this allegation of the complaint, and to show by reading and by proper comments, fairly explaining the answer, that it was not denied?"

(2) How does this principle affect the use of the pleadings upon another issue in the same cause? It forbids any resort to a pleading upon another issue;

¹ Accord: 1878, *New Albany & V. P. R. Co. v. Stallcup*, 62 Ind. 345, 347 (pleadings are not to be read as evidence, but may be commented on; because the pleadings "constitute a part of its proceedings without being introduced in evidence"); 1879, *Culter v. Calloway*, 68 Id. 219, 223 (they may be commented on without being offered in evidence); 1893, *Shipley v. Reasoner*, 87 Ia. 555, 557, 54 N. W. 470 ("They go to the jury; not as evidence, but for the purpose of showing what the issues are"); 1895, *Woodworth v. Thompson*, 44 Nebr. 311, 62 N. W. 450 (pleadings need not be formally put in evidence, when referred to as admissions); 1898, *Lee v. Heath*, 61 N. J. L. 250, 89 Atl. 729 (plaintiff's bill of particulars, not being part of the record, must be formally offered in evidence when used as an admission); 1871, *White v. Smith*, 48 N. Y. 418, 420 (pleading may be used as an admission; the opinion not stating how advantage is to be taken of the admission); 1889, *Tisdale v. R. Co.*, 116 Id. 416, 418, 22 N. E. 700 (opponent's pleadings may be read by counsel, even when not formally put in evidence; see quotation *supra*); 1890, *Holmes v. Jones*, 121 Id. 461, 466, 24 N. E. 701 (defendant's answer read to the jury; "there is no rule of law which requires a party in any action to put his adver-

sary's pleadings in evidence before his counsel can be allowed to comment upon them in his address to the jury. Statements, admissions, and allegations in pleadings are always in evidence for all the purposes of the trial"); 1875, *Leavitt v. Cutler*, 37 Wis. 46, 53 (reading of an answer, held unnecessary; "it is awkward practice formally to put them in evidence"). In *Massachusetts*, the statute seems to have been improperly interpreted: *Mass. Pub. St. 1882, c. 167, § 75, Rev. L. 1902, c. 173, § 85* ("Neither the declaration, answer, nor a subsequent allegation, shall be deemed evidence on the trial, but allegations only whereby the party making them is bound"); 1866, *Walcott v. Kimball*, 13 All. 460 (pleadings not to be treated as evidence, in argument to the jury, but only as definitions of the issue; statute approved, because the circumstances giving rise to the drafting are improper to consider, and because comment at the argument leaves no opportunity for contrary evidence); 1872, *Phillips v. Smith*, 110 Mass. 61 (preceding case approved; pleading not admitted in evidence); 1878, *Lyons v. Ward*, 124 Id. 364 (subsequent clauses of an answer, following a general denial, not allowed to be read as admissions); 1885, *Taft v. Flske*, 140 Id. 250, 5 N. E. 621 (preceding doctrine approved).

because the object of each set of pleadings or counts is to raise and to define the separate issues, and any use of the one to aid the other would to that extent defeat this object and prevent the trying of the issue made. This result has always been conceded³ (except, for a time, in Massachusetts⁴). It is a purely artificial rule, an exception to principle, and is rendered necessary solely by the peculiar theory of common-law pleading; for its fundamental object is "to separate the law from the facts, and to narrow the latter down to a single issue,"⁴ and the statute permitting multiple pleas did not and could not destroy the primary scheme of keeping each issue independent for the purpose of submission to the jury. Thus, in order to secure for each of these issues an independent investigation, it becomes necessary, *during that trial*, to ignore, artificially, the existence of the other series of pleadings in the same cause.

§ 1065. *Same: (c) Bills and Answers in Chancery in Other Causes.* The moment we leave the sphere of the same cause, we leave behind all questions of judicial admissions. A judicial admission is a waiver of proof (*ante*, § 1057); and a pleading is, for the purpose of the very cause itself, a defining of the lines of controversy and a waiver of proof on all matters outside these lines of dispute. But this effect ceases with that litigation itself; and when we arrive at other litigation and seek to resort to the parties' statements as embodied in the pleadings of prior litigations, we resort to them merely as quasi-admissions, *i. e.* ordinary statements, which now appear to tell against the party who then made them. Hence, their use is to be de-

³ 1786, *Kirk v. Nowill*, 1 T. R. 118, 125 (Buller, J.): "There was no such an idea before . . . that one plea might be supported by what is contained in another; each plea must stand or fall by itself; they are as unconnected as if they were on separate records"; 1813, *Harington v. MacMorris*, 5 Taunt. 229, 233 (Mansfield, C. J.): "It is every day's practice that the defendant's language in one plea cannot be used to disprove another plea; as in the familiar instance I have given of trespass and not guilty and a justification pleaded, where the justification would certainly if admissible prove the act, in case the reason of the justification fails"; excluding a bill of particulars furnished with a notice of set-off; 1839, *Jones v. Flint*, 2 Per. & D. 594, 595 (debt; pleas, first, *numquam indebtedatus*, invoking the Statute of Frauds, and, next, tender and payment into court; the plaintiff argued that the objection of the statute was obviated by the admission of the contract in the plea of payment; but Coleridge, J., said: "How can the admission made in one plea be called in aid of the issue joined on another?" and counsel answered, "It is conceded that it could not"); 1841, *Kinnear v. Gallagher*, 1 Kerr N. Br. 424, 425; 1903, *Craig v. Burris*, — Del. —, 55 Atl. 353 (plea of confession and avoidance in the same cause, excluded); 1856, *Nye v. Spencer*, 41 Me. 272, 276 ("the language of a defendant in one plea cannot be used to disprove another plea"); 1859, *Morris v. Henderson*, 37 Miss. 492, 508 ("The subject-matter of each

plea is a distinct and separate ground of defence, which cannot be used in evidence when the case turns upon an issue presented by another plea"); 1842, *Kimball v. Bellows*, 13 N. H. 58, 66 (conflicting statements in another count or plea cannot be used as admissions; here, a count struck out since the former trial); 1900, *Gattis v. Kilgo*, 128 N. C. 402, 38 S. E. 931, *semble*; Gould on Pleading, c. 8, pt. I. On the question whether an *affidavit of defence* is a plea, in this sense, see the following: 1897, *Mullen v. Union C. L. Ins. Co.*, 182 Pa. 150, 37 Atl. 988; 1902, *Taylor v. Beatty*, 202 id. 120, 51 Atl. 771.

⁴ 1818, *Jackson v. Stetson*, 15 Mass. 39, 50 ("the confession or admission of the defendant in one plea may be used against him on the trial of another"; here laid down for a plea of justification in alander, and even under a statute allowing multiple pleas by permission); this ruling was followed in two cases: 1822, *Alderman v. French*, 1 Pick. 1, 4, 11 Am. Dec. 114 (careful opinion); 1827, *Hix v. Drury*, 5 id. 296, 303; but the law was altered by St. 1826, c. 107, for actions of defamation, and later for all actions: Pub. St. 1882, c. 167, § 78, Rev. L. 1902, c. 173, § 89 ("When a defendant answers two or more matters in his defence, no averment, confession, or acknowledgment contained in one of them shall be used or taken as evidence against him on the trial of an issue joined on any other of them").

⁴ Langbeil, Summary of Equity Pleading, § 34.

terminated by the principles peculiar to the present subject. Such extrinsic pleadings, being upon their face direct and plain assertions made for a serious purpose, would naturally be supposed to be available as admissions; and the inquiry plausibly arises, Why should they not be? Viewed in the light of the principles of the present subject, there can be but two conceivable objections; one is the objection that they were not made by the party himself, nor by any one authorized to speak for him (on the principle of § 1078, *post*); the other is that they are conventional or hypothetical only, and not intended to be taken as sincere or absolute assertions. Before examining the validity of these objections for common-law pleadings, it must be noticed what result was reached, as a matter of law, for pleadings in chancery.

(1) An *answer in chancery*, in another suit, was always and unquestionably allowed to be used as an admission of the party.¹ Neither of the above-suggested objections, indeed, could by possibility be urged against it; for it was not made in the name of another person, but was subscribed to by the party himself; nor could it be regarded as conventional or hypothetical, for it was solemnly sworn to as the party's sincere and unqualified avowals.

(2) A *bill in chancery* was originally considered as equally admissible.² The fact that it was not subscribed and sworn to by the plaintiff was regarded as at most requiring some further evidence of the party's authority, — to safeguard against the possibility of assuming to be his a bill which had been filed by a stranger in his name; and for this purpose the presence of the opponent's answer in the files was deemed a sufficient safeguard.³ But there grew up, with the development of chancery pleading, a marked distrust of the significance of a bill. The practice in drafting was such that the allegations were commonly understood to be, in large part, mere conventional rigmarole; for, since every interrogatory of discovery put to the opponent had to be founded on some charge in the bill, and since the answer need be no more *specifico*

¹ 1767, Buller, *Trials at Nisi Prius*, 237 ("If the bill be evidence against the complainant, much more is the answer against the defendant, because this is delivered in upon oath"); 1812, *Lady Dartmouth v. Roberts*, 16 East 334, 339; 1903, *Booth v. Lenox*, — Fla. —, 34 So. 566; 1860, *Robbins v. Butler*, 24 Ill. 387, 427; 1855, *Williams v. Cheney*, 3 Gray 215, 220 (statutory discovery); 1855, *Judd v. Gibbs*, ib. 539, 543 (same); 1875, *Broadrap v. Woodman*, 27 Oh. St. 553. *Contra*: 1834, *Arnold v. Caldwell*, 1 Man. 81, 155 (answer in discovery).

For other and distinct questions affecting the use of answers in chancery, see *post*, §§ 2111, 2121 (whether the *whole* must be offered or might be offered); *post*, § 1216 (whether the *original* must be offered); *post*, § 2158 (how the *signature* could be authenticated); *post*, § 1387 (whether the *issues* must be the same in the other suit); and *post*, § 1416 (whether the party's *absence* must be accounted for).

² 1665, *Snow v. Phillips*, 1 Sid. 220 (bill in chancery; objected that it is "not evidence, because it only contains matter suggested perhaps by counsel or solicitor without the privity of the

party"; but, *per Curiam*, it was received, because "they will not intend that it was preferred without the privity of the party, and if it was, he has good remedy against those who had preferred it, in action on the case"; here the "privity" clearly means, not the relation of consultation between an engaged counsel and his client, but that of the original engagement without which the counsel may be acting for some stranger pretending to be the party named); 1767, Buller, *Trials at Nisi Prius*, 235 ("The bill in chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed true; nor shall it be supposed to be preferred by a counsel or solicitor without the party's privity, and therefore it amounts to the confession and admission of the truth of any fact"; yet there must have been further proceedings on it, otherwise it might be merely a false bill by a stranger; "it must be supposed to be the party's bill, where his adversary has been compelled by the process of the court of Chancery to answer it").

³ Buller, quoted above.

than the charge on the interrogatory,⁴ it was necessary to make specific and positive charge-allegations upon all topics on which the party desired specific discovery from the opponent; and hence, such charges could and did take the widest range of possibility, in the form of downright assertions of fact, merely as a preliminary to securing the discovery. In short, the allegations were (to a large extent) simply the interrogatories phrased in affirmative form for technicality's sake, and to that extent were no index at all of what the plaintiff really believed and meant to assert. For these reasons the doctrine came to be settled that a bill in chancery was not receivable in another suit as an admission:

1828, *L. C. Hart, in Kilbee v. Sneyd*, 2 Moll. 186, 206: "The Court never reads a bill as evidence of a plaintiff's knowledge of a fact; it is mere pleader's matter; the statements of a bill are no more than the flourishes of the draftsman. No decree was ever founded on the allegations of a plaintiff's bill as evidence of facts."

1847, *Mr. R. N. Gresley, Evidence in Equity*, 323: "Bills in equity are notoriously filled with fictitious matter. Neither is it allowed to be used against the plaintiff, the assertor of these false allegations, because it has been found by experience that under the present system of pleading no process is so efficacious as alleging, in effectually eliciting the truth. The Court looks upon these allegations as the mere suggestions of counsel, and connives at statements and charges being made for the sole purpose of putting questions founded upon them to the defendant."⁵

This doctrine, which (barring Mr. Justice Buller's adherence to the earlier practice⁶) became established in England by the end of the 1700s,⁷ was generally accepted in the United States, and seems to have lasted even under improved methods of pleading in chancery;⁸ although it may be supposed

⁴ Langdell, *Summary of Equity Pleading*, §§ 56, 57, 64.

⁵ 1797, (?) *L. C. Eldon, in Twiss' Life*, 1, 301: "Lord Thurlow, when Lord Chancellor, called me into his room at Lincoln's Inn Hall, and among other things asked me if I did not think that a wooden machine might be invented to draw bills and answers in Chancery. I told him that I should be glad if such a machine could be invented, as my stationer's copy of my pleadings generally cost me more than the fees paid me by the solicitors." For another passage illustrating the common understanding as to the fictitious character of these allegations, see post, § 2111.

⁶ Quoted *supra*, note 2.

⁷ 1730, *Lord Ferrers v. Shirley*, Fitzg. 195 (bill in chancery objected to as being "no more than the surmises of counsel for the better discovery of title"; excluded without giving a reason); 1737, *Ives v. Medcalf*, 1 Atk. 63, 65 (*L. C. Hardwicke*: "At law, the rule of evidence is that a bill in chancery ought not to be received in evidence, for it is taken to be the suggestions of counsel only; but in this Court it has often been allowed"); 1797, *Doe v. Sybourn*, 7 T. R. 1, *L. C. J. Kenyon* (bill in chancery, excluded; it is to be taken "merely as the suggestion of counsel," and is admissible only "to show that such a bill did exist and that certain facts were in issue between the parties, in order to let in the answers or deposi-

tions of the witnesses"); 1799, *Taylor v. Cole*, 1b, note (same); 1848, *Boileau v. Rutlin*, 2 Exch. 665, 676 (assumpsit for use and occupation; to prove an agreement to purchase, the defendant filed a bill in chancery for specific performance, filed by the plaintiff, and setting out the agreement; excluded as an admission); *Parke, B.*: "Those, as well as pleadings at common law, are not to be treated as positive allegations of the truth of the facts therein 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 for judicial decision"); 1862, *Malcomson v. O'Dea*, 10 H. L. C. 593 (to prove a prescriptive title to a fishery, a bill and answer in equity of 1674 were read; "This bill and answer were not read as evidence of the facts stated therein," but as indicating a dispute and then its abandonment, and thus, in connection with other things, an admission by the one party). The opinion of the judges in the *Hanbury Peerage Case*, 1809 (extracted in 2 *Selwyn's Nisi Prius*, c. 18, 11th Eng. ed., p. 765), sometimes cited as excluding a bill on the present principle, is in truth not an authority, since the bill was offered on behalf of the descendant of the party making it, and the present question was not referred to.

⁸ *Id.*: 1838, *Adams v. M'Millan*, 7 Port. 73, 85 (unsworn bills in chancery held inadmis-

that where a bill is now required to be sworn to, the rule for answers would be applied.⁹ It will be seen, then, that the objection to the use of bills in chancery was, not that its words were those of counsel only (for this argument seems to have been commonly ignored¹⁰), but that its allegations were not intended as the sincere statements of either counsel or party, and were merely conventional utterances formally desirable for ulterior purpose.

§ 1066. *Same: (d) Common-Law Pleadings in Other Causes.* In the light of the considerations just noted (in § 1065), what objection could exist to the use of common-law pleadings, filed in other causes, and containing statements now serviceable as admissions? The objections that have been advanced are the two already noticed, namely, that the utterances of the pleading are not in fact made by the party himself, and that they are frequently conventional and fictitious allegations; though these distinct reasons are seldom carefully discriminated:

1837, *Bronson, J., in Starbuck v. Converse*, 17 Wend. 20, 22: "The party may make an admission in one suit or plea which he would be very unwilling to follow in another. A fact which is either directly or impliedly admitted in pleading will be deemed true for all the purposes of that issue. But it may still be that the fact does not exist and that it was only conceded in the particular case because the party did not think it important in relation to that matter to put it in issue."

1817, *Shaw, C. J., in Baldwin v. Gregg*, 13 Metc. 253, 255: "The pleadings are usually filed by the attorneys; and they are filed with a view of laying the merits of the respective parties before the court, in a technical form, and can hardly be considered as the act of the parties. It is not competent for the jury to hear evidence, and inquire and decide whether a specification of defence was filed *bona fide* or *mala fide*. A bill of particulars filed by a plaintiff, or a specification of defence filed by a defendant, is usually a formal document, drawn up by counsel, after some examination of his client's case, and is made broad enough to cover all which the party can expect, in any event, to prove; and in most instances, probably, is not seen by the party in whose behalf it is filed."

The answers to these objections are not difficult to find. (1) That the statements of the pleading are *not those of the party himself* must be immaterial, since they are those of his authorized attorney. The appointment of attorney and counsel makes them agents to manage the cause in all its parts, including unquestionably the pleading. The agent's utterances for the principal in the pleadings bind the party as solemn judicial admissions; much more, then, may the agency suffice to admit them as informal quasi-admis-

sible, being "the mere suggestions of counsel"; 1842, *Durden v. Cleveland*, 4 Ala. 225, 227 (same; there must be some recognition of the bill, as by verifying oath); *Ga.*: 1892, *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92 (see citation *post*, § 1066); *Ky.*: 1817, *Francis v. Hazelrigg*, 1 A. K. Marsh. 93 (except to identify the land described in a decree); 1820, *Rankin v. Maxwell*, 2 Md. 488, 491 ("We well know that counsel are not restricted in crowding into their bill numerous allegations to dress their case"); 1823, *Rees v. Lawless*, 4 Litt. 218 (similar); 1827, *McConnell v. Bowdry*, 4 T. B. Monr. 392, 395 (bill considered; opinion obscure); *Mass.*: 1870, *Elliott v. Hayden*, 104 Mass. 180,

183, *semble* (see citation *post*, § 1066); *Pa.*: 1832, *Owens v. Dawson*, 1 Watts 149, 150; *U. S.*: 1855, *Church v. Shelton*, 2 Curt. C. C. 271, 274 (libel in admiralty, in another suit, not admissible, even though privy appear; following *Boileau v. Rutlin*). *Contra*: 1898, *Schmisseur v. Beatrice*, 147 Ill. 210, 216, 85 N. E. 525.

⁹ 1862, *Doe v. Ross*, 5 All. N. Br. 346 (bill in chancery sworn to, admitted; "the maxim *conventus ratio etiam cessante lex* is now made applicable"); 1890, *Buzard v. McAnulty*, 77 Tex. 438, 445, 14 S. W. 138.

¹⁰ See the comment on *Snow v. Phillips*, cited *supra*, note 2.

sions. If the fortunes of the party in the cause are irretrievably determined by the utterances of the attorney in the pleadings, it is difficult to argue that the attorney is not an agent for the purpose of making the same utterances receivable in evidence as quasi-admissions. (2) It is said that the utterances of the pleadings are merely conventional and therefore *fititious allegations*, not to be taken as sincere and *bona fide* statements. This is an objection which had weight when the common-law fictions of trover and ejectment and implied assumpsit were in vogue, and when the bill in chancery could be correctly said by John Wesley to be "stuffed with stupid senseless improbable lies," and by Jeremy Bentham, a century later, still to be "a volume of notorious lies." Even then, the recognized conventions could be distinguished by the practitioner from the plain unvarnished claims. But to-day, in the great majority of jurisdictions, the reforms in pleading deprive this objection of all weight. (3) Furthermore, the only plausible objection, namely, that many defensive pleadings are purely *hypothetical* in their nature and form, concerns matter which is restricted in scope and lends itself readily to segregation. For example, affirmative pleas in confession and avoidance should in strictness speak hypothetically in the confessing part;¹ but the avoiding part is unqualified in its form and must be taken to be sincere and final. It would therefore be correct enough to reject the former part as not an admission, since in form (if properly drawn) it admits nothing but assumes the fact provisionally for the purpose of avoiding it. But, leaving aside such portions, there is no reason why the plaintiff's allegations and the defendant's substantive replies in avoidance should not be taken for what they purport to be, namely, absolute utterances. Indeed, any other view is stultifying to the theory of legal proceedings; for it represents the pleadings during the trial of the cause itself as solemn asseverations upon the faith of which the parties' rights and liberties are forever adjudged and vindicated, and then proceeds, in the ensuing cause, to brush them aside as mere academic and unmeaning disputations, idle feats of forensic logic. Such a view is a travesty upon the facts.

That the pleadings in prior causes, then, can be treated as the parties' admissions, usable as evidence in later causes, must be conceded:

1883, *Elliott, J.*, in *Boots v. Canine*, 94 Ind. 408, 412: "Our statute has adopted the equity practice; we treat pleadings as statutory facts, not fictions. . . . If it can be said that Courts can presume that an answer under our code does not state facts, then it may be logically said that it is not evidence; but if the presumption is, that it does state

¹ Not all the orthodox forms do so, but the following illustrate the correct practice. Chitty, Pleading, 14th Am. ed., III, 956 (plea of set-off: "[Because the plaintiff owed the defendant at the same time the sum of \$100, which sum] exceeds the *supposed* debt due and owing from the said defendant to the said plaintiff and the damages sustained by the said plaintiff by reason of the detention of the *supposed* debt so alleged to be due and owing to the said plaintiff as in the said declaration mentioned, and out of which said sum of money

. . . he the said defendant is ready and willing and hereby offers to set off and allow to the said plaintiff the full amount of the said *supposed* debt and damages"); III, 1061 (plea of accord and satisfaction to a trespass: "Because he says that the said *supposed* trespasses were committed by the said W. P. (if at all committed by him) jointly with the said defendant G. S., and that after the committing of the said several *supposed* trespasses" an accord and satisfaction was had).

facts, then it is logically inconceivable that it should not be evidence against the party. . . . Our code imperatively requires that pleadings shall state facts, but it does not stop with this command. It provides that 'All fictions in pleading are abolished.' It is several times declared that pleadings not sworn to shall have the same effect as pleadings sworn to. It is simply absurd to say that under our code the statements in the pleadings are mere fictions, and if they are not fictions then they are facts, and if facts in some cases, and in others conclusive admissions of record, then they are evidence. An admission in a pleading is the admission of matters of fact; this seems so plain that it is difficult to understand how the contrary doctrine can be seriously asserted."²

² The cases representing the different rules are as follows: *England*: 1848, *Bolleau v. Rutlin*, 2 Exch. 665, 676 (pleadings at common law in another suit, said *obiter* to be inadmissible; quoted *supra*, § 1065, note 7); 1851, *Marianaki v. Calra*, 1 Macq. Sc. App. 212, 225 (creditor's claim against an estate; plaintiff's plea, in a suit for alimony, not sworn to but signed, held admissible; Lord Brougham: "Being in writing and signed by himself, it is to be regarded in the light of an admission"); *Canada*: 1877, *R. v. Wright*, 17 N. Br. 363, 873 (affidavit made in another cause, admitted, per Wright, J., citing *Richards v. Morgan*, *post*, § 1075); 1877, *Domville v. Ferguson*, ib. 40 (record in another suit, showing an admission of ownership of a vessel, admitted); *Cal.*: 1874, *McDermott v. Mitchell*, 47 Cal. 249 (joint answer of R. and M., verified by R. alone, not received against M.; "it was the mere work of the attorney"; no authority cited); 1886, *Duff v. Duff*, 71 id. 513, 521, 12 Pac. 570 (petition for letters of administration; certain statements therein were excluded, as not required to be made and therefore not impliedly authorized, nor yet shown to be inserted with the petitioner's knowledge and sanction); 1887, *Kamm v. Bank*, 74 id. 191, 195, 15 Pac. 765 (claim against an estate; the action being brought by the party's consent, "the complaint therein is evidence against him of the fact of suit brought and of the nature of the action"); 1889, *Coward v. Clanton*, 79 id. 23, 29, 21 Pac. 359 (said *obiter* that the attorney's presumed authority entitles the pleading to be "regarded as the admission of the party," subject to his showing that he did not in fact authorize it); 1894, *Solari v. Snow*, 101 id. 387, 399, 35 Pac. 1004 (complaint in another suit excluded, because not signed by nor known to the party); *Ga.*: 1892, *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92 (bill to recover land, filed in another suit against another person about the same land, admitted, though not sworn to or signed by the complainant but only signed by the solicitor); 1897, *Farmer v. State*, 100 id. 41, 28 S. E. 26 (false representations; answer in a creditor's suit, signed by certain persons as defendant's attorneys, not received in the absence of proof of his direction or knowledge; distinguishing *Lamar v. Pearre* as a civil case requiring a less stringent rule); 1901, *St. Paul F. & M. Ins. Co. v. Brunswick G. Co.*, 113 id. 786, 39 S. E. 483 (garnishee's admissions in an answer in litigation with a debtor of the same name, admitted); *Ill.*: 1897, *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 307 (plea of set-off, etc., in another suit between the same parties on the same matter, admissible, but not without the declaration); *Ind.*: 1883, *Boots v. Canine*, 94 Ind. 408, 414 (pleadings in general are admissible, on the presumption that the client authorizes its terms; see quotation *supra*); *Ia.*: 1864, *Ayers v. Ins. Co.*, 17 Ia. 176, 187 (unsworn answer, admitted); *Kan.*: 1876, *Hobson v. Ogden*, 16 Kan. 388, 894 (verified pleading admitted); 1883, *Solomon R. Co. v. Jouse*, 30 id. 601, 608, 2 Pac. 657 (name); *La.*: 1842, *Wells v. Compton*, 3 Rob. 171, 182 *semble* (petition in another suit, admitted); *Me.*: 1851, *Parsons v. Copeland*, 33 Me. 370, 374 (pleading in another suit, admitted; point not raised); 1897, *Rockland v. Farnsworth*, 89 id. 481, 36 Atl. 989 (a declaration of town of residence in a writ in another suit still pending, excluded); *Md.*: 1903, *Nicholson v. Snyder*, — Md. —, 55 Atl. 484 (answer in bankruptcy, admitted); *Mass.*: 1861, *Currier v. Silloway*, 1 All. 19 (writ bearing an affidavit, in another suit, admitted); 1861, *Gordon v. Parmelee*, 2 id. 212, 215 (declaration in former suit, received, as being "not a mere technical statement of a cause of action by an attorney," but an averment by an agent in *Lia* employment); 1861, *Jouce v. Howard*, 3 id. 224 (action on contract for use and occupation; evidence of previous action on writ of entry, admitted, subject to explanation by plaintiff as the result of a mistake); 1866, *Illias v. Nichols*, 12 id. 443, 445 (declaration in another suit, "made by her authority," received); 1866, *Boston v. Richardson*, 13 id. 146, 162 (record in another suit, admitted); 1870, *Elliott v. Hayden*, 104 Mass. 180, 183 (sworn bill in another suit, filed but afterwards withdrawn, received, "upon the same ground upon which sworn answers and pleas in chancery, or allegations concerning the substance of the action in a declaration at common law, have been held admissible"); 1876, *Brown v. Jewett*, 120 id. 215, 217 (bill in equity received, if the party had signed and sworn to it or had authorized counsel to bring the bill for the purpose set forth therein, so far as that involved the statement in question); 1883, *Dennie v. Williams*, 135 id. 28 (answer in another suit, excluded, there being "nothing to indicate how far the attorney was particularly instructed"; prior cases distinguished as touching allegations "obviously made by direction" of the party or adopted "by prosecuting the action upon them" after knowledge of them); 1887, *Johnson v. Russell*, 144 id. 409, 11 N. E. 670 (answer in a former suit, admissible, when it contains "particular and specific allegations of matters of action or defence which cannot be presumed to

The rule of law, however, as generally applied under the orthodox common-law system of pleading, seems to have been to exclude all common-law pleadings filed in other causes; but, on the other hand, under most of the reformed systems (by which the pleadings, approximating the chancery practice, are required to be signed by the party, and sometimes to be sworn to) they are commonly ruled to be admissible if it appears that the party signed them. A few Courts concede the same result also when the party's personal knowledge of the pleading's contents is otherwise shown. For the reasons already explained, all of these limitations and requirements must be regarded as unsound, and this a few Courts appear to hold.

Certain discriminations, however, resting on peculiar grounds or on special evidential uses, need to be made. (1) A statement by a person as *counsel in*

have been made under the general authority of the attorney but are obviously from specific instructions of the party"); 1899, *Farr v. Rouillard*, 172 id. 303, 52 N. E. 443 (answer in another suit, not signed by defendant himself, excluded); 1900, *Smith v. Paul Boyton Co.*, 176 id. 217, 57 N. E. 367 (record containing answer in another cause, received to show defendant's admission of ownership of property in issue); 1902, *Stone v. Com.*, 181 id. 438, 63 N. E. 1074 (the plaintiffs now denying their title, the fact that in a prior case the counsel for the plaintiff "argued and tried to prove" that title was in the plaintiff, held inadmissible); *Mich.*: 1903, *Cornelissen v. Ort*, — *Mich.* — , 93 N. W. 617 (affidavit in another cause, received); *Minn.*: 1884, *Vogel v. Osborne*, 32 Minn. 167, 20 N. W. 129 (receivable "if it was signed or verified by the party, or if it otherwise affirmatively appears that the facts stated therein were inserted with his knowledge or by his direction," or perhaps "if the party stands by it by allowing it to remain the pleading in the case"); 1889, *Rich v. Minneapolis*, 40 id. 82, 41 N. W. 455 (preceding case approved); 1893, *O'Riley v. Clampt*, 53 id. 539, 55 N. W. 740 (former claim in another lien-suit, received); 1902, *Yoki v. First State Bank*, 87 id. 295, 91 N. W. 1101 (affidavit of destitution in a divorce suit, admitted in an action for personalty); *Mo.*: 1874, *Dowzelot v. Rawlings*, 58 Mo. 75 (petition filed by attorney of R. "at the latter's instance," admitted, "whether R. had "seen the petition after it was drawn up, or not"); 1885, *Anderson v. McPike*, 86 id. 293, 301 (though the pleading is *prima facie* receivable, yet, if proved to have been filed by one not employed as an attorney in the case, it is inadmissible); 1893, *Nichols v. Jones*, 32 Mo. App. 657, 664 (allegations in a pleading in another suit are receivable, because "*prima facie* the party acquiesced"; but stipulations of fact filed in one action are not admissible elsewhere unless acquiescence of the client is shown); *Mont.*: 1903, *Tague v. Caplice Co.*, — *Mont.* — , 72 Pac. 297 (admissible if "verified by the party or prepared under his instructions"); *Nebr.*: 1886, *Bunz v. Cornelius*, 19 *Nebr.* 107, 114, 26 N. W. 621 (former petition for specific performance, admitted; no rule stated); 1899, *Paxton v. State*, 59 id. 460, 81 N. W. 333 (other pleadings "either made by his direction or afterwards sanctioned by him," or signed or verified, are admissible); 1899, *Paxton v. State*, 59 id. 460, 81 N. W. 383 (official bond of treasurer for second term; prior suit brought against bondsmen for first term, taken as an admission that part of total defalcation occurred during first term); *N. Y.*: 1837, *Starkweather v. Converse*, 17 *Weed*, 20, 22 (bill of particulars in another suit, excluded; see quotation *supra*); 1870, *Cook v. Barr*, 44 *N. Y.* 156, 158 ("It must first be shown, by the signature of the party or otherwise, that the facts were inserted with his knowledge or under his direction and with his sanction"); 1893, *Hutchins v. Van Vechten*, 140 id. 115, 118, 35 N. E. 446 (admissions in a pleading in another action are receivable, "if signed by the party with knowledge of its contents"); *Pa.*: 1841, *McClelland v. Lindsay*, 1 *W. & S.* 360 (plea in abatement in another suit, received); 1849, *Truby v. Seybert*, 12 *Pa. St.* 101, 105 (record in another suit, received, and assumed to be "either immediately from the party himself or authorized or assented to by him"); *Tex.*: 1866, *Wheeler v. Styles*, 28 *Tex.* 240, 246 (answer and exhibit in another cause, admitted; "it was his statement, made under oath"); 1890, *Buzard v. McAnulty*, 77 id. 438, 445, 14 *S. W.* 138 (pleading sworn to by the party, received); *U. S.*: 1858, *Combs v. Hodge*, 21 *How.* 397, 404 (petition and answer in another suit "signed by counsel and not by the parties," held not receivable as admissions; following *Boileau v. Rutlin*); 1885, *Pope v. E. Allis*, 115 *U. S.* 363 (pleading in equity or law, if sworn to by the party, is receivable as a "solemn admission"); 1889, *Delaware Co. Com'rs v. Diebold S. & L. Co.*, 133 id. 473, 487, 10 *Sup.* 399 (complaint "not under oath nor signed by the plaintiff," excluded); *Wis.*: 1896, *Lindner v. Ins. Co.*, 93 *Wis.* 526, 531, 67 *N. W.* 1125 (prior pleading, unverified, held admissible; "presumptively the answer was authorized by the defaulant, but it might show the circumstances and that the allegations were inserted without proper authority"); 1893, *Lee v. R. Co.*, 101 id. 352, 77 *N. W.* 714 (pleading of plaintiff in another suit, not signed by him, admitted).

another's cause, may of course not be treated as his own admission usable against him personally.³ (2) A pleading, or other litigious allegation (such as plea of *nolo contendere* or a case stated) may be in its terms merely hypothetical or ambiguous, and may therefore not be interpretable as an admission.⁴ (3) So far as the fact of the *existence of a record* or suit or claim is in issue, the pleading may be considered in order to evidence that fact.⁵ (4) The privilege *against self-crimination* does not forbid the use, in a criminal prosecution, of a plea in prior civil case admitting the fact now charged, because the plea, filed voluntarily, was a waiver of the privilege. Nevertheless, in order to deprive a civil party of the right to refuse to plead on that ground, statutes have been enacted in some jurisdictions, forbidding the use of such pleadings in criminal cases.⁶ Whether such statutes accomplish their primary purpose depends upon the principle of the privilege (*post*, §§ 2281, 2282). But the converse use, that of an accused's pleading in a subsequent civil case, would seem to be proper, and not within the prohibition of such statutes.⁷ (5) The use here discussed, of informal or quasi-admissions (*ante*, § 1057). The latter are conclusive in their nature; but that effect is confined to the cause in which they are made. When used in other causes as ordinary admissions, they are of course *not conclusive*:⁸ (on the principle of § 1058, *ante*); and therefore, so far as their admissibility is made (by some Courts, as above noted) to depend on the party's actual knowledge of their contents, or (when that requirement is not made) so far as the purpose is to detract from their weight, it may be shown by appropriate evidence that the party was in fact unaware of their contents.⁹

§ 1067. **Same: (c) Superseded or Amended Pleadings.** When a pleading is amended or withdrawn, the superseded portion disappears from the record as a judicial admission limiting the issues and putting certain facts beyond dispute. Nevertheless, it exists as an utterance once seriously made by the party. While thus denied all further effect as a pleading, may it not still be

³ 1887, *Wood v. Graves*, 144 Mass. 365, 370, 11 N. E. 567 (defendant's assumption of a fact in a brief submitted as counsel, held not an admission); 1902, *Stone v. Com.*, 181 Id. 438, 63 N. E. 1074 (see citation *supra*).

⁴ *Case stated*: 1807, *Elting v. Scott*, 2 John. 157, 162 ("case made" for argument, in another cause, rejected, as made "by counsel without any communication with the parties"); 1835, *M'Lughan v. Bovard*, 4 Watts 308, 313 (case stated for a judge cannot be used as an admission, especially when the parties have abandoned it and gone to the jury); 1848, *Hart's Appeal*, 8 Pa. St. 32, 37 (case stated, excluded). *Plea*: 1873, *State v. Bove*, 61 Me. 176 (a plea of guilty of adultery, which might refer to either the woman's or the man's previous marriage, was therefore excluded as ambiguous); 1900, *White v. Creamer*, 175 Mass. 567, 56 N. E. 832 (bill to restrain the sale of liquor; plea of *nolo contendere* in a prosecution for illegal sale, followed

by conviction and sentence, excluded); 1902, *State v. La Roe*, 71 N. H. 435, 52 Atl. 943 (careful opinion; plea of *nolo contendere*, excluded); 1901, *State v. Henson*, 66 N. J. L. 601, 50 Atl. 468, 616 (plea of *nolo contendere*, usable as an admission of guilt in discrediting a defendant-witness).

⁵ 1848, *Boileau v. Rattin*, 2 Exch. 665, 677.

⁶ These statutes are collected *post*, § 2281. A few of them are so broad as to exclude the pleading in "any" subsequent proceeding.

⁷ 1855, *Birchard v. Booth*, 4 Wis. 67, 69, 72 (battery; the defendant's oral plea of guilty on a criminal prosecution for the same battery, admitted).

⁸ 1867, *Tahb v. Cabell*, 17 Gratt. 160, 166.

⁹ 1835, *M'Lughlan v. Bovard*, 4 Watts 308, 313 (case stated for the Court).

Compare also the cross-references *ante*, § 1065, note 1.

used as a quasi-admission, like any other utterance of the party? The objection to this use of it has been thus stated:

1865, *Devens, J.*, in *Taft v. Fiske*, 140 Mass. 250, 252, 5 N. E. 621: "The plaintiff here, by means of the answer first filed and that subsequently relied on, endeavored to show that the amended answer was a 'put up' defence. The force of his argument depended upon a comparison of the evidence afforded by the two answers. It would be a serious embarrassment to that liberal amendment of pleadings contemplated by our statutes, if a party availing himself of the leave in this respect granted by the Court could only do so by subjecting himself to the imputation that his new form of statement, by its difference from that previously made, showed that he presented a simulated case. . . . The original statement of a party's case is often hurriedly prepared, with imperfect information of the facts, and sometimes under misapprehension of the law. New facts are revealed at the trial, and new views of the law applicable to them are suggested. It would be unjust, if, in a closing argument, the counsel could be allowed to compare the answer originally made with that finally relied on, without an investigation of all the circumstances under which the original answer was made. Yet such an investigation would be manifestly impossible. To permit counsel thus to comment after the evidence has been concluded, and when no opportunity for explanation remains, or indeed could ever be given, would often cause an entirely different effect to be attributed to the legal statements of a defence from that which they should properly bear."

So far as the argument from hurry and inadvertence is concerned, it would be equally valid against many extrajudicial utterances of the party. Yet no one has ever supposed that it afforded any reason for their rejection. The party is always at liberty to show the circumstances in explanation, to detract from the significance of his utterance. The other argument — that of the unfairness of allowing comment in argument, after the evidence closed — rests on incorrect premises, for the conceded rule (noted later) is that the superseded pleading, when thus used, must always be formally offered in evidence at the proper time, like all other matters of evidence. There is no reason why a retraction, based (perhaps) on better information, should effect the exclusion of this rather than of any other sort of statement, once made by the party and now offered against him:

1883, *Elliott, J.*, in *Boots v. Canine*, 94 Ind. 408, 416: "We should feel that we were doing an idle thing if we should undertake to cite authority upon the proposition that a party cannot be deprived of his right to give in evidence an admission because the latter had withdrawn it. Even in criminal cases, an admission made by the accused before the examining magistrate is not rendered incompetent by a subsequent withdrawal. The withdrawal of an admission may, in proper cases, go in explanation, but it cannot change the rule as to its competency. We have never, until the argument in this case, known it to be asserted that the withdrawal of a confession or an admission destroyed its competency as evidence against the person making it. If it did, then criminals might destroy evidence by retraction, and parties escape admissions by a like course. The law tolerates no such illogical procedure. It is proper to show the withdrawal and all attendant circumstances, for the purpose of determining the weight to be attached to the admission, but not for the purpose of destroying its competency."

Such is the view generally accepted, although the rulings are by no means uniform.¹

¹ *Cal.*: 1876, *Ponce v. McElvy*, 51 Cal. 222 (superseded complaint, not allowed to be read); 1884, *Johnson v. Powers*, 65 id. 179, 180, 3 Pac. 625 ("Such statements, so far as they were con-

But, since the superseded pleading is offered, like any other statement of the party constituting a quasi-admission, as an item in the general mass of evidence against the party, it must of course be put in *at the proper time*. It therefore cannot be commented on in argument, unless (according to the principles of §§ 1806, 1866, *post*) it has been thus formally offered in due season:

1886, *Orton, J., in Folger v. Boyinton*, 67 Wis. 447, 30 N. W. 715: "The pleadings in the cause may be referred to by counsel or the Court to ascertain the nature and scope of

trading or inconsistent with his statements as a witness, were as much admissible, for the purpose of impeaching him, as if they were contained in a letter written by him to a third person or in an affidavit filed in a distinct proceeding"; 1886, *Pfister v. Wade*, 69 id. 133, 133, 10 Pac. 369 (superseded pleading does not bind; but it is receivable so far as it serves any purpose other than as a pleading; here, the plaintiff was allowed to use his own superseded pleading as containing an offer to pay money into court); 1886, *Wheeler v. West*, 71 id. 126, 128, 11 Pac. 871 (superseded complaint, held not admissible for defendant, the purpose not appearing in the report); 1889, *Coward v. Clanton*, 79 id. 23, 28, 21 Pac. 359 (answer in another suit on the same subject, received, though "superseded by the filing of another answer"; "no matter if it had ceased to exist as a pleading in the cause, it was still binding upon the respondent as an admission"; no authority cited); 1896, *Ralph v. Hensler*, 114 id. 106, 45 Pac. 1062 (superseded pleading held inadmissible in evidence); 1896, *Miles v. Woodward*, 115 id. 308, 46 Pac. 1076 (original amended pleading, not received); 1897, *O'Connor's Estate*, 118 id. 69, 50 Pac. 4 (superseded pleading, admitted); 1902, *Ruddock Co. v. Johnson*, 135 id. 919, 67 Pac. 680 (withdrawn cross-complaint, held not evidence); *Ga.*: 1902, *Alabama Midland R. Co. v. Guilford*, 114 Ga. 627, 40 S. E. 714 (superseded pleading, held admissible); *Ill.*: 1899, *Wenegar v. Bollenbach*, 180 Ill. 222, 54 N. E. 102 (superseded bill in same proceeding, excluded, where not verified by the party but drawn by the attorney under a misapprehension; no general rule laid down); *Ind.*: 1883, *Boots v. Canine*, 94 Ind. 408, 416 (see quotation *supra*); *Ia.*: 1873, *Mulligan v. R. Co.*, 36 Ia. 180, 189 (amended pleading, admissible); 1886, *Baridan v. R. Co.*, 69 id. 527, 531, 29 N. W. 599 (same); 1893, *Shipley v. Reasoner*, 87 id. 555, 557, 54 N. W. 470 (same); 1897, *Ludwig v. Cahwell v. Drummond*, — id. —, 96 N. W. 1122 (same); *Ky.*: 1903, *Wyles v. Berry*, — Ky. —, 76 S. W. 126 (original amended pleading, signed and sworn, held admissible); *Mass.*: 1847, *Baldwin v. Gregg*, 13 Metc. 253 (the filing and withdrawing of a specification of defence is not to be considered); 1885, *Taft v. Fiske*, 140 Mass. 250, 5 N. E. 621 (the filing of an amendment to a pleading is not a proper subject of comment in argument, nor can the original pleading be used in evidence; see quotation *supra*); 1900, *Denelman v. Burton*, 176 id. 363, 57 N. E. 665 (comments on the amended answer, held improper on the facts); *Minn.*: 1884, *Vogel v. Osbourne*, 32 Minn. 167, 20 N. W. 129 (superseded pleading, held admissible, but under a stricter rule, as to proof of the party's personal knowledge of it, than other pleadings); *Mo.*: 1897, *Walsor v. Wear*, 141 Mo. 443, 42 S. W. 928 (two former answers in the same cause, omitting to allege the present defence, received); *Mont.*: 1897, *Mahoney v. Hardware Co.*, 19 Mont. 377, 48 Pac. 545 (a part abandoned before trial, held not admissible); *Nebr.*: 1895, *Woolworth v. Thompson*, 44 Nebr. 311, 62 N. W. 450 (original pleading, admitted); 1899, *Miller v. Nicodemus*, 58 id. 352, 78 N. W. 618 (original of amended answer, receivable); *N. Y.*: 1899, *Tisdalo v. R. Co.*, 116 N. Y. 416, 420, 22 N. E. 700 (original answer, as modified by a stipulation narrowing the issue, allowed to be used); *Or.*: 1899, *Sayre v. Mohney*, 35 Or. 141, 56 Pac. 526 (original of verified pleading, afterwards amended, receivable); *S. D.*: 1896, *Corbett v. Clough*, 8 S. D. 176, 65 N. W. 1074 (superseded complaint, verified by the attorney only, held inadmissible, unless the party's direction or sanction is shown for the parts offered); 1903, *La Rue v. St. Anthony & D. E. Co.*, — id. —, 95 N. W. 292 (superseded complaint, signed by the attorney, held not admissible unless the plaintiffs had personally sanctioned its recitals); *Tex.*: 1859, *Coats v. Elliott*, 23 Tex. 606, 613 (said *obiter* that a superseded pleading might properly have been excluded); 1896, *Barrett v. Featherston*, 89 id. 567, 35 S. W. 11, 36 S. W. 245 (superseded answer, admitted); *Boots v. Canine*, *Ind.*, followed; *Hunter, J., diss.*, in the *Civ. App. Ct.*; 1902, *Houston S. W. T. R. Co. v. De Walt*, 96 id. 121, 70 S. W. 531 (former nonamended pleading, received); *Utah*: 1896, *Kilpatrick Co. v. Dox*, 13 Utah 494, 45 Pac. 629 (original answer before amendment, admitted); *Wis.*: 1875, *Leavitt v. Cutler*, 37 Wis. 46, 53 (original and first amended answer, in an action for breach of marriage-promise, held inadmissible to enhance damages); 1886, *Folger v. Boyinton*, 67 id. 447, 30 N. W. 715 (original complaint under oath, in an action for a crop-contract, held admissible "by way of impeachment or as admissions of the plaintiffs"); 1896, *Lindner v. Ins. Co.*, 93 id. 526, 530, 67 N. W. 1125 (loss by fire; portions of the answer withdrawn by the defendant, held receivable; *Leavitt v. Cutler*, distinguished); 1901, *Hocks v. Sprangers*, 113 id. 123, 87 N. W. 1101, 89 N. W. 113 (defendant's original default and subsequent reopening of the case, excluded).

the action and, if there is an answer, the real issues in the cause, and for no other purpose. But they cannot be referred to as proof of any fact unless they are introduced in evidence on the trial with at least some chance for explanation. The original complaint was sought to be read to the jury [during the closing argument] to show what the allegation of the plaintiffs was as to the contract. This was to prove the admissions of the plaintiffs as to what it was, and therefore should have been introduced as any other testimony in the case, so as to give the plaintiffs a chance to explain such an admission. But that old complaint, not then being the complaint in the cause, should of course be introduced in evidence like the records in another case. . . . To read that complaint to the jury would not be reading any part of the pleadings in the cause, either to ascertain the issues or the nature and scope of the action. I never heard of such a practice as here attempted, and in my opinion it is as illogical as it is unlawful."²

3. Vicarious Admissions (by other than the Party himself).

§ 1069. **In general.** Admissions, in the sense here concerned, are merely the prior assertions of the party, which, being inconsistent with his present claim, serve now to discredit it by their discrepancy (*ante*, § 1048). How, then, can the utterances of any other person than the party himself serve for that purpose? In other words, how do other persons' statements become receivable as vicarious admissions?

Three different modes suggest themselves as possible. By *preappointment*, the party may designate a person whose utterance he assents to beforehand as correct, and this utterance, when made, thus represents the party's own belief. By *adoption*, the party may assent to a statement already uttered by another person, which thus becomes effectively the party's own admission. By *privity of interest* and by *agency* the party's rights may in the substantive law be affected by the acts of another person, and thus the other person's admissions may equally be available evidentially. These various modes may now be noticed in order; though it will be found that some classes of statements have to be considered from more than one of these three points of view.

§ 1070. **Admissions by Reference to a Third Person.** If a party, instead of expressing his belief in his own words, names another person as one whose expected utterances he approves beforehand, this amounts to an anticipatory adoption of that person's statement; and it becomes, when made, the party's own. This species of admission is well recognized,¹ though not

² *Accord*: 1893, *Shiple v. Reasoner*, 87 Ia. 555, 558, 54 N. W. 470 (explaining away *Cross v. Garrett*, 35 id. 480, 486; *Hanners v. McClelland*, 74 id. 318, 323, 37 N. W. 389; *Brannum v. O'Connor*, 77 id. 632, 635, 42 N. W. 504); 1896, *Leach v. Hill*, 97 id. 81, 66 N. W. 69; 1895, *Woodworth v. Thompson*, 44 Nebr. 311, 62 N. W. 450; 1886, *Folger v. Boyinton*, 67 Wis. 447, 30 N. W. 715 (see quotation *supra*).

¹ 1794, *Lloyd v. Willan*, 1 Esp. 178 (defendant proposed to pay, if the plaintiff's porter would make an affidavit of the delivery of the goods: the affidavit was made; the defendant was then "precluded from going into any evidence whatever on the case," on the ground of

mala fides and of unfairness in probing an opponent's evidence); 1804, *Burt v. Palmer*, 5 id. 145 (defendant, on a demand made, said "You must apply to J. A., and he will pay you"; A.'s admission received; "where a person is referred to, to settle and adjust any account or business, what he says, if it is connected with the business which is referred to him, is evidence"); 1806, *Daniel v. Pitt*, 1 Camp. 364 note (defendant said, "If C. will say that he did deliver the goods, I will pay for them"; C.'s statement held admissible); 1807, *Brock v. Kent*, *ih.*, note (defendant "desired him to enquire of J. about it," J. being a person who had paid money; Jones' statement held admissible); 1808, *Wil-*

frequently available. In earlier times it had a prototype in a not uncommon contract-clause among merchants by which the obligor bound himself to perform when one or more specified persons should make an oath that certain facts existed, upon which the obligation became due, irrespective of the truth of the sworn statement; and litigation over such contracts was not infrequent up to the time of the Stuarts.² This admission by reference brings us, indeed, close to the principle of awards by arbitrators; for, though the validity of the award rests on a contractual basis (*ante*, § 1056) yet the process is one of reference to a third person's pronouncement.³

Admission by reference differs from admission by adoption in that in the latter form the third person's statement is already made; the varieties of this form we may now proceed to consider.

§ 1071. **Third Person's Statement assented to by Party's Silence; General Principle.** *Qui tacet consentire videtur*, "silence gives consent," are ancient maxims, which have ever been taken to be unquestioned and have a larger scope than their application in the law of evidence. But, like all maxims, they merely sum up a broad principle, and cannot serve, without decided qualification, as practical and precise rules. Silence implies assent to the correctness of a communication, but on certain conditions only. The general principle of Relevancy (*ante*, § 29) tells us that the inference of assent may safely be made only when no other explanation is equally consistent with silence; and there is always another such explanation — namely, ignorance, or dissent — unless the circumstances are such that a dissent would in ordinary experience have been expressed if the communication had not been correct. This much has always been conceded judicially when the question

Hams v. Innes, 1 Camp. 364 (defendant's letter told the plaintiff "if she wanted any farther information regarding the affairs of the deceased, she should apply to a Mr. R."; L. C. Ellenborough: "If a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it, as much as if that had been said or done by himself"); 1822, *Garnet v. Hall*, 3 Stark. 160 (trover for a horse; the plaintiff had said "that if the defendant would take his oath that the horse was his, he should keep him"; the fact of the defendant's affidavit being made was received); 1828, *Hood v. Reeve*, 3 C. & P. 532 (defendant's letter "I refer you to him thereon," meaning one H., held to admit H.'s statement respecting the account, though H.'s statement was made at another time; "anything that he says about the account is admissible"); 1836, *Sybray v. White*, 1 M. & W. 435 (injury to a horse; defendant said that if a miners' jury would say that the shaft where the horse was killed was his, he would pay; the miners' verdict received to charge the defendant; "the jury are in the nature of his accredited agents"); 1884, *R. v. Mallory*, 15 Cox Cr. 456 (knowing receipt of stolen goods; the defendant referred the police to his wife for a

list of the prices and dates of purchase of the goods, stating that he did not know them, and the next day the wife handed the police the list in his presence; the list was received, as an admission of the prices and dates); 1856, *Chadsey v. Greene*, 24 Conn. 562, 572 (warranty of a horse; statements of N., to whom defendant referred plaintiff for information as to defendant's responsibility, received); 1853, *Chapman v. Twitchell*, 37 Me. 59 ("Twitchell can show you where the corner is"; T.'s showing admitted); 1878, *Lambert v. People*, 6 Abb. N. C. 181, 193 (statements held not on the facts an admission by reference); 1869, *Allen v. Killinger*, 8 Wall. 480, 486 (rule recognized). The following case belongs somewhere here: 1895, *State v. Kent*, 4 N. D. 577, 62 N. W. 631 (the witness had written at defendant's dictation a certain account, which he was allowed to read and hand in, as embodying the defendant's admission).

² See some early examples cited in Pollock & Maitland, *Hist. Eng. Law*, II, 224. There are later ones scattered through Croka's reports.

³ Distinguish the question whether the party's own statements, made to arbitrators, may be excluded as being made with a view to compromise (*ante*, § 1062, note).

has been presented. But the force of the brief maxim has always been such that in practice (and especially in the original English tradition) a sort of working rule grew up that *whatever was said in a party's presence was* receivable against him as an admission, because presumably assented to. This working rule became so firmly entrenched in practice that frequent judicial deliverances became necessary in order to dislodge it; for in this simple and comprehensive form it ignored the inherent qualifications of the principle. These qualifications, in varying phraseology, are expounded in the following passages:

1826, *Duncan, J.*, in *Moore v. Smith*, 14 S. & R. 388, 393: "The reason why this species of evidence is given is because the party by his silence is supposed to acquiesce. *Qui tacet consentire videtur*. That presupposes a declaration or proposition made to him which he is bound either to deny or to admit. . . . [In the present case], the only evidence is that he was present at the view [of the land]; that he was on the land, the tract; and he was acting as chain-carrier [when remarks were made by the litigants]. This is quite too loose. Two men, at this rate, might talk a third out of his whole estate, with a witness! Nothing can be more dangerous than this kind of evidence. It should always be received with caution; and never ought to be unless the evidence is of direct declarations of that kind which naturally calls for contradiction, — some assertion made to the man with respect to his right, which by his silence he acquiesces in."

1838, *Phelps, J.*, in *Vail v. Strong*, 10 Vt. 457, 463: "It is sometimes said that, if a fact, which makes against the party, is stated in his presence, and is not contradicted by him, his silence raises a presumption of its truth. To this position we cannot accede. The mere silence of the party creates no evidence, one way or the other. There are, indeed, cases where the silence of the party creates a presumption or inference against him; but this presumption derives all its force from the circumstances, under which the statement is made, which may call for a denial. If the party is under a moral or honorary obligation to disclose, or if his reputation or interest is jeopardized by the statement, he has a strong inducement to deny it, if he can do so with truth. His silence, under such circumstances, affords an inference against him, which is more or less strong, in proportion to the inducement to make the denial. But even here, the evidence, thus created, rests altogether upon the attendant circumstances. If, for instance, the party be engaged in defending his reputation or his rights, an assertion, bearing upon the subject under discussion, and unfavorable to him, calls for a denial, and if there be not a denial, a presumption of its truth arises. But we know of no obligation upon the party to answer every idle or impertinent inquiry. He has the right to be silent, unless there be good occasion for speaking. We cannot admit that he is bound to disclose his private affairs, at the suggestion of idle curiosity, whenever such curiosity is indulged, at the hazard of being concluded by every suggestion, which may be suffered to pass unanswered. The true rule we understand to be this. Evidence of this character may be permitted to go to the jury, whenever the occasion, upon which the declaration is made in the presence of the party, and the attendant circumstances, call for serious admission or denial on his part; but the strength of the evidence depends altogether upon the force of the circumstances and the motives, which must impel him to an explicit denial, if the statement be untrue. But if no good reason exist to call for disclosure, and the party decline to enter into useless discussion, or answer idle curiosity, no legitimate inference to his prejudice can be drawn from his silence."

1844, *Redfield, J.*, in *Mattocks v. Lyman*, 16 Vt. 113, 119: "It seems to have been generally considered that all conversation had in the presence of a party, in regard to the subject of litigation, might properly be given in evidence to the jury. . . . There are many cases of this character when one's silence ought to conclude him. But when the

claim is made for the mere purpose of drawing out evidence, as, in the present case, it is obvious must have been the fact, or when it is in the way of altercation, or, in short, unless the party asserting the claim does it with a view to ascertain the claim of the person upon whom he makes the demand, and in order to know how to regulate his own conduct in the matter, and this is known to the opposite party, and he remains silent, and thereby leads the adversary astray, mere silence is, and ought to be, no ground of inference against any one. The liabilities to misapprehension, or misrecollection, or misrepresentation are such, that this silence might be the only security. To say, under such a dilemma, that silence shall imply assent to all which an antagonist may see fit to assert, would involve an absurdity little less gross than some of the most extravagant caricatures of this inferring assent, and with others none at all. The testimony then would depend upon the character and habits of the party, — which would lead to the direct trial of the parties, instead of the case."

1847, *Shaw, C. J.*, in *Com. v. Kenney*, 12 Metc. 235, 237: "In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts: first, whether he hears and understands the statement, and comprehends its bearing; and secondly, whether the truth of the facts embraced in the statement is within his own knowledge, or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistent with decorum and the rules of law. So, if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief that his security will be best promoted by his silence; then no inference of assent can be drawn from that silence. Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance, to decide ultimately upon them."

1891, *Bowen, L. J.*, in *Wiedemann v. Walpole*, 2 Q. B. 534, 539: "There must be some limitation placed upon the doctrine that silence when a charge is made amounts to evidence of an admission of the truth of the charge. The limitation is, I think, this: Silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not."

These limitations cannot be questioned in point of abstract principle. But it is perhaps questionable whether the specified conditions should be required to appear in a particular case before receiving the third person's statement made in the party's presence. Such strictness was proper enough in earlier days, up to fifty years ago, when the party himself was disqualified as a witness and therefore could not by his own testimony protect himself against undue inferences drawn from his silence. But to-day there is ample opportunity thus to counteract the risk of misconstruction; moreover, the rigid enforcement of the conditions above specified would tend to introduce technicalities and to cumber the issues. It would seem to be better to rule at least that any statement made in the party's presence as an auditor is receivable, unless he can show that he lacked either the opportunity or the motive to deny its correctness; thus placing upon the opponent of the evidence the burden of showing to the judge its impropriety. But the burden is in practice generally left upon the proponent to show that the requisite conditions

existed; ¹ though the middle course is sometimes taken of leaving the question to the jury.²

§ 1072. **Same: Specific Rules; Statements made during a Trial, under Arrest; Notice to Quit; Omission to Schedule a Claim, etc.** (1) The application of the principle is of course commonly attended by little difficulty; and such doubt as may arise depends on particular circumstances not leading to any specific rule. Most of the rulings cannot properly serve as precedents.¹

¹ 1894, *People v. Mallon*, 103 Cal. 513, 514, 37 Pac. 513; 1859, *Drumright v. State*, 29 Ga. 430. Compare other cases in the next section.

² 1824, *State v. Parkins*, 3 Hawks 377 (whether the defendant was by intoxication incapable of understanding what was said to him, held properly left to the jury).

³ *Eng.*: 1834, *Hayslep v. Gymer*, 1 A. & E. 162 (plaintiff's statements as to a gift, received because made to the defendant without dissent); 1877, *Bessie v. Stern*, L. R. 2 C. P. D. 265 (breach of marriage-promise; defendant's silence when taxed by the plaintiff with a promise, admitted, and also sufficient to go to the jury as corroboration under the statute); 1892, *R. v. Mitchell*, 17 Cox Cr. 503, 508 (dying declarations in defendant's presence excluded, because a denial at that moment was not to be expected); *Ala.*: 1858, *Fuller v. Dean*, 31 Ala. 654, 657 (slander); 1876, *Campbell v. State*, 55 id. 80, 82 (larceny); 1876, *Matthews v. State*, ib. 187, 194 (rape); 1886, *Williams v. State*, 81 id. 1, 6, 1 So. 179 (homicide; co-defendant's declarations, admitted); 1895, *Peck v. Ryan*, 110 id. 336, 17 So. 733 (claim to a debt); 1902, *Davis v. State*, 131 id. 10, 31 So. 569; *Cal.*: C. C. P. § 1872, par. 3 ("an act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto," is admissible); 1867, *People v. McCrea*, 32 Cal. 98; 1879, *People v. Ah Ynta*, 53 id. 613; 1895, *People v. Young*, 108 id. 8, 41 Pac. 281; 1899, *Tibbet v. Sue*, 125 id. 544, 58 Pac. 160 (statement about a loan to a third person); *Fla.*: 1903, *Weightnovel v. State*, — Fla. —, 35 So. 856 (physician charged with abortion); *Ga.*: Code 1895, § 5195, Cr. C. § 1003 ("acquiescence or silence, when the circumstances require an answer or denial or other conduct, may amount to an admission"); 1847, *Carter v. Buchanan*, 3 Ga. 513, 521 ("what one party says to another without contradiction is admissible, but what a stranger says to a party may, although uncontradicted, not always be evidence"); 1857, *Morris v. Stokes*, 21 id. 552, 571; 1859, *Block v. Hicks*, 27 id. 522, 524; 1859, *Phillips v. State*, 29 id. 103, 108; 1874, *Markham v. O'Connor*, 52 id. 183, 197; 1891, *Small v. Williams*, 87 id. 631, 635, 13 S. E. 589; 1892, *Giles v. Vandiver*, 91 id. 192, 194, 17 S. E. 115; 1899, *Chapman v. State*, 109 id. 157, 34 S. E. 369 (certain vague threats of a wife in defendant's presence, excluded); 1895, *Ware v. State*, 96 id. 349, 23 S. E. 410; 1903, *Graham v. State*, — id. —, 45 S. E. 616 (mere silence when arrested, excluded); *Ind.*: 1871, *Pierce v. Goldeberry*, 35

Ind. 317, 330; 1876, *Blessing v. Dodds*, 53 id. 95, 101; 1884, *Barber v. State*, 99 id. 71, 73; 1886, *Conway v. State*, 118 id. 482, 483, 21 N. E. 285; *Ky.*: 1898, *Franklin v. Com.*, 106 Ky. 237, 46 S. W. 966; *Mass.*: 1839, *Com. v. Call*, 21 Pick. 515, 521 (accomplice's statements); 1854, *Boston & W. R. Co. v. Dana*, 1 Gray 83, 104; 1854, *Com. v. Harvey*, ib. 467; 1861, *Larry v. Sherburne*, 2 All. 34 (plaintiff's silence when offered payment by a third person, held not an admission of that person's liability); 1862, *Hildreth v. Martin*, 3 id. 371 (preceding case approved); 1879, *Drury v. Harvey*, 126 Mass. 519, 522 (not admissible "unless the circumstances are such that a denial would naturally be expected or an explanation of some sort would naturally be called for"); 1879, *Whitney v. Houghton*, 127 id. 527; 1883, *Com. v. Braisley*, 134 id. 527, 530; 1888, *Com. v. Funal*, 146 id. 570, 16 N. E. 458; 1895, *Com. v. McCabe*, 163 id. 98, 39 N. E. 777; 1901, *Com. v. O'Brien*, 179 id. 533, 61 N. E. 213; *Mich.*: 1895, *People v. Fowler*, 104 Mich. 449, 62 N. W. 572; *Mo.*: 1896, *State v. Hill*, 134 Mo. 643, 36 S. W. 223 (the party, when charged with being the father of a child, "kinder laughed"; admitted); *N. H.*: 1860, *Corser v. Paul*, 41 N. H. 24, 29 (demand of payment of a note); *N. J.*: 1857, *Donnelly v. State*, 26 N. J. L. 463, 504, 601, 612 (dying declarations as to the deceased's assailant; admitted); *N. Y.*: 1887, *People v. Driscoll*, 107 N. Y. 414, 424, 14 N. E. 305 (similar to *Donnelly v. State*, N. J.); 1900, *People v. Page*, 162 id. 272, 52 N. E. 750 (rape; silence when told by a third person that the prosecutrix was charging the defendant with the rape, excluded; unsound); 1902, *Peopls v. Smith*, 172 id. 210, 64 N. E. 814 (there must be a motive to respond or to act); 1903, *Seldenspinner v. Metrop. L. Ins. Co.*, 175 id. 95, 67 N. E. 123 (receipt of sick benefits is an admission by the beneficiary of sickness existing at the time); 1903, *Stecher Lith. Co. v. Inman*, ib. 124, 67 N. E. 213 (there must be a motive to reply; applying this to a third person's statements as to defective goods; *Parker, C. J.*, and two others, diss., on the wholly untenable ground that such evidence is admissible only in criminal cases); *N. C.*: 1877, *Francis v. Edwards*, 77 N. C. 271, 274 (unanswered remarks of an intoxicated person, treating defendant as a partner, held not admissible); 1833, *Gny v. Manuel*, 89 id. 83, 86 (declarations of a boundary, in the defendant's presence, before he had an interest, excluded); 1899, *Webb v. Atkinson*, 124 id. 447, 32 S. E. 737; 1902, *Virginia C. C. Co. v.*

Among the commoner classes of cases, it may be noted that a tenant's silence upon receiving a notice to quit was formerly a common instance of the principle's application.³ Under this principle, also, comes the inference from a party's omission to file a claim in a list of debts or the like,⁴ though this is sometimes hardly to be distinguished from the analogous instances of silence at a trial (*infra*, par. 3) and failure to answer a letter (*post*, § 1073); distinguish also the inference, from a party's failure to testify or to make complaint, of his consciousness of the weakness of his cause (*ante*, §§ 284, 289), where the inference does not involve an assent to a third person's statement.

(2) By way of specific rule, carrying out the principle already examined, it is sometimes said that the proponent of the evidence must show, not merely that the party was present⁴ when the remark was made (and "presence" of course implies "proximity within a distance sufficient to permit hearing"), but also that the party actually heard and understood what was said.⁵ But this seems too strict; the presence of a party may be assumed to indicate that he heard and understood. So, also, it is sometimes said that the proponent must show that the party had knowledge of the facts stated, since otherwise

Kirven, 180 id. 161, 41 S. E. 1; N. D.: 1898, Paulson Mercantile Co. v. Seaver, 8 N. D. 215, 77 N. W. 1001; Pa.: 1826, Moore v. Smith, 14 S. & R. 888, 892 (conversation between two others, in defendant's presence, during a survey, not admitted; see quotation *supra*); 1847, M. Clenkan v. McMillan, 6 Pa. St. 366; S. C.: 1820, State v. Rawls, 3 Nott & McC. 331, 336 (gaming; defendant's silence, when called by other players with a certain name, held to be evidence of his name); U. S.: 1853, Turner v. Yates, 16 How. 14, 27 (declarations admitted because they were "of such a character and made under such circumstances as imperatively to have required them to deny their correctness if they were untrue"); Utah: 1903, State v. Mortensen, — Utah —, 73 Pac. 562 (statements made over the body of the deceased, admitted on the facts); W.: 1838, Vail v. Strong, 10 W. 457, 463 (see quotation *supra*); 1839, Gale v. Lincoln, 11 id. 152, 155; 1844, Matlocks v. Lyman, 16 id. 113, 119 (see quotation *supra*); 1851, Harsey v. Barton, 23 id. 685, 688 (statements to a third person in defendant's presence, excluded); 1896, State v. Magoon, 68 id. 289, 35 Atl. 810.

³ 1809, Doe v. Biggs, 2 Tannt. 109 (silence on receiving a notice to quit, received as evidence of an admission of the term of tenancy); 1811, Doe v. Wombwell, 2 Camp. 559 (notice to tenant to quit; his failure to object, with his language at the time, held to be an admission of the time of beginning of tenancy); 1811, Thomas v. Thomas, ib. 647 (failure to object, on personal service of notice to quit, say be an admission; but it "must depend upon circumstances"; e. g. the defendant might be illiterate, or the server might have left too soon for objection to be made); 1811, Doe v. Forster, 18 East 405 (the tenant's knowledge of contents and his demeanor may amount to an admission). Compare the rule for an account rendered (*post*, § 1073).

Distinguish the question whether the landlord's receipt of rent without protest amounts to a waiver of default in payment: 1810, Doe v. Calvert, 2 Camp. 337.

⁴ 1811, Hart v. Newman, 3 Camp. 13 (insolvent's failure to schedule a bill of exchange "is not enough to prove that the amount was not then due"); 1830, Nicholls v. Downes, 1 Mo. & Rob. 13 (excluded; L. C. J. Tenterden: "Can it be allowed that a party shall be admitted to claim, in a court of justice, a debt, after having on oath declared there was none such?") Counsel then cited "a similar case in which Lord Ellenborough had said that the defendant's having cheated his assignees was no reason why another person should cheat him"; L. C. J.: "I cannot assent to that"; 1878, Eaton v. New England T. Co., 68 Me. 63, 66 (omission to claim the present property in a garnishee or trustee answer in another suit, received); 1859, Stevens v. Miller, 13 Gray 282 (plaintiff's settlement of a debt without mention of counterclaim arising from the same transaction, admissible); 1840, Miller v. Heck, 9 Watts 439, 445 (executor's inventory, omitting a claim now made, received).

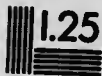
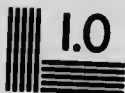
⁵ This much is always understood nowadays: 1903, People v. Philbon, 138 Cal. 530, 71 Pac. 650; 1895, Josephi v. Furnish, 27 Or. 260, 41 Pac. 424 (a conversation held twelve feet away and around a corner out of sight, excluded).

⁶ 1903, Weightnovel v. State, — Fla. —, 35 So. 856 (the defendant being outside the room); 1880, Jones v. State, 65 Ga. 147, 150 (the statement must be made in his presence and hearing, and the witness "must be certain thereby that his attention was arrested"); 1860, Queener v. Morrow, 1 Coldw. 123, 130 ("it is indispensable that the party should have heard and understood the statement").



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he might have hesitated to contradict.⁶ This, again, is perhaps too strict, for a party's admission (as already noted in § 1053) is receivable irrespective of his personal knowledge.

(3) On the other hand, if on the circumstances it appears that the party was in fact *physically disabled* from answering, his silence of course signifies nothing, and the statement is inadmissible.⁷ So, too, if the party had plainly no *motive for responding*, his silence permits no inference; and this is often the case where the statement is addressed to another person, and not to the party himself.⁸ Much more is the silence without significance when a positive deterrent motive, such as *fear*, was operating upon the party.⁹ Certain situations in particular may furnish a positive motive for silence without regard to the truth or falsity of the statement. Whether the fact that the party is at the time *under arrest* creates such a situation has been the subject of opposing opinions; a few Courts (for the most part in acceptance of an early Massachusetts precedent), by a rule of thumb exclude the statement invariably; but the better rule would seem to allow some flexibility according to circumstances.¹⁰ But where the party is in a *court-room*, and a trial or

⁶ 1841, *Robinson v. Blen*, 20 Me. 109; 1838, *Edwards v. Williams*, 2 How. Miss. 846, 849.

⁷ 1895, *Dean v. State*, 105 Ala. 21, 17 So. 28 (remarks addressed to a party who was shot and unable to speak, excluded); 1899, *Lallande v. Brown*, 121 id. 513, 25 So. 997 (conversation in presence of defendant while ill, admitted); 1893, *Springer v. Byram*, 137 Ind. 15, 36 N. E. 361 (remark made by the brother of the injured plaintiff, before the latter in the ambulance, admitted); 1897, *People v. Koerner*, 154 N. Y. 355, 43 N. E. 730 (remarks in the presence of one unconscious, excluded, though there was evidence that he was shamming unconsciousness); 1903, *State v. Epstein*, — R. I. —, 55 Atl. 204 (statements in the presence of an accused who was physically in such suffering as to be probably unable to understand or reply, excluded); 1896, *Gowen v. Bush*, 22 C. C. A. 196, 76 Fed. 349 (statements addressed to a plaintiff when he was semi-unconscious after an injury, excluded).

⁸ 1852, *Lawson v. State*, 20 Ala. 65, 68, 80 (fornication; conversation in the presence of the female defendant, as to the party to be charged by the doctor, just after the delivery of the child, held inadmissible); 1851, *Rolfe v. Rolfe*, 10 Ga. 143, 145 (excluded on the facts); 1890, *State v. Mullins*, 101 Mo. 514, 518, 14 S. W. 625 (remarks addressed to third persons in defendant's presence, not admitted); 1882, *State v. Kemp*, 87 N. C. 540 (adultery; the children of the female defendant in her presence called the male defendant "papa"; held, an admission of parentage and therefore of intercourse); 1895, *Fry v. Stowers*, 92 Va. 13, 22 S. E. 500 (a conversation in D.'s presence but not addressed to him).

⁹ 1858, *Boh v. State*, 32 Ala. 560, 565 (remarks of white persons, in the master's house, charging guilt upon a slave, whose shoe-tracks

were being measured, excluded, because of his condition of "subordination and discipline").

¹⁰ The cases on both sides are as follows: *Eng.*: 1837, *R. v. Bartlett*, 7 C. & P. 832 (defendant's silence, when charged, while in custody, by his wife's remark to him, held sufficient to admit her remark); 1866, *R. v. Jankowski*, 10 Cox Cr. 365 (silence on being identified at the police station, admitted; but it "ought not to weigh against him"); *Can.*: 1892, *R. v. Drain*, 8 Munit. 535 (assaulted person's statement in the presence of the accused under arrest, admitted); *Ala.*: 1852, *Spencer v. State*, 20 Ala. 24, 27 (declarations by a slave in defendant's presence, admitted); *Cal.*: 1874, *People v. Estrado*, 49 Cal. 171 (co-defendant's statement to a police-officer, admitted; the defendant being afterwards allowed to make his statement); 1883, *People v. Ah Fook*, 64 id. 380, 1 Pac. 347 (statement of third person, admitted); 1898, *People v. Dole*, 122 Cal. 486, 497, 55 Pac. 581 (undecided); 1901, *People v. Williams*, 133 id. 165, 65 Pac. 323 (silence when under arrest, excluded on the facts); 1901, *People v. Amaya*, 134 id. 531, 66 Pac. 794 (undenied charges made against the defendant, under arrest, by the deceased on his death-bed, admitted; *Com. v. Kenney, Mass.*, explained, and the doctrine repudiated that the mere fact of arrest excludes such statements); *Ga.*: 1902, *Simmons v. State*, 115 Ga. 574, 41 S. E. 983 (here excluded, the accused's hearing, etc., not being clearly shown); *Ky.*: 1901, *Porter v. Com.*, — Ky. —, 61 S. W. 16 (silence of defendant, under arrest, during an accomplice's confession in his presence, excluded); *La.*: 1882, *State v. Diakin*, 34 La. An. 919, 921 (murder; silence when charged by the dying man, not admitted; here the officer in charge told the defendant to be quiet); 1887, *State v. Estoup*, 39 id. 906, 908, 3 So. 124 (like the

other judicial proceeding is going on, his failure to deny statements made publicly by another person in the course of the proceeding would obviously admit of no inference against him, whether he attends as party or merely as witness; for in either case he is prevented by the dictates of decorum from making open interruption and he knows that he may at the proper time make all necessary denials:

1829, *Parke, J., in Melen v. Andrews, M. & M. 336* (excluding the testimony of a witness on a former trial in the present plaintiff's presence, now offered against the plaintiff): "It is true that the plaintiff might have cross-examined or commented on the testimony. But still, in an investigation of this nature, there is a regularity of proceeding adopted which prevents the party from interposing when and how he pleases, as he would in a common conversation. The same inferences therefore cannot be drawn from his silence or his conduct in this case which generally may in that of a conversation in his presence."

1830, Messrs. *Carrington and Payne, Note to 4 C. & P. 243*: "The reason why anything said in the presence of the prisoner is receivable in evidence against him is that, being said in his hearing, he might have contradicted it had he chosen. Now this seems hardly to apply to what takes place at the time of an examination before the magistrate; because, as the prisoner could not keep up a running commentary of contradictions, the reason of admitting such evidence appears to fail."¹¹

next case); 1899, *State v. Sadler, 51 id. 1397, 26 So. 390* (silence when charged while under arrest, inadmissible); 1901, *State v. Carter, 106 La. 407, 30 So. 395* (similar rule, deceased's declarations, excluded); *Mass.*: 1847, *Com. v. Kenney, 12 Mete. 235* (statements by an officer and by the complaining party, not received under the circumstances); 1866, *Com. v. Walker, 13 All. 570* (identification of defendant by a witness, excluded); 1876, *Com. v. Brown, 121 Mass. 69, 80* (statements not receivable, unless "he was at liberty to reply," and the statement "was made by such a person and under such circumstances as naturally call for a reply unless he intends to admit it"); 1877, *Com. v. McDermott, 123 id. 440* (conversation between an officer and the defendant's companion, excluded); 1892, *Com. v. Trefethen, 157 id. 180, 198, 31 N. E. 961* (rule in *Com. v. Brown* approved; effect of equivocal replies, considered); 1902, *Smith v. Duncan, 181 id. 435, 63 N. E. 938* (statements by a police officer to the defendant after an injury, but without arrest, admitted on the facts); *Mo.*: 1895, *State v. Murray, 126 Mo. 611, 29 S. W. 700* (defendant's brother, a co-defendant, declared in the presence of the defendant under arrest that the latter was the one who had fired the shot; excluded); 1898, *State v. Foley, 144 id. 600, 46 S. W. 733* (silence when under arrest can never be receivable as an admission); *N. Y.*: 1874, *Kelley v. People, 55 N. Y. 565, 572* (that an accused is under arrest is no objection; here the identifying statements of the injured person was received; "the declaration was in substance a challenge to them to assert their innocence if they were not guilty"); 1900, *People v. Kennedy, 164 id. 449, 456, 58 N. E. 652* (identifying remarks, made in answer to a police officer's inquiry, excluded, the officer having forbidden the accused to reply);

1901, *People v. Wennerholm, 166 id. 567, 60 N. E. 259* (silence during statements to an officer just before arrest, admitted; *Martin and Bartlett, J.J., diss.*); 1902, *People v. Smith, 172 N. 210, 64 N. E. 814* (silence of husband, under arrest, at the bedside of his wife, who was semi-conscious, the physician having enjoined silence, held not sufficient to admit the wife's remarks and conduct); *Oh.*: 1881, *Murphy v. State, 27 Oh. St. 628* (two persons having stolen goods in their possession were taken into custody; the remarks of one, to the officer, in the other's presence and on his behalf, admitted); *R. I.*: 1903, *State v. Epstein, — R. I. —, 55 Atl. 204* (statements by the injured person and the police, the accused being present under arrest, excluded; narrow doctrine approved); *Tenn.*: 1896, *Green v. State, 97 Tenn. 50, 36 S. W. 700* (confession of an accomplice made within hearing, admitted); 1896, *Gardner v. State, — Tex. Cr. —, 34 S. W. 945* (following the Massachusetts rule of exclusion); 1901, *Fuunderburk v. State, — id. —, 61 S. W. 393* (same); 1901, *Weaver v. State, 43 id. 340, 65 S. W. 534* (same); *Utah*: 1896, *People v. Kessler, 13 Utah 69, 44 Pac. 97* (the deceased charged the accused with shooting him, but the chief of police told the accused not to speak; excluded); *Wash.*: 1897, *State v. McCullum, 18 Wash. 394, 51 Pac. 1044* (confession by co-defendant, in the presence of the defendant, kept there by compulsion, excluded); *W. Va.*: 1899, *State v. Dickey, 46 W. Va. 319, 33 S. E. 231* (statements by counsel of defendant under arrest, in the latter's presence, to the prosecuting attorney, excluded).

¹¹ *Eng.*: 1821, *R. v. Appleby, 3 Stark. 33* (defendant's silence when charged with guilt in the testimony of a co-defendant before the magistrate, held not to admit the testimony); 1825, *Child v. Grace, 2 C. & P. 193* ("what was said

Here, however, must be distinguished the effect of another principle (*ante*, § 289), by which the party's failure to produce testimony (in particular, to testify himself) permits an inference as to his consciousness of the weakness of his cause. The difference is that there the inference arises from his failure formally to take the stand at the proper time; while here the inference, if any, would arise from his failure to speak out informally at an improper time.¹²

by the magistrate before whom the matter had been investigated, in the presence of both plaintiff and defendant," excluded; Best, C. J.: "If such evidence is allowed, we shall have causes tried at the police offices before they come here"; 1829, *Melen v. Andrews, M. & M.* 336 (see quotation *supra*); 1830, *R. v. Hollingshead*, 4 C. & P. 242, *semble* (what a solicitor for the prosecution said in defendant's presence, before the magistrate, excluded); *Can.*: 1894, *Thompson v. Didion*, 10 Manit. 246 (witnesses' testimony in the presence of the party in court, but not understanding their language, not taken as admission-); *Ala.*: 1856, *Abercrombie v. Allen*, 29 Ala. 281 (contract for services; plaintiff's remarks on the subject, in defendant's presence, at another trial before a justice of the peace, excluded); 1884, *Weaver v. State*, 77 id. 26, 28 (remarks of the magistrate, excluded on the facts); 1895, *Collier v. Dick*, 111 id. 263, 18 So. 522 (C. present in court as spectator while statements were made by M. on the stand; excluded); *Ga.*: 1890, *McElmurray v. Turner*, 86 Ga. 215, 217, 12 S. E. 359 (testimony of the party's own witness at a former trial, excluded, on the theory that silence did not mean assent); 1894, *Bell v. State*, 93 id. 557, 559, 19 S. E. 244 (silence of accused during preliminary examination, excluded); *Ind.*: 1874, *Broyles v. State*, 47 Ind. 251, 253 (testimony of opposing witness in the party's presence, before a magistrate, excluded); 1880, *Howard v. Howard*, 69 id. 592, 690 (statements by a witness on the stand, the defendant being then present as a party, excluded); 1881, *Johnson v. Holliday*, 79 id. 151, 156 (defendant's failure to deny statements of a witness before the magistrate, excluded); 1892, *Puett v. Beard*, 86 id. 104, 106 (battery done at a trial before a justice of the peace; unanswered remarks of the opponent's attorney, as to the battery, admitted, the trial having been ended by the brawl); *Mass.*: 1902, *Keith v. Marcus*, 181 Mass. 377, 63 N. E. 924 (declarations by the judge in the party's presence, not admitted on the facts); *Mo.*: 1890, *State v. Mullins*, 101 Mo. 514, 517, 14 S. W. 625 (silence of defendant at a coroner's inquest, excluded); 1900, *State v. Hale*, 156 id. 102, 56 S. W. 881 (defendant on trial "nodded his head" when a witness said, "Don't you know that is the pocket-book?"; excluded, but erroneously, for this was an explicit assent); *N. H.*: 1903, *Little v. R. Co.*, — N. H. —, 55 Atl. 190 (argument of plaintiff, after evidence closed, challenging defendant to make experiments showing the time required for stopping a car, held improper); *N. Y.*: 1883, *People*

v. Willett, 34 N. Y. 29 (experiments as to identity, made during a coroner's inquest and in defendant's presence, not admitted; "the doctrine as to silence . . . does not apply to silence at a judicial proceeding or hearing"; *N. C.*: 1849, *Moffit v. Witherspoon*, 10 Ired. 185, 191 (silence during remarks of counsel made in argument to the jury, held not to make them admissible); 1887, *Blackwell D. T. Co. v. McElwee*, 96 N. C. 71, 1 S. E. 676 (silence of defendant, and his failure later as a witness to make denial, concerning the terms of a letter admitted by his partner when giving a deposition, to be correct, held inadmissible; the second point of the ruling is erroneous); *Pa.*: 1903, *Conn. v. Zorambo*, — Pa. —, 54 Atl. 716 (accused's silence when charged by a witness speaking before the magistrate, after the hearing was over, but when he might still have supposed it going on, excluded on the facts); *U. S.*: 1853, *Carr v. Hilton*, 1 Curt. 390 (statement of counsel, arguing before a Supreme Court, that he had notified H., not then a party, not received against H. now plaintiff); *Vt.*: 1853, *Brainard v. Buck*, 25 Vt. 573, 579 (statements at a chancery proceeding, by a party, in the presence of the now defendant as a witness, charging him with the receipt of money, and not denied by him, excluded); 1863, *State v. Gilbert*, 36 id. 145, 147 (statements of a witness in defendant's presence before a magistrate, held not admissible because of the party's silence).

Compare the cases as to a witness' self-contradictions (*ante*, § 1042).

¹² The confused recognition of this other principle has sometimes led to rulings which are correct enough, but are not clearly placed upon the proper ground: 1844, *Jones v. Morrell*, 1 C. & K. 266, 268 (defendant's depositions, offered before a magistrate at a prior hearing, admitted, because the plaintiff, then being there, after the reading was "called upon to answer it," and did answer not denying); 1848, *Simpson v. Robinson*, 12 Q. B. 512 ("We do not understand that case [of *Melen v. Andrews, supra*] as deciding that under no circumstances can such evidence be admitted; . . . for cases might certainly be conceived in which a party by not denying a charge so made might possibly afford strong proof that the imputation was unjust"); 1901, *State v. Dexter*, 115 Ia. 678, 87 N. W. 417 (testimony of wife of defendant at a former trial in his presence, admitted; he "had the opportunity to deny it on the witness stand").

Distinguish also the party's omission, at a former trial, to mention certain facts in his testimony, for that is equivalent to a contradiction of

(4) It ought not to be necessary to note that the party's *denial* of the third person's statement destroys entirely the ground for using it.¹³ Furthermore, when by silence the statement is made admissible, the inference of the party's assent may always (on the logical principle of § 32, *ante*) be *explained away* in rebuttal by circumstances showing that the silence was due to other motives.¹⁴

(5) Certain distinct principles need here to be discriminated. (a) Silence on the part of an *accused person* has sometimes a circumstantial significance, not by way of assent to a third person's statement, but as indicative of a *consciousness of guilt*; this is better considered in connection with related topics dealt with elsewhere (*ante*, § 284, failure to explain innocence; *post*, § 1144, consistent exculpatory statements; and *post*, § 1781, explaining the possession of stolen goods). (b) Statements of third persons, which, not receivable by virtue of the present principle of assenting silence, may still be receivable, against an *accused person*, as admissions of a *co-conspirator*¹⁵ (*post*, § 1079), or as parts of an *entire conversation*¹⁶ (*post*, §§ 2115, 2119). (c) Statements by a *wife in the husband's presence*, being admissible under the present principle, may still have to satisfy the rule prohibiting testimony of wife against husband (*post*, § 2232). (d) Silence may indicate assent in a *contractual* sense; this involves the substantive law, and is without the present purview.¹⁷

§ 1073. **Third Person's Document: Writing Sent to the Party or Found in his Possession; Unanswered Letter; Account rendered; "Proofs of Loss" in Insurance.** The written statements of a third person may be so dealt with by the party that his assent to the correctness of the statements may be inferred, and they would thus by adoption become his own statements. What sort of dealing with the document will suffice for this purpose has in several respects been a mooted question. Leaving aside for the moment the particular problems as to corporation-books and depositions, which are affected by independent considerations, the different situations may be grouped under four heads: (1) Documents seen; (2) documents found in possession; (3) documents of demand, received but not answered; and (4) documents made use of.

(1) In some circumstances, the party's mere seeing or *perusal* of a third person's document, without responsive protest of denial or explanation, may indicate an admission of correctness. But here each case virtually must stand by itself.¹

his present testimony (under § 1042, *ante*). The party's use of a witness' deposition at a former trial rests on a different application of the principle (*post*, § 1075).

¹³ 1903, *People v. Morton*, 139 Cal. 719, 78 Pac. 609; 1899, *State v. Robinson*, 51 La. An. 694, 25 So. 330 (chargee made against defendant in his presence, by deceased, and then denied by the former, excluded); 1901, *Brown v. State*, 78 Miss. 637, 29 So. 519; 1901, *Low v. State*, 108 Tenn. 127, 65 S. W. 401.

¹⁴ 1867, *Flanagin v. State*, 25 Ark. 92, 94 (threats or promises to the defendant, as explaining his silence, admitted).

¹⁵ 1867, *State v. Fitzhugh*, 2 Or. 227, 232.

¹⁶ 1844, *Redfield, J.*, in *Mattocka v. Lyman*, 16 Vt. 113, 119.

¹⁷ 1822, *Peele v. Ins. Co.*, 3 Mason 27, 81 (underwriters' silence, as forming an acceptance of the insured's abandonment of a vessel).

¹ 1877, *Jones v. Botsford*, 17 N. Br. 62 (document written by one under arrest, in the sheriff's presence, and forwarded by the latter to the former's attorney, admitted against the sheriff); 1902, *Hull's Will*, 117 Ia. 738, 89 N. W. 979 (obituary notice, published with a party's sanction, held on the facts not an admission of sanity); 1898, *Raub v. Nisbett*, 118 Mich. 248,

(2) The party's *possession* of a document made by a third person may well be evidence of the party's knowledge of its contents (*ante*, § 260); but is it sufficient to justify an inference of assent to the statements contained therein? It is easy to imagine instances in which such an inference would be fallacious. Yet, since the party may always exculpate himself and disown the inference by proving the true reason for his retention of the document, the question remains whether the mere fact of possession ought not to suffice at the outset to make the document receivable, subject to explanations that may later be made. This question was in orthodox practice answered in the affirmative:

1704, *Horne Tooke's Trial*, 25 How. St. Tr. 1, 120; treason; a certain paper, addressed to Mr. Tooke and found at his house, was offered against him; Mr. Tooke: "I do not know what papers may have been taken from my house; but are letters written to me to be produced as evidence against me?" L. C. J. Eyre: "Being found in your possession, they undoubtedly are producible as evidence; but, as to the effect of them, very much will depend upon the circumstances of the contents of those letters, and whether answers to them can be traced, or whether anything has been done upon them. A great number of papers may be found in a man's possession which will be, *prima facie*, evidence against him, but will be open to a variety of explanations; and it is always a very considerable explanation that nothing appears to have been done in consequence of the paper being sent to him. But all papers found in the possession of a man are, *prima facie*, evidence against him, if the contents of them have application to the subject under consideration." Mr. Tooke: "The reason of my asking it is, I am very much afraid that, besides treason, I may be charged with blasphemy." Lord Chief Justice Eyre: "You are not tried for that." Mr. Tooke: "It is notorious I do not answer common letters of civility, but I have received and kept many curious letters. I received some letters from a man whose name is *Oliver Verall*, and he endeavoured to prove to me that he was God the Father, Son, and Holy Ghost. He proved it from the Old Testament; in the first place that he was God the Father, because God is *O Veral*; that is, God over all. He proved he was God the Son, from the New Testament—verily, verily I am he; that is, *Veral I, Veral I, I am he*. Now, if these letters, written to me, which I, from curiosity, have preserved, but upon which I have taken no step, and to which I have given no answer, are produced against me, I do not know what may become of me." L. C. J. Eyre: "If you can treat all the letters that have been found upon you with as much success as you have these letters of your correspondent, you will have no great reason for apprehension, even if that letter should be brought against you."

1814, *De Berenger's Trial*, Gurney's Rep. 223; Mr. Park, for the defendant: "Am I to be answerable for all manner of things sent to me by my friends?" L. C. J. Ellenborough: "I think a paper found under the lock and key of the party is *prima facie* readable against him. It is subject to observations. If you do not go farther, the reading this as found in his possession is doing little."²

76 N. W. 393 (looking through an adversary's book of accounts, and stating no objection, makes the books receivable); 1896, *Hulett v. Carey*, 66 Minn. 327, 69 N. W. 31 (a letter read by the writer's husband, put into an envelope, and taken away to post, held an admission by him of the fact of marriage therein asserted); 1875, *Tilton v. Beecher*, N. Y., Abbott's Rep. I, 367 ff. (here the particular situation was that of a person who assisted in framing an answer to a letter received by him; and his failure to make an oral denial of its assertions was held not alone to admit the letter, and the written answer was held to be necessary in order to show how far he

assented to the letter's statements); 1902, *People v. Smith*, 172 N. Y. 210, 64 N. E. 814 (defendant's statement that he had read a newspaper account, held not an admission of its truth); 1895, *Hamilton v. Gray*, 67 Vt. 233, 31 Atl. 315 (taxation of costs by a clerk of court in a suit in which the person was a party).

² *Eng.*: 1717, *Francia's Trial*, 15 How. St. Tr. 897, 990 (treasonable correspondence: L. C. B. Bury: "To receive so many letters, and to keep them so long, is an evidence that he assented to the matter"); 1809, *Doe v. Pembroke*, 11 East 504 (plaintiff's predecessor charged with recognition of relationship of his

(3) The failure to reply to a written communication may sometimes suffice to permit an inference of the party's assent to the correctness of the statements made therein (upon the general principle of § 1071, *ante*). But the inference is not ordinarily so strong; and judges have always pointed out that the failure to reply in writing to a written communication does not have the same significance as a failure to reply orally to an oral communication:

1828, *Fairlie v. Denton*, 3 C. & P. 103; Mr. F. Pollock (arguing to admit a letter demanding money); "I submit that it is evidence, exactly the same as what is said verbally in the presence of a defendant is evidence against him, though he may make no answer"; L. C. J. Tenterden: "I am slow to admit that. What is said to a man before his face he is in some degree called on to contradict, if he does not acquiesce in it. But the not answering a letter is quite different; and it is too much to say that a man, by omitting to answer a letter, at all events admits the truth of the statements that letter contains. . . . You may have that single line read, in which the plaintiff makes a demand of a certain amount, but not any other part which states any supposed fact or facts."

1858, *Aldis, J., in Fenno v. Weston*, 31 Vt. 345, 352: "The omission of a party to reply to statements in a letter about which he has knowledge, and which if not true he would naturally deny, when he replies to other parts of the letter, is evidence tending to show that the statements so made and not denied are true. So where there has been a correspondence between parties in regard to some subject-matter, and one of the parties writes a letter to the other making statements in regard to such subject-matter, of which the latter has knowledge, and which he would naturally deny if not true, and he wholly omits to answer such letter, such silence is admissible as evidence tending to show the statements to be true. Still all such evidence is of a lighter character than silence when the same facts are directly stated to the party. Men use the tongue much more readily than the pen. Almost all men will reply to and deny or correct a false statement verbally made to them. It is done on the spot and from the first impulse. But when a letter is received making the same statement, the feeling which readily prompts the verbal denial not unfrequently cools before the time and opportunity arrive for writing a letter. Other matters intervene. A want of facility in writing, or an aversion to correspondence, or habits of dilatoriness may be the real causes of the silence. As the omission to reply to letters may be explained by so many causes not applicable to silence when the parties are in personal conversation, we do not think the same weight should be attached to it as evidence."

grandfather and the ancestor of defendant, on the strength of a recital in a cancelled will of the grandfather, found in drawer of plaintiff's predecessor the grandson); 1814, *R. v. Plumer*, R. & R. 264 (larceny of money from a letter; a letter and a money-bill being found on the defendant, *scilicet* the contents of the letter could be used to connect it with the bill); 1817, *R. v. Watson*, 2 Stark. 116, 140 (possession suffices); 1858, *R. v. Bernard*, 8 St. Tr. N. S. 887, 938 (conspiracy to murder Napoleon III; paper in A's handwriting, found in defendant's room bearing his handwriting, admitted to show knowledge of its contents, but not assent to them); *U. S.*: 1895, *People v. Colburn*, 105 Cal. 648, 649, 38 Pac. 1105 (letter found on defendant, not admitted); 1899, *Casey v. Leggett*, 125 Cal. 664, 58 Pac. 264 (letter by stranger advising one whose fraudulent intent was in question to make a deed; mere receipt and possession of letter no evidence of acquiescence); 1894, *Razor v. Razor*, 149 Ill. 621, 624, 36 N. E. 863 (letter by X found in a wife's trunk, appointing an assignation, not received as implying assent, because not shown

to be answered or acted on); 1848, *Com. v. Eastman*, 1 Cush. 189, 215 (conspiracy to defraud; letters found in defendants' possession, held not admissible "unless adopted or sanctioned by the defendants by some reply or statement or by some act done in pursuance of their suggestions"); 1863, *Com. v. Jeffries*, 7 All. 548, 561 (press copies in defendant's possession, received as "affecting him with an implied admission of the statements contained in them"); 1837, *Starkweather v. Converse*, 17 Wend. 20, 24 (application of payments; defendant's retention of a document held on the facts no evidence of acquiescence); 1845, *People v. Green*, 1 Park. 11, 17 (letter from deceased, found in defendant's pocket, excluded on the facts); 1901, *Packer v. U. S.*, 46 C. C. A. 35, 106 Fed. 906 (unanswered letter to the accused from a victim of his fraud, found in the former's possession, excluded).

Compare the cases cited *ante*, § 260 (possession as evidence of knowledge); the judges do not always distinguish the two principles in their application.

So far as any definite rule is concerned, then, it seems impracticable; and the precedents indicate that each case must stand on its own facts.³ In one

³ *Eng.*: 1828, *Fairlie v. Deuton*, 3 C. & P. 103 (money had and received; letter of demand by plaintiff to defendant, but unanswered, not read; see quotation *supra*); 1846, *Draper v. Crofts*, 15 M. & W. 166 (unanswered demand for rent of premises actually occupied by a cotenant; Parke, B., after noting the difference of opinion: "My own opinion is that no attention at all need be paid to a letter asking for money which the party does not owe; it is a different case if he is bound by circumstances or by his situation to return an answer. I think, therefore, not that such evidence is absolutely inadmissible, but that it is worth very little when admitted"); 1850, *Gaskill v. Skene*, 14 Q. B. 664, 669 (money had and received; plaintiff's unanswered letters to defendant, admitted, so far as they were in general a demand of the claim, even though certain details of the claim are also mentioned; "to make an intelligible demand, some statement of the facts on which the demand arises must be made"); 1858, *Keen v. Priest*, 1 F. & F. 314 (distrain; unanswered letter from plaintiff's attorney to defendant, received on the facts; Bramwell, B.: "Silence may sometimes be conduct"); 1872, *Richards v. Gellatly*, L. R. 7 C. P. 127, 131 (false representations as to a ship's equipment; letters of complaint, unanswered, from the plaintiff's fellow-passengers to the defendant, excluded; Willes, J.: "That notion has been long exploded; . . . it may be otherwise where the relation between the parties is such that a reply might properly be expected"); 1891, *Wiedemann v. Walpole*, 2 Q. B. 534 (failure to answer a letter charging the defendant with having promised to marry, held no admission by the defendant of the promise; distinguishing the case as one of a charge of an offence which is usually ignored); *Can.*: 1870, *Gilbert v. Campbell*, 1 Hann. N. Br. 474, 491 (an unanswered itemized demand, excluded on the fact); *U. S.*: *Colo.*: 1890, *Patrick v. Crowe*, 15 Colo. 543, 555, 25 Pac. 985 (document submitted to the opponent in the course of a compromise, and not signed, but not specifically repudiated by him, excluded); *L. C.*: 1877, *Meguire v. Corwine*, 10 D. C. 81, 89 (unanswered letters demanding counsel fees, admitted; but a charge leaving to the jury to infer an admission of the claim, held properly refused); *Ga.*: Code 1895, § 5155 ("In the ordinary course of business, when good faith requires an answer, it is the duty of the party receiving a letter from the other to answer within a reasonable time. Otherwise he is presumed to admit the acts mentioned in the letter of his correspondent, and to adopt them"); *Ill.*: 1903, *Chicago v. McKechney*, 205 Ill. 372, 68 N. E. 954, 987 (letters and reports of the plaintiff and his agents, sent to and read by the defendant's officers, but not by them answered or otherwise noticed, held not admissible); *Md.*: 1901, *Biggs v. Stueler*, 93 Md. 100, 48 Atl. 727 (failure to answer a letter, not equivalent to

acquiescence); *Mass.*: 1852, *Dutton v. Woodman*, 9 Cosh. 257, 262 (letter to defendant, inquiring as to his liability as partner, admitted on the facts); 1862, *Fearing v. Kimball*, 4 All. 125 (unanswered letter, not admitted on the facts); 1865, *Com. v. Edgerly*, 10 id. 184, 187 (counterfeit utterance; letter received by defendant at a post-office, containing counterfeit bills, but taken from him before he read or opened it, held inadmissible); 1886, *Sturtevant v. Wallack*, 141 Mass. 119, 122, 4 N. E. 615 (letter demanding payment, etc., received as evidence of assent to the defendant's authority to T. as agent to order); *Nebr.*: 1888, *Kierstead v. Brown*, 23 Nebr. 595, 613, 37 N. W. 471 (silence, upon the receiving of a written proposition for settlement, held not an admission); *N. J.*: 1897, *Hund v. Howell*, 61 N. J. L. 142, 38 Atl. 748 (failure to answer a letter making a claim, not an admission of the claim); *N. Y.*: 1837, *Brouson, J.*, in *Starkweather v. Converse*, 17 Wend. 20, 24 ("No man by doing wrong can make it the duty of another to complain of the injury at the risk of being concluded by his silence"); 1872, *Waring v. Tel. Co.*, 44 How. Pr. 69, 75 (undisputed letter of claim to defendant, held not to amount to an admission on the facts); 1883, *Talcott v. Harris*, 93 N. Y. 567, 571 (failure of a party arrested on *ex parte* affidavits to answer them by motion to vacate the order, held not an admission); 1884, *Learned v. Tillotson*, 97 id. 1, 8 (account, for partnership profits in stock proceeds; letter of plaintiff to defendant, making a demand, not admitted because of defendant's failure to reply); 1891, *Bank of British N. America v. Delaheld*, 126 id. 410, 418, 27 N. E. 797 (unanswered letter relating to a loan, excluded on the fact); 1894, *Thomas v. Gage*, 141 id. 506, 509, 35 N. E. 385 (services in making a monument; unanswered letter to defendant, excluded on the fact); 1900, *Gmy v. Kaufman D. & I. C. Co.*, 162 id. 388, 397, 56 N. E. 908 (preceding cases approved); *U. S.*: 1876, *U. S. v. Babcock*, 3 Dillon 571, 576 (unanswered telegrams to the defendant, held admissible, if, *semble*, under all the circumstances of the case the jury find that they called for an answer); *Vt.*: 1856, *Hill v. Pratt*, 29 Vt. 119, 126 ("It would seem that the rule has never been extended to unanswered letters, particularly when the fact stated has relation to past transactions and upon which no future action of the party is contemplated"; here, a letter to an attorney, reporting the service of a writ, was excluded); 1858, *Fenno v. Weston*, 31 id. 345, 351 (failure to contradict a particular assertion, in answering a letter, and failure to reply to subsequent letters, held admissible; see quotation *supra*).

Distinguish the principle of Completeness, under which the question arises whether the reply to a letter must be offered in connection with it (*post*, § 2104) or may be offered in rebuttal (*post*, § 2120).

situation, however, there has been a uniform rule, namely, that the failure to dispute an *account rendered*, after the lapse of a reasonable time, amounts to an admission of its correctness.⁴

(4) The party's *use of a document* made by a third person will frequently amount to an approval of its statements as correct, and thus it may be received against him as an admission by adoption. A common instance of this application of the principle is the *insured's* or *beneficiary's* presentation of the "*proofs of loss*" to the insurer.⁵

⁴ 1741, *Willis v. Jernegan*, 2 Atk. 251 (a stated account need not be signed, to be set up in bar; it is "the person, to whom it is sent, keeping it by him any length of time without making any objection, which shall bind him"); 1750, *Tickel v. Short*, 2 Ven. Sr. 239 (L. C. Harlwick: "If one merchant sends an account current to another in a different country, on which a balance is made due to himself, the other keeps it by about two years without objection, the rule of this Court and of merchants is that it is considered as a stated account"); 1850, *Gilbert v. Palmer*, 1 All. N. Br. 667 (mere presentment of an account in person, the opponent not conceding its correctness; excluded); 1852, *McCulloch v. Judd*, 20 Ala. 703, 705; 1882, *Burns v. Campbell*, 71 id. 271, 286 (objection to one item only is "an implied admission of the correctness of the rest"); 1895, *Peck v. Ryan*, 110 id. 336, 17 So. 733; 1859, *Terry v. Sickles*, 13 Cal. 427, 429 (failure to object in a reasonable time amounts to an admission); Cal. C. C. P. 1872, § 1963, subdiv. 40, as amended by Commission in 1901 (account rendered and not objected to within 30 days, presumed correct; for the validity of this amendment, see *ante*, § 488); 1895, *Palst Browing Co. v. Lueders*, 107 Mich. 41, 64 N. W. 872; 1898, *Raub v. Nisbett*, 118 Mich. 218, 76 N. W. 393 (failure to object in 30 days, not an admission as matter of law); 1818, *Murray v. Toland*, 3 John. Ch. 569, 575; 1821, *McBride v. Watts*, 1 McCord 384; 1809, *Corps v. Robinson*, 2 Wash. C. C. 388, 390 (account rendered to defendant by B. and A., and "retained by them without objection," held admissible to prove B. and A.'s partnership); 1812, *Freeland v. Heron*, 7 Cr. 147, 151 (the facts were held to afford "room for the application of a rule of the Chancery Court and of merchants to decide the controversy; it is this: When one merchant sends an account current to another residing in another country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him").

The above evidential use seems never to have been questioned; distinguish, however, (1) the question of substantive law what constitutes irrevocably an *account stated*, so as to create a new cause of action thereon: 1844, *Langdon v. Roane*, 6 Ala. 518, 527; 1901, *Louisville Banking Co. v. Asher*, — Ky. —, 65 S. W. 133; (2) the question when an *account stated* may be

set aside by a bill in equity with leave to surcharge and falsify: *Langdon v. Roane*, *supra*.

In an action on an *account stated*, i. e. a specific document of contract, the opponent's *account-books* are not receivable, because the only issue is the agreement as to the account: 1894, *Sterling L. Co. v. Stinson*, 41 Nebr. 363, 369, 59 N. W. 888; though otherwise, in ordinary actions for the price of goods or services, the opponent's account-book entries are of course receivable as admissions against himself: 1894, *German N. Bank v. Leonard*, 40 Nebr. 676, 683, 59 N. W. 107. The use of account-books of *parties* and of *third persons* under exceptions to the hearsay rule is dealt with *post*, §§ 1517-1561.

⁵ This much is generally assumed as unquestioned; the only matter of argument being the conclusiveness of such proofs by way of estoppel; in the following cases the "proofs" were received, except as otherwise noted: 1884, *Welther v. Ins. Co.*, 65 Cal. 417, 4 Pac. 413 (coroner's verdict); 1887, *U. S. Life Ins. Co. v. Kielgast*, 26 Ill. App. 567, 572 (coroner's verdict; "the delivery of the paper imported no admission that the verdict was true"); 1889, *U. S. Life Ins. Co. v. Vocke*, 129 Ill. 557, 562, 22 N. E. 467 (point reserved); 1903, *Supreme Tent v. Stensland*, — id. —, 68 N. E. 1098; 1871, *New York Central Ins. Co. v. Watson*, 23 Mich. 486 (admission that other insurance existed); 1898, *John Hancock M. L. Ins. Co. v. Dick*, 117 id. 518, 76 N. W. 9 (physician's certificate); 1901, *Wasey v. Ins. Co.*, 126 id. 119, 85 N. W. 459 (physician's affidavit; but a majority of the Court excluded such portions as were based on mere hearsay); 1901, *Modern Woodmen v. Kozak*, 63 Nebr. 146, 88 N. W. 248; 1903, *Cox v. Royal Tribe*, 42 Or. 365, 71 Pac. 73 (held receivable as admissions; but here rejected because furnished by the insurer's agent); 1874, *Insurance Co. v. Newton*, 22 Wall. 32, 36 (coroner's verdict, admitted); 1877, *Insurance Co. v. Higginbotham*, 95 U. S. 380, 390 (foregoing case approved); 1889, *Richelieu & O. N. Co. v. Boston M. Ins. Co.*, 136 id. 408, 435, 10 Sup. 934; 1900, *Sharland v. Ins. Co.*, 41 C. C. A. 307, 101 Fed. 206 (coroner's verdict); 1903, *Voelkel v. Supreme Tent*, 116 Wis. 202, 92 N. W. 1104 (coroner's certificate). The question ought to be, in each case, whether the beneficiary has in fact adopted the statements as his own; there can be no general rule for all cases.

Distinguish the question whether the admissions of the *deceased insured* may be used *against* the beneficiary (*post*, § 1081); and whether the

§ 1074. *Same: Books of a Corporation or Partnership.* Respecting the use of corporation-book entries as evidence of the facts recorded, an unnecessary doubt and confusion has arisen, chiefly through a failure to keep in mind the history of the rule for parties' account-books. This aspect of the subject may best be disposed of at the outset.

(1) By a peculiar course of development (examined *post*, § 1518) a party's account-book, once receivable by custom, became inadmissible on his own behalf in England as early as the 1700s, through a combination of statute and judicial legislation. In the Colonies, this absolute prohibition never came to prevail; but the surviving use was limited in various ways; in particular, the transactions recorded must be of goods or services, and not of cash payments nor of special contracts, and the entrant must be the party himself. These limitations were later removed by statute in many jurisdictions; but in England, substantially till the end of the 1800s, the prohibition remained. The account-books of a corporation, then, were in England not admissible, any more than the account-books of a natural person.¹ In the United States, they would have been admissible so far as any other party's account-books would have been; but obviously the above restrictions in fact excluded them, even when they related to entries of goods or services, because they were kept by a clerk. Nevertheless, they might have been and doubtless were used by calling the clerk to use them as memoranda of recollection, precisely as could be done by the clerk of any other party (*ante*, §§ 734 ff.). Moreover, after the statutory removal of some of the above restrictions — in particular, the restriction as to the nature of the transaction recorded — there was no reason why corporation account-books could not be used, on verification by the recorder, like any other books. They were and are neither more nor less admissible than any other party's books, either under the Parties'-Books branch of the Hearsay exception for Regular Entries (*post*, §§ 1537 ff.), or under the branch which admits Regular Entries by Deceased Persons (*post*, §§ 1521 ff.), or as verified memoranda of recollection (*ante*, §§ 734 ff.). There is no mystery about them, and no eccentricity. But doubt was introduced by ignoring this point of view and fixing the attention on another principle, the test of which they could not satisfy:

(2) This principle was that of Official Statements, or *Public Records*, by virtue of which, as an exception to the Hearsay rule, official registers, by persons having a duty and authority, were receivable to evidence the facts stated. This principle sufficed to admit certain public registers, including the books of certain public corporations (*post*, § 1661); but it obviously could not cover the records of a private corporation or of a public corporation doing private acts.² Conceding this, the English Court found of course no other title for

testimony before the coroner is admissible (*post*, § 1374). Distinguish also the question whether the insured or beneficiary may, *on his own behalf*, under the Hearsay rule offer *affidavits* contained in these "proofs" (*post*, § 1384), or whether the coroner's verdict may be offered by either party as an official report (*post*, § 1671),

or may offer the "proofs" as part of the *res gestæ* (*post*, § 1770).

¹ 1819, *Marriage v. Lawrence*, quoted *infra*.

² 1789, *London v. Lynn*, 1 H. Bl. 205, 215 (corporate tolls; same ruling as in the next case); 1819, *Marriage v. Lawrence*, 3 B. & Ald. 142 (right of a borough corporation to tolls; to

admitting corporate books as parties' entries, for the reason above explained. But, for the same reason, our own Courts, if they had kept in mind our peculiar tradition and statutes as to parties' books, might have correctly estimated the negative conclusion of the English Court, and might have laid hold of such other principle as plainly would have sufficed for the purpose in hand. This they did not do; they seem constantly to have ignored the likeness between the account-books of natural parties and of corporate parties.³ The consequence is that (apart from unrecorded practice) they seem seldom to have supposed that there was any way of using corporate books otherwise than on the further principles now to be noticed; and the few Courts that have permitted their use have not done so with any firm and clear recognition of the sound reason for that result.

(3) No one doubted that the records of a meeting were receivable in proving the doings of the meeting. On the theory of the Parol Evidence rule (*post*, § 2451) those records were the doings; i. e. as with judicial and legislative records, the votes of the meeting are supposed not to be *in pais*, or oral, but in writing; hence, in proving the acts of the meeting, as such, the acts are to be sought in the written records. Thus, the record is not somebody's hearsay testimony to the act; it is the act itself.⁴ This rule, however, though not disputed, sufficed only to admit what was actually done as a part of the corporate meeting; it still did not serve any purpose of proving matters that occurred apart from the meeting, such as the sale of goods, the erection of a fence, the receipt of money, the subscription to shares, and the like. Was there any other principle upon which the books could be used as evidence for these purposes? It is just here that the present principle of Admissions comes to be invoked:

(4) May not the account-books be used against a member of the corporation as statements assented to by him, by virtue of his presumed access to them? The books of a partnership are receivable against a partner, either on this principle or on the principle of agency;⁵ may not corporation account-books be receivable in the same way, assuming that the opponent is shown to be a member, and that the object is to charge him with an admis-

show acts of prescriptive claim, the ancient corporate records of fines imposed and paid were not admitted; because though the books were public records, still "if the entry apply to private transactions alone, it will still fall within the rule applicable to private books," as a mere "minute made by a party in his own memorandum-book".

³ *E. g.*, in *Chase v. R. Co.*, 38 Ill. 215 (1865). *Contra*, in a good opinion: 1891, *Terry v. Birmingham N. Bank*, 93 Ala. 608, 9 So. 299 (stock-exchange corporation books). There is a plain recognition of the sound view in *Trainer v. Ass'n, Ill.*, and *Ganther v. Jenks, Mich.*, cited *infra*.

⁴ 1820, *Owings v. Speed*, 5 Wheat. 420, 422 (land vested in trustees; the "book of the board of trustees," in which their proceedings

were recorded, was admitted, because, per Marshall, C. J., "the books of such a body are the best evidence of their acts, and ought to be admitted whenever those acts are to be proved"); 1902, *Signa Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194. Compare §§ 1661, 2451, *post*.

⁵ 1903, *Safe Deposit & T. Co. v. Turner*, — Md. —, 55 Atl. 1023; 1844, *Allen v. Coit*, 6 Hill N. Y. 318 (entries in the firm's books; "the knowledge of their agent was in this respect their own knowledge"); 1892, *Kohler v. Lindenmeyr*, 129 N. Y. 498, 501, 29 N. E. 957 (here excluding books of a prior partnership); 1824, *Thomson v. Kalbach*, 12 S. & R. 238; 1892, *Chick v. Robinson*, 37 C. C. A. 205, 95 Fed. 619 (special partner legally entitled to access to books; entries admitted).

sion of the correctness of the account? This question has generally been answered in the negative:

1833, *Hill v. Manchester & S. W. Co.*, 2 Nev. & M. 573, 579, 580, 582; *Parke, J.*: "In the case put of a partnership, the books are evidence against the individual partner dealing with the partnership, because he has access to the books and may alter them, and his not doing so is evidence of acquiescence"; *Campbell, Solicitor-General*: "In the case of a partnership, the books are evidence against a partner, not on the ground of access, but because they are kept by a clerk, who is his agent, or by a partner, who is also his agent"; *Parke, J.*: "That is the true ground upon which they are evidence"; *Denman, L. C. J.*: ". . . We are, however, of opinion that the principle on which partnership books are evidence against the partners is that they are the acts and declarations of such partners, being kept by themselves or, by their authority, by their servants and under their direction and superintendence. But the clerk of the company, once appointed, is subject to the control of no individual member; and the free access provided for [by the charter] is only for the purpose of inspection."

1891, *Earl, J.*, in *Rudd v. Robinson*, 126 N. Y. 113, 117, 26 N. E. 1046: "There was no proof that the defendant had actual knowledge of the entries contained in the books which were used as evidence against him, or that he authorized such entries or caused them to be made. There was no proof from which the law would raise a legal presumption that he had knowledge of the entries, unless he is chargeable with such knowledge from the mere fact that he was a stockholder and trustee of the corporation. . . . The books of corporations for many purposes are evidence, not only as between the corporation and its members, and between members, but also as between the corporation or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors and its financial condition when its solvency comes in question. But . . . we can perceive no principle upon which the account-books of a corporation can be evidence, against a member of the corporation, of the accounts and entries therein made in a suit brought by the corporation or its representatives against him to enforce his liability upon such account. The officers and book-keepers of a corporation are in no sense his agents. Individually he has no control over their acts, and has no responsibility therefor; and in making the entries they do not, in any legal sense, represent or bind him. As to the competency of such books, directors and stockholders of a corporation stand upon the same footing. It is quite true that a director stands in a more favorable position to know what is going on within the corporation and to be more familiar with its books in some cases than a stockholder. He has the right to inspect the books of the corporation, and so has a stockholder. A stockholder having the ability is just as able to become familiar with the contents of the books of a corporation to which he belongs as a director; and there is no principle of law by which a director can be charged with knowledge of the entries in the books of a corporation which is not equally applicable to its stockholders. . . . It would be quite a dangerous and, we think, startling proposition to hold that a clerk or other officer in a business corporation could enter charges in its books of account against a director or stockholder which could be proved in favor of the corporation by the mere production of the books, thus throwing upon him, or his personal representatives after his death, the burden of explaining the entries or showing them to be untrue, and we believe the doctrine has no support in principle or authority. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence which are applied in an action brought by an individual to enforce a claim against any defendant."

Hence, the account-books have generally been excluded, in actions against stockholders, unless actual access to the books was shown, or unless the in-

debtedness in issue was that of the corporation to the plaintiff (in which case the corporate entries, as its admissions, evidenced the debt, and would not be offered as the stockholder's own admissions).⁶ Yet it would seem, upon the principle already examined (in par. (1) *supra*), that the account-books should be received against any person and without any other restrictions than ordinarily are applied in the use of such books of natural persons. The inadequacy of the result reached by the Courts is indicated by the statutory enactments which in many jurisdictions have expressly declared corporate account-books admissible on certain conditions.⁷

(5) A similar question, lacking one circumstance, is presented when, in an action charging the defendant as stockholder, it is desired to use the corporate *stock-book* to prove him to be a *stockholder*. Here there is no room for arguing upon the principle of admissions, because the assent to be presumed from the right of access presupposes the party to have that right as a stockholder, which is here the very fact in issue. Much more, then, should this use of the books be denied by the Courts which see no other point of view than the principle of Admissions. On the other hand, a Court which permits this use must implicitly assume that the principles of Regular Entries (noted above) apply to corporate-books, for there is no other available

⁶ The cases on both sides are as follows: 1816, *Alderson v. Clay*, 1 Stark. 405 (a member of a company who had attended three meetings, held to be affected by all the recorded doings of the company kept in a book open to all members); 1813, *Hill v. Manchester & S. W. Co.*, 2 Nev. & M. 573 (see quotation *supra*); 1898, *Booth v. Fire-Engine Co.*, 118 Ala. 369, 24 So. 405 (books admitted, the member being present at the meeting); 1877, *Neilson v. Crawford*, 52 Cal. 248 (not received against a stockholder to show the company's indebtedness to the plaintiff; *Hill v. Manchester & S. W. Co.* followed); 1896, *McGowan v. McDonald*, 111 Ill. 57, 69, 43 Pac. 418 (received in a case like the preceding; "the first fact to be established is the indebtedness of the corporation, and when that is established, the liability of the stockholder results as a necessary sequens"; attempting to distinguish *Neilson v. Crawford*); 1898, *San Pedro L. Co. v. Reynolds*, 121 Id. 74, 53 Pac. 410 (admitted as against an agent having charge of the books); 1897, *Anderson v. Life Ass'n*, 171 Ill. 40, 49 N. E. 205 (directors' resolution of assessment, held *prima facie* evidence against members); 1903, *Trainor v. Germain A. S. L. & B. Ass'n*, — Id. —, 68 N. E. 650 (books of account not admissible *per se* against a stockholder; but admissible if fulfilling the requisites of books of account in general); 1889, *Ganther v. Jenks*, 76 Mich. 510, 514 (entries of payment in the defendant company's books, admitted; "such books, when properly kept by the proper officers or agents of the company, are competent testimony" as regular entries); 1858, *Haynes v. Brown*, 36 N. H. 545, 563, 566 (the corporation-books are evidence, "in the nature of public records, as to everybody, of the corporate proceedings," including the fact of a defendant

being stockholder; but not of other matters of fact, including the state of accounts between a stockholder and the corporation; following *Hill v. Manchester & S. W. Co.*); 1891, *Rudd v. Robinson*, 126 N. Y. 113, 26 N. E. 1046 (action by a receiver to charge a director with unlawful appropriation of corporate funds; corporate account-books held not admissible to charge a director or stockholder; see quotation *supra*); 1902, *Continental Bank v. First Nat'l Bank*, 108 Tenn. 374, 68 S. W. 497 (corporate account-books held admissible, like other account-books, "either for or against a corporation, and against a stranger or as between two strangers"); 1899, *Hayden v. Williams*, 37 C. C. A. 479, 96 Fed. 279 (usable only as admissions by the corporation against a member or between members; but, even here, not "as to his own dealings" with a corporation).

⁷ The following list is partial only: Ont. St. 1900, c. 27, § 14 (books of a loan corporation, admissible "as against the corporation or as between shareholders or alleged shareholders thereof"); Colo. St. 1893, p. 90, § 1 (stock-book to be evidence of facts stated in action against stockholder); Fla. Rev. St. 1892, § 2470 (in prosecution for false entry of transfer, fraudulent issue, etc., of corporate stock, books of "any corporation to which such person has access or the right of access" are admissible); Ind. Rev. St. 1897, § 3500 (corporate proceedings, to be admissible against a stockholder); Mass. Pub. St. 1882, c. 203, § 57 (corporation-books to be evidence in certain charges against one having access or the right of access to them); Vt. St. 1894, § 4084 (savings-bank regulations printed and posted, to be evidence between corporation and depositors).

principle. In other words, the entry is, in effect, that A. B. by himself or his agent orally agreed to take shares of stock, or (where the subscription is in writing) that the purporting signature of A. B. is genuine. The judicial rulings are at variance;⁶ but it is a little singular that there should appear more inclination to sanction the use of corporate-books to prove a defendant a stockholder than to sanction their use in an accounting against one who is otherwise proved a stockholder.

§ 1075. Same: Depositions in another Trial, Used or Referred to. If a

⁶ *Eng.*: 1850, *Bain v. R. Co.*, 3 H. L. C. 1, 21 (Lord Brougham said that at common law a corporation's share-book was not admissible to prove A. B. a shareholder; here applying a statute expressly making such books admissible); *Can.*: 1851, *Stadacona Ins. Co. v. Rainsford*, 21 N. Br. 309 (a charter made a certificate of the corporation evidence of a shareholder's indebtedness; held, tant other evidence of the defendant being a shareholder must be given); *Cal.*: 1867, *Mudgett v. Horrell*, 33 Cal. 25 (creditor's suit to charge a stockholder; stock-books held not admissible to prove defendant a stockholder; per *Currey, C. J.*, and *Shafter, J.*); *Conn.*: 1900, *Fish v. Smith*, 73 Conn. 377, 47 Atl. 711 (excluded; yet admissible to prove time of membership commencing, if membership is otherwise evidenced); *D. C.*: 1899, *National Expr. & T. Co. v. Morris*, 15 D. C. App. 262, 274 (stock-book "entries are not *per se* evidence sufficient to establish the fact of membership"; there must be some conduct of assent by the person charged); *Me.*: 1840, *Collin v. Collins*, 17 Me. 440 (execution against a stockholder for the company's debts; *semble*, the corporate records were admissible); *Md.*: 1872, *Hager v. Cleveland*, 36 Md. 476, 491 (corporation-books not admissible, "except perhaps in actions between the members"); *N. H.*: 1858, *Haynes v. Brown*, 36 N. H. 545, 563 (admissible; see citation *supra*); *N. Y.*: 1813, *Highland Turnpike Co. v. McKean*, 10 John. 154 (books held admissible to show defendant a stockholder, if duly authenticated); *U. S.*: 1824, *Rockville & W. Turnpike Co. v. Van Ness*, 2 Cr. C. C. 449 (action by the corporation for a balance due on a subscription; the original subscription-book being offered, without evidence of the signature's genuineness, the Court, "*nem. con.*", was of opinion that the commissaries' book of subscriptions is *prima facie* evidence that the subscriptions were genuine or made by persons duly authorized"); 1877, *Turnbull v. Payson*, 95 U. S. 418 (assignee's action for stockholder's assessed liability to the company; stock-book held admissible to show "that he is the owner of the stock"); 1892, *Liggett v. Glenn*, 2 C. C. A. 286, 51 Fed. 381 (trustee's suit to recover unpaid assessment of stockholder; stock-ledger and transfer-book held admissible to prove the defendant a stockholder, and sufficient therewith evidence of identity; following *Turnbull v. Payson*); 1892, *Taussig v. Glenn*, 2 C. C. A. 314, 51 Fed. 409 (same principle applied); 1897,

Carey v. Williams, 25 C. C. A. 227, 79 Fed. 906, 909 (action for an unpaid assessment; entries in the stock-books held inadmissible to prove the defendant a stockholder; the contract of membership must be shown by some act of assent; *Turnbull v. Payson* and *Liggett v. Glenn* treated as containing *obiter* statements only); 1908, *Signa Iron Co. v. Greene*, 31 C. C. A. 477, 68 Fed. 207 (like the preceding case); *Va.*: 1826, *Grays v. Turnpike Co.*, 4 Rand. 578, 580, 582 (corporation-books used to prove its organization; defendant's subscription proved by his signature to the subscription-book); 1879, *Stewart v. Valley R. Co.*, 32 Gratt. 148, 156 (stock-ledger and shareholders' list, admitted in an action by the company for the amount due from shareholders, to show the company's reliance on a subscription-paper signed by the defendant); 1888, *Lewis v. Glenn*, 84 Va. 947, 984, 6 S. E. 866 (preceding case approved); 1888, *Vanderwerken v. Glenn*, 85 id. 9, 14, 6 S. E. 806 (action by a trustee of the company for the amount due from a shareholder; "that the stock-books of such a company are *prima facie* evidence of who are its stockholders is well settled"); *W. Va.*: 1882, *Pittsburgh W. & K. R. Co. v. Applegate*, 21 W. Va. 172, 180 (action for residue of shareholder's subscription; ledger and stockholders' list admitted to prove the defendant a stockholder, under express statute, Code 1860, c. 57, § 25); 1897, *South B. R. Co. v. Long*, 43 id. 131, 27 S. E. 297 (similar).

By statute, corporation stock-books are sometimes made receivable as evidence of the facts recorded; for example: *Eng.* Companies Clauses Consolidation Act, 1845, § 28; Companies Act, 1862, §§ 25, 27; *Can.* Rev. St. 1886, c. 118, § 27, c. 119, § 47 (stock-books admissible in actions against the company or a shareholder); *N. Sc.* Rev. St. 1900, c. 128, § 47 (certificate under corporate seal shall be evidence of shareholder's title); *Ont.* Rev. St. 1897, c. 191, § 76 (corporation stock-books to be evidence, in actions against the company or a shareholder); *Mass.* St. 1903, c. 437, § 30 (stock and transfer books shall be "competent evidence"); *Mich.* Comp. L. 1897, § 6134 (banking); § 6178 (trust, security, and deposit); *Mo.* Rev. St. 1899, § 1000 (records of private domestic incorporation, admissible in any suit to which the corporation is a party); *Cook*, Corporations, 4th ed. (1898), § 714.

For the authentication of corporate books, see *post*, §§ 2159, 2169; for proof of their contents by certified copies, see *post*, §§ 1223, 1683.

party expressly states that a certain piece of testimony by another person is correct, there can be no question that it becomes his statement by adoption, and is receivable as his admission.¹

But does he by implication approve and adopt as his all the *depositions*, testimonies, and affidavits that are offered on his behalf in a litigation, so that in a subsequent litigation these may be used against him as his admissions? It is true that the rule against impeaching one's own witness was once explained upon the theory that a party guarantees the credibility of his witness, and (by inference) the correctness of the witness' statements (*ante*, § 898). But that impossible theory has long been exploded (*ante*, § 899), and cannot serve here. The question is purely one of implication from the facts. In the endeavor to define that implication, a distinction was at one time advanced that the use of an affidavit implied an admission of the correctness of its specific contents, while the use of a witness' deposition or oral testimony did not:

1837, *Denman*, L. C. J., in *Brickell v. Hulse*, 7 A. & E. 454, 456: "There can, I think, be no question but that a statement which a party produces on his own behalf, whether on oath or not, becomes evidence against him. There is nothing to distinguish it from a statement made by the party himself. . . . [In equity proceedings a different rule may obtain]; a party who uses such depositions does not know beforehand what they are; if he did, such cases would stand on the same footing as the present; he can only refer to what he expects will be produced; it is like the case of a witness called at Nisi Prius, whose evidence does not bind the party calling him. It is quite different from a case where a party produces, as part of his own statement, an affidavit of which he knows the contents."

But this view was in England afterwards repudiated for the more accurate view that *some depositions* or testimonies may be so used as to become admissions, while *some affidavits* may not be; the result depending upon whether in the case in hand the particular statement was offered knowingly for a specific purpose:

1864, *Cockburn*, L. C. J., in *Richards v. Morgan*, 10 Jur. n. s. 559, 564: "In principle, there can be no difference whether the assertion or admission be made by the party sought to be affected against himself, or by some one employed, directed, or invited by him to make the particular statement on his behalf. In like manner, a man who brings forward another, for the purpose of asserting or proving some fact on his behalf, whether in a court of justice or otherwise, must be taken himself to assert the fact which he thus seeks to establish. . . . Where a witness is called for the purpose of proving a particular fact, this amounts to an assertion of that fact by the party who so uses his testimony. And in this respect I must observe, that I can see no difference between written and oral testimony. For while I concur in the position, that the evidence of a witness, called on a trial, is not necessarily, nor, to the full extent to which it may go, admissible against the party calling him in a future proceeding, yet if it can be shown that the witness was called to prove a specific fact, it appears to me that this would be admissible as an assertion of such fact by the party calling the witness. . . . On the other hand, as I have

¹ 1835, *R. v. John*, 7 C. & P. 324 (deposition of T., which had been admitted to be correct by the defendant in his examination, received); 1863, *State v. Gilbert*, 36 Vt. 145, 147 (an ad-

mission that the testimony of a witness on a former occasion was true makes the testimony receivable).

already said, I entirely concur in the position, that it is not because a witness is called for the purpose of proving a particular fact or facts, that *all* that he may say becomes admissible in any future proceeding against the party calling him. And here, again, I see no valid distinction between *via voce* and written testimony. It has, indeed, been said, that a party, calling a witness to be examined in court, may, in many instances, be ignorant how far the witness may make statements unfavourable to the party calling him, while a party using a written deposition does so with a full knowledge of what it contains, and after full opportunity of balancing the advantages and disadvantages of using it. But it must be borne in mind that the party in the one case calling the witness, in the other using the deposition, may do so, not only without the intention of abiding by all the witness may say, but with the deliberate intention of calling on the Court or jury to disbelieve so much of the evidence as makes against him. Just as at Nisi Prius, a party is sometimes under the necessity of calling a doubtful or even hostile witness, in order to prove some part of his case which cannot otherwise be made out; and, in the event of adverse statements being made by the witness, seeks to induce the jury to reject them, as unworthy of belief, or as contradicted by the rest of the evidence; so, in the case of written evidence, a deposition or affidavit may, under similar circumstances, be used with a view to the adoption of a part and the rejection of the rest. It would be in the highest degree unreasonable to suffer the party using the evidence to be affected by that portion which he may have repudiated or disregarded, on the ground, that the statements of the witness must be taken to be his. Bearing in mind, that the true ground on which such evidence is admissible, is, that a party seeking to establish a fact by evidence in a court of justice, must be taken [in that litigation] to assert the fact he so seeks to prove, it seems to me to follow, on the one hand, that oral evidence, so far as it shall appear to have been used to establish a specific fact, will [in subsequent litigation] be evidence against the party using it, as an assertion of that fact; and on the other, that written evidence will be admissible against the party using it, in a subsequent proceeding with a different party, not for the purpose of proving all the statements it may contain, but only so far as it shall appear to have been used to establish a given fact or facts. It is not because a witness may have been called, or a deposition may have been used, that all the statements made are to be considered as having been adopted by the party using the evidence. In order to render this species of evidence admissible, as the assertion of a particular fact by the party using it, it must appear, either from the evidence itself, or from extrinsic circumstances, that it was used for the purpose of proving such fact. . . . I am not insensible to the inconvenience that may result from the admission of evidence of this sort. The evidence may have utterly failed in its effect in the original suit; the decision of the Court or jury may have been adverse; the party may long since have abandoned the ground which he formerly took; the production of such evidence in a subsequent suit may lead to collateral issues in the shape of inquiry into all the circumstances and bearings of the first. Counsel, too, may possibly be embarrassed in the conduct of a cause, as regards the production of evidence, by having to consider what may be its effects on the interests of their client beyond the present proceeding. But many of these difficulties would obviously apply in the case of statements made by the party irrespective of legal proceedings, which, if relevant to the matter in dispute, no one can deny to be admissible against him. All these difficulties exist equally in the case of affidavits and depositions in bankruptcy, both of which have been held to be admissible. The difficulty in which it is suggested that counsel would be placed in the conduct of a cause becomes reduced to a matter of small importance, when the admissibility of the deposition is limited by the qualification to which, in my view, it should be subject, namely, that it can only be used against the party to the extent of the purpose for which it was used by him in the former suit."

1840, *Collier, C. J.*, in *Hallett v. Walker*, 1 Ala. 585, 589: "The mere filing of a deposition does not license the party against whom it was taken to read it as an admission

to the jury. . . . The party taking the deposition may have discovered that it was inadmissible for him, or that the facts it proved were unfavorable to his interest, or were in themselves false. Under such circumstances he could not in justice be charged with having made an admission of its truth." 2

Certain other principles affecting the use of depositions must be discriminated. (1) Even if the party taking the deposition has not used it, so that

3 The rulings are as follows: *England*: 1806, *Johnson v. Ward*, 6 Esp. 47 (to prove one D. an agent of defendant, an affidavit of D. on a motion to postpone trial was admitted, as used by defendant and known and adopted by him); 1837, *Brickell v. Hulse*, 7 A. & E. 454 (trover for goods seized on execution; plaintiff allowed to use affidavit of W., put in by defendant on motion in chambers, to show seizure by W. on defendant's behalf; see quotation *supra*); 1839, *Garner v. Mout*, 10 id. 464 (assumpsit by assignees in bankruptcy against a creditor; plaintiff allowed, in proving act of bankruptcy, to use a deposition made by agent of defendant, expressly at defendant's instance, to open bankruptcy proceedings; the deposition being "a particular statement which their agent was sent to make"); 1834, *Chambers v. Bernasconi*, 1 C. M. & R. 341, 352, 360, 367 (action by alleged bankrupt against assignees; depositions used by petitioning creditors in the opening proceedings, not admitted; the assignees' enrollment of them pursuant to law not being an adoption and affirmation of them); 1840, *Cole v. Hadley*, 11 A. & E. 807 (trespass *q. c. f.*; issue whether plaintiff was tenant of the soil; at a former trial of a criminal proceeding against defendant on the now plaintiff's information for a trespass, plaintiff had alleged himself to be tenant, and defendant had put in the deposition of one D., the landlord, denying plaintiff's tenancy; deposition admitted); 1845, *White v. Dowling*, 8 Ir. L. R. 128 (affidavit of plaintiff's clerk, used by him on an interlocutory motion in the same cause, not admitted for the defendant, by a majority of the Court, chiefly because it was used in his absence and without his knowledge); 1848, *Boileau v. Rutlin*, 2 Exch. 655, 680 (above cases referred to as sound, so far as the deposition, etc., was offered "for the purpose of proving a certain fact"); 1851, *Pritchard v. Bagshawe*, 11 C. B. 459, 462 (to prove D. to be an agent of the defendant in an act of conversion, an affidavit of D. on that point, used by the defendant in an action by him against one M., was admitted); 1863, *Paget v. Birkbeck*, 3 F. & F. 683, 686 (trespass *q. c. f.*; deposition made by witness for defendant in a Chancery suit in the same dispute, not admitted for the plaintiff; because not appearing to be so "used or adopted by the defendant to make it admissible against him in this action as an admission made by him or with his authority"); 1864, *Richards v. Morgan*, 10 Jur. N. S. 559, 4 B. & S. 641 (replevin for sheep; avowry, damage feasant; to prove title to the *locus*, the plaintiff offered depositions used by the defendant in a Chancery suit by one E. against the now defendant in which the same title was in issue, there being "no privity whatever" between E. and the now plaintiff; held admissible, by two judges out of three, because the depositions were formerly used for the specific fact as to which they were now offered); 1899, *Evans v. Merthyr Tydfil*, 1 Ch. 241, 250 (principle of *Richards v. Morgan* approved); *Canada*: 1863, *Thayer v. Street*, 23 U. C. Q. B. 189, 192 (affidavit of M., filed and used by defendants in another suit, admitted); 1900, *Livingstone v. Collyer*, 4 N. W. Terr. 441, 442 (defendant's cross-examination on his affidavit filed in the case, admitted; *Richards v. Morgan* followed; on appeal, this point was not decided); *United States*: 1840, *Hallett v. Walker*, 1 Ala. 585, 588 (deposition on affidavit filed in same or prior cause, but not read, is not an admission); 1863, *Wilkins v. Stidger*, 22 Cal. 231, 236 (medical services; defendant had called the plaintiff as a witness, in an action before arbitrators against the person who had injured the defendant; plaintiff's testimony not received; "a party to a suit is not bound by or held to admit as true every statement made by his witnesses during the trial of a cause, because he does not deny or contradict them at the time"; this is a misapplication of the principle of § 1072, *ante*); 1842, *Hovey v. Hovey*, 9 Mass. 216 (taking and filing a deposition, without using it, is not an admission of its truth); 1821, *Martin v. Root*, 17 id. 222, 227 (former witness' testimony not received; "then, he used him as a witness, and was obliged to content himself with all he was willing to swear to"); 1899, *Wright v. Rothschild*, 172 id. 546, 52 N. E. 15, 2 (statements of one affidavit expressly adopted in another, admitted); 1900, *Bageard v. Consol. T. Co.*, 64 N. J. L. 316, 45 Atl. 620 (after showing plaintiff's inconsistent testimony on former trial, defendant was allowed to show that plaintiff then also brought a witness to testify to same effect; citing *Richards v. Morgan*); 1903, *Connecticut M. L. Ins. Co. v. Hillmon*, 188 U. S. 208, 23 Sup. 294 (affidavit of a witness J. H. B., put in evidence by the plaintiff on the cross-examination of W. J. B., held to be usable against the plaintiff as a part of her evidence, and not merely as affecting the credit of J. H. B.); 1826, *McMahon v. Spangler*, 4 Rand. 51, 56 (affidavit of B. read by plaintiff below, allowed to be used by defendant). In any case, however, the deposition may be offered to show the party's knowledge of the facts stated in it, if that is material; 1836, *Lorton v. Kingston*, 5 Cl. & F. 269, 344; and cases cited *ante*, § 260.

by no possibility could it be treated as an admission, nevertheless it may be offered by the other party as a deposition, on showing the witness *deceased or otherwise unavailable*, if it was taken in the *same cause*; since the only objection to it arises from the Hearsay rule and that has been satisfied (*post*, § 1389). Thus the particular advantage to be gained by succeeding in treating it as an admission is that these restrictions do not then obtain. (2) The party's *silence during the giving of opposing testimony* cannot be treated as an admission of its correctness, for the reasons already examined (*ante*, § 1072, par. (3)).

§ 1076. **Admissions of Other Parties to the Litigation; Nominal and Real Parties; Representative Parties (Executor, Guardian, etc.); Stockholders; Joint Parties; Confessions of a Co-defendant.** A third mode (of those enumerated in § 1069) by which vicarious admissions may become receivable is by privity of interest, *i. e.* a relation which permits one person's rights, obligations, or remedies to be affected by the acts of another person, and thus also permits resort to such evidence as that other person may have furnished by way of admissions. This privity may be of two sorts, namely, privity of obligation and privity of title. But first it is necessary to distinguish those instances in which merely the *definition of a "party"* is involved. By hypothesis, an admission is a statement elsewhere made by the party and now offered against him as inconsistent with and contradictory of his present claim made in the pleadings or evidence (*ante*, § 1043). Who, then, is the "party," *i. e.* the litigating person, whose admissions may thus be now turned against himself?

(1) In the first place, so long as fictions were copiously employed in the formal conduct of litigation, the admissions of a *nominal*, or fictitious party, were in strict logical consequence obliged to be received. For example — the typical instance — so long as the suit of the assignee of a chose in action was at common law required to be brought fictitiously in the name of the assignor, the latter's admissions were receivable, as being those of the party himself;¹ even though they would have been inadmissible, if made after assignment, as those of an assignor, on the principle of privity of title (*post*, § 1035). But, since the universal reforms in procedure, this problem is no longer presented; although even before those reforms the spirit of judicial progress had in some jurisdictions refused to recognize this logical extension of the fiction.² Where, however, the relation is not a fiction, but represents a real relation of legal interest — as where the administrative and beneficial interests are divided between trustee and *cestui que trust* — it would seem that the admissions of the trustee should be receivable. Conversely, so far as procedure still permits any litigation to be conducted without joining the real and beneficial

¹ 1798, *Baerman v. Radenius*, 7 T. R. 663, 668; 1833, *Gibson v. Winter*, 5 B. & Ad. 96, 102; 1819, *Bulkley v. Landon*, 3 Conn. 76, 82; 1836, *Johnson v. Blackman*, 11 id. 342, 348.
² 1848, *Dazey v. Mills*, 10 Ill. 67; 1868, *Shailer v. Bumstead*, 99 Mass. 112, 127 ("In

modern practice, at law even, the admissions of a party to the record who has no interest in the matter will not be permitted to be given in evidence to the prejudice of the real party in interest"); 1846, *Sargeant v. Sargeant*, 18 Vt. 371, 376.

party in interest, his admissions would nevertheless be received;³ perhaps such a case is not likely to-day to arise. In a *criminal prosecution*, the person to whose injury the crime was done is in no legal sense a party, and his statements are not receivable,⁴ except, of course, by way of self-contradiction as a witness. So, too, the *stockholder of a corporation* is not the real party in legal interest, and his statements cannot be received as admissions of the corporation.⁵

(2) Where the party sues in a *representative capacity* — *i. e.* as trustee, executor, administrator, or the like —, the representative is distinct from the ordinary capacity, and only admissions made in the former quality are receivable; in particular, statements made before or after incumbency are inadmissible.⁶ Conversely, his admissions as executor or the like would not be receivable against him as a party in his personal capacity. A *guardian*, so far as his powers place him in a representative capacity, is subject to the same rules;⁷ but the function of a guardian *ad litem* begins and ends with the litigation, and consequently his extrajudicial admissions are not receivable at all.⁸

(3) It will thus be seen that in receiving the admissions of a party as such, the only question can be, who the party is. The probative process consists in contrasting the statements of the same person made now as litigant and made formerly elsewhere, and it is in that view that it becomes necessary to define the identity of the person. It follows that the statements of one who

³ 1749, *Hanson v. Parker*, 1 Wils. 257 (action on a bond for the benefit of D.; "D. is to be considered as if she were really plaintiff"); 1809, *Bayley, J.*, in *R. v. Hardwicke*, 11 East 578, 584 ("Bauerman v. Rudenus only decided that the declarations of the nominal party on the record were evidence against him; but not that the declarations of the real party would not also have been evidence"); 1813, *Smith v. Lyon*, 3 Camp. 465 (action by a ship-master, for the benefit of the owner, on a charter contract; *L. C. J. Ellenborough*: "Although this action is in the name of the master, it is brought for the benefit of the owner; I am therefore of opinion that anything said by the latter is admissible evidence for the defendant"). But this would not necessarily be the rule where the trustee as party represented an entire estate and the *cestui* was interested in only a part of it, *e. g.* as life tenant: 1838, *Doe v. Wehnwright*, 3 Nev. & P. 598, 605. It would be apparently on the above principle that, to prove a *plea in abatement for non-joinder*, the admission of liability by the person sought to be joined would be receivable: 1827, *Clay v. Langslow, M. & M.* 45.

⁴ 1875, *Williams v. State*, 52 Ala. 411, 412; 1901, *Green v. State*, 112 Ga. 638, 37 S. E. 835; 1834, *Herper v. State*, 101 Ind. 109, 111 (bastardy); 1898, *Shields v. State*, 149 Ind. 395, 49 N. E. 351 (murdered person); 1860, *Cora v. Sanders*, 14 Gray 394 (embezzlement); 1898, *State v. Knock*, 142 Mo. 515, 44 S. W. 235 (mother of a rape-prosecutrix); 1903, *State v. Terry*, 172 id. 213, 72 S. W. 513 (murdered

man); 1902, *State v. Deel*, 41 Or. 437, 70 Pac. 534 (owner of a stolen horse).

⁵ The contrary view was early taken in England for parish-inhabitants: 1809, *R. v. Hardwicke*, 11 East 578, 585; but it was repudiated by American Courts for town-proprietors; see Judge Redfield's note to Greenleaf on Evidence, I, § 175, 15th ed. But the status of the parish-inhabitant and the town-proprietor was different from that of the modern shareholder in a private corporation; the admissions of a shareholder cannot affect the corporation: 1839, *Fairfield Co. Turnpike Co. v. Thorp*, 13 Conn. 173, 180. This is sometimes expressly provided by statute: Wis. Stats. 1898, § 4079 (admissions of a member of a corporation, not receivable unless he is a party or an agent).

⁶ 1823, *Plant v. McEwen*, 4 Conn. 544, 548 (executor, before appointment); 1895, *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. 165 (guardian, after revocation); 1900, *Horkan v. Benning*, 111 id. 126, 36 S. E. 432 (administrator); 1898, *Charlotte O. & F. Co. v. Rippey*, 123 N. C. 656, 31 S. E. 879 (executor; excluded, unless connected with the settlement of the estate; this seems doubtful); 1901, *Williams v. Culver*, 39 Or. 337, 64 Pac. 763 (administrator, before appointment). For the case of *co-executors, co-legatees*, etc., see *post*, § 1081.

⁷ *Contra*: 1846, *Collia v. Bowen*, 8 Blackf. 262.

⁸ 1895, *Chipman v. B. Co.*, 12 Utah 68, 41 Pac. 562.

is confessedly a distinct person B do not become receivable as admissions against A merely because B is also a party. In other words, the *admissions of one co-plaintiff or co-defendant are not receivable against another*, merely by virtue of his position as a co-party in the litigation. This is necessarily involved in the notion of an admission; for it is impossible to discredit A's claims as a party by contrasting them with what some other party B has elsewhere claimed; there is no discrediting in such a process of contrast, because it is not the same person's statements that are contrasted. Moreover, ordinary fairness would forbid such a license; for it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statements as admissions. It is plain, therefore, both on principle and in policy, that the statements of a co-party (while usable of course against himself) are not usable as admissions against a co-party. The situation has, to be sure, often been obscured by the circumstance that the co-party's admissions are always received against himself, and, furthermore, that they are sometimes received also against the other co-party because of a privity of obligation or of title (on the principle of §§ 1077 ff.). But it is not by virtue of the person's relation to the litigation that this can be done; it must be because of some privity of title or of obligation, which would indeed have admitted the statements even had the declarant not been made a co-party. This principle, long recognized by the Courts, has not always been clearly appreciated by the profession:

1806, L. C. *Erskine*, in *Morse v. Royal*, 12 Ves. Jr. 355, 361: "So in trespass, where the defendants may be found severally guilty or not guilty, a witness may say he heard one acknowledge that he committed the act with the others; that is decisive against that one, and as it is legitimate evidence against him, the Court must hear it; though it is no evidence against the others."

1809, L. C. J. *Ellenborough*, in *R. v. Hardwicke*, 11 East 578, 585: "Evidence of an admission made by one of several defendants in trespass will not, it is true, establish the others to be co-trespassers. But if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass will be evidence⁹ against all who are proved to have combined together for the common object."¹⁰

The principle is particularly illustrated by the rule in regard to the admissions of a *co-defendant in a criminal case*; here it has always been conceded that the admission of one is receivable against himself only;¹¹ and thus,

⁹ I. e. on the principle of § 1079, *post*.

¹⁰ *Accord*: 1825, *Dun v. Brown*, 4 Cow. 483, 492 (Woodworth, J.: "An admission by a party to the record is evidence against him who makes it; . . . but not against others who happen to be joined as parties to the suit"). Otherwise, where the parties have a common interest independently of being joined as parties: 1903, *Fourth Nat'l Bank v. Albough*, 188 U. S. 734, 23 Sup. 450.

¹¹ 1664, *Tong's Case*, Kelyng 18.

The ruling in *Allen v. Allen*, 1894, Prob.

248, that when the *co-respondent* and the respondent, in *divorce* for adultery, take the stand, then the testimony of either cannot be taken against the other, if no right of cross-examination is permitted, is erroneous, being based on the common-law rule forbidding such use of extrajudicial admissions of co-defendants. But testimony on the stand is entirely different from admissions, and nothing can prevent a witness' testimony, when credible, from being used to prove any relevant fact against any party. Compare § 916, *ante* (impeaching a co-defendant).

where A's confession, for example, implicates also a co-defendant B, it is allowed to be read against A, under express instructions to the jury not to consider it as affecting B; and some judges at one time favored the practice of omitting the name of B, or any other co-defendant, in the proof of the confession.¹² As for *answers in chancery*, it has never been doubted that the answer of one defendant is no evidence against another.¹³

§ 1077. *Privies in Obligation; Joint Promisor; Principal and Surety, etc.* So far as one person is privy in obligation with another, *i. e.* is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally. Not only as a matter of principle does this seem to follow, since the greater may here be said to include the less; but also as a matter of fairness, since the person who is chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish. Moreover, as a matter of probative value, the admissions of a person having precisely the same interests at stake will in general be likely to be equally worthy of consideration. There being an identity of legal liability, the two persons are one so far as affects the propriety of discrediting one by the statements of the other.

When does this privity of obligation exist? This is plainly a matter for definition by the substantive law, not the law of evidence. The rule of evidence assumes whatever is otherwise established in the substantive law; and it would require a lengthy and inappropriate digression to examine here the conclusions of that law upon the variety of situations in which the question is presented. It is enough to note that the principle finds constant application chiefly to the admissions of a co-promisor,¹ of a principal (against his surety),² and of one or two other classes of liability which may now be ex-

¹² The cases are collected *post*, § 2100, because they are concerned primarily with the principle of completeness, there discussed.

For the use of a *confession of a deceased person*, implicating himself and *exonerating* the defendant, under the Hearsay exception for statements against interest, see *post*, § 1476.

For the use of admissions of *co-conspirators*, see *post*, § 1079.

¹³ 1806, *Morse v. Royal*, 12 Ves. Jr. 355, 361; 1817, *Leeds v. Ina. Co.*, 2 Wheat. 380, 383. But, of course, where the other party is a nominal one only, and thus is competent as a witness, his answer, if subjected to cross-examination, could be received. Distinguish also the admission of the other answer where one party makes it his own by reference (*ante*, §§ 1070, 1075).

¹ One of the most troublesome problems in this connection, namely, whether a promise or *acknowledgment by one joint promisor* serves to remove the bar of the *statute of limitations* against another, goes back to a ruling of Lord Mansfield, in *Whitcomb v. Whiting*, 2 Doug. 652 ("an admission by one is an admission by all"), and illustrates how the principle involved

is one of the substantive law; this principle was confirmed in 1824, in *Perham v. Raynal*, 2 Bing. 306, 312, and in 1828, in *Burleigh v. Stott*, 8 B. & C. 36, 41. There is an interesting note upon it in *Greenleaf on Evidence*, 15th ed., I, § 112.

² 1821, *Goss v. Watlington*, 3 B. & B. 132, 137; 1828, *Whitnash v. George*, 8 B. & C. 556, 561 ("The entries [of the principal] were evidence against the surety because they were made by the collector [principal] in pursuance of the stipulation contained in the condition of the bond"). The Hearsay exceptions for Statements against Interest (*post*, § 1455) and Regular Entries (*post*, § 1517) serve to confuse some of the earlier cases on this topic.

It was on this principle that admissions of a *debtor* were held admissible against a *sheriff charged with his escape*: 1798, *Sloman v. Herne*, 2 Esp. 691 ("whatever evidence would be sufficient to charge the original defendants would do to charge a sheriff in such an action as the present").

By statute in most of the Codes there is a general definition of the various persons whose admissions are receivable.

amined in order to distinguish the present question from certain genuine rules of evidence.

§ 1078. **Same: Agent; Partner; Attorney; Deputy-Sheriff; Interpreter; Husband and Wife.** (1) He who sets another person to do an act in his stead as *agent* is chargeable by such acts as are done under that authority, and so too, properly enough, is affected by admissions made by the agent in the course of exercising that authority. The question therefore turns upon the scope of the authority. This question, frequently enough a difficult one, depends upon the doctrine of agency applied to the circumstances of the case, and not upon any rule of evidence.¹ The common phrasing of the principle is well represented in the following passage:

1839, *Buchanan, C. J.*, in *Franklin Bank v. Pennsylvania D. & M. S. N. Co.*, 11 G. & J. 28, 33: "The principle upon which the declarations or representations of an agent, within the scope of his authority, are permitted to be proved, is, that such declarations, as well as his acts, are considered and treated as the declarations of his principal. What is so done by an agent, is done by the principal through him, as his mere instrument. So whatever is said by an agent, either in the making a contract for his principal, or at the time, and accompanying the performance of any act, within the scope of his authority, having relation to, and connected with, and in the course of the particular contract or transaction in which he is then engaged, is, in legal effect, said by his principal, and admissible in evidence; not merely because it is the declaration or admission of an agent, but on the ground, that being made at the time of and accompanying the contract or transaction, it is treated as the declaration or admission of the principal, constituting a part of the *res gestæ*, a part of the contract or transaction, and as binding upon him as if in fact made by himself. But declarations or admissions by an agent, of his own authority, and not accompanying the making of a contract, or the doing of an act, in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon his principal, not being part of the *res gestæ*, and are not admissible in evidence, but come within the general rule of law, excluding hearsay evidence; being but an account or statement by an agent of what has passed or been done or omitted to be done, — not a part of the transaction, but only statements or admissions respecting it."

The most difficult field in the application of this principle is that of *tortious liability*. For example, if A is an agent to drive a locomotive, and a collision ensues, why may not his admissions, after the collision, acknowledging his carelessness, be received against the employer? Because his statements under such circumstances are not made in performance of any work he was set to do. If he had before the collision been asked by a brakeman whether the train would take a switch at a certain point, and had then mentioned receiving certain instructions from the train-dispatcher, this statement might be regarded as made in the course of performing his appointed work. Nevertheless, such problems naturally admit of much speculative and barren argument.

¹ The best of the earlier expositions is that of Sir W. Grant, M. R., in 1803, in *Fairlie v. Hastings*, 10 Ves. Jr. 123. Lord Kenyon, who became Chief Justice in 1788, had set himself against receiving any admissions by agents; and it was some time before the true principle was

defined and accepted. For a collection of authorities applying the rule in *Fairlie v. Hastings*, see *Wambaugh's Cases on Agency*, 447 ff.; 1903, *McEntire v. Levi C. M. Co.*, 132 N. C. 598, 44 S. E. 109.

In that class of cases, namely, cases involving tortious liability, and, in particular, liability for injury in a railway accident, the question is usually complicated by the applicability of the Hearsay exception for Spontaneous Declarations (*post*, § 1745), which admits statements made under the influence of excitement, before the declarant had "time to contrive or invent." This serves commonly to admit the immediate statements of the injured persons and the bystanders; and since the much-abused phrase "*res gestæ*" has been commonly employed to suggest the limitations of that Hearsay exception, and has also been employed (though having nothing in common) to designate the scope of an agent's authority, it is natural that judges should sometimes have discussed the two principles, in their application to railway accidents, as if there were but one principle.² That there are two distinct and unrelated principles involved must be apparent; and the sooner the Courts insist on keeping them apart, the better for the intelligent development of the law of evidence. Practically, the results of the two principles in application are decidedly different; for upon the principle of the Hearsay exception such statements may (if admissible) be received against either party; but, on the principle of agency, against the employer only; moreover, when offered against the employer, the limitations of the two principles would be in some respects more favorable, in others less favorable, to the reception of the evidence.

Upon the application of the principle to specific instances, it would be useless here to enter, for only the rules of the substantive law of agency are involved.³ It may be noted that the *fact* of agency must of course be some-

² This confusion is dealt with, *post*, § 1797. Examples of it may be found in opinions in the following cases: 1886, *Vickaburg R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. 118; 1893, *Linderberg v. Mining Co.*, 9 Utah 163, 33 Pac. 692. For an example of the correct treatment of these two principles, see *Blackman v. West Jersey & S. R. Co.*, 68 N. J. L. 1, 52 Atl. 370 (1902).

³ The following include merely casual recent decisions in various jurisdictions, which may serve as illustrations: *Ala.*: 1895, *Postal Cable Co. v. LeNoir*, 107 Ala. 640, 18 So. 266; *Postal Cable Co. v. Brantley*, *ib.* 683, 18 So. 321; 1897, *Georgia H. I. Co. v. Warten*, 113 id. 479, 22 So. 288; 1897, *Louisville & N. R. Co. v. Hill*, 115 id. 331, 22 So. 163; *Ark.*: 1893, *Fort Smith Oil Co. v. Slover*, 58 Ark. 168, 179, 24 S. W. 106; 1896, *Ames Ironworks v. Pulley Co.*, 63 id. 87, 37 S. W. 409; *Cal.*: 1895, *Hewes v. Fruit Co.*, 166 Cal. 441, 39 Pac. 853; 1895, *Mutter v. Lime Co.*, — id. —, 42 Pac. 1068; 1896, *McGowan v. McDonahl*, 111 id. 57, 43 Pac. 418; 1898, *Horne v. DeYoung*, 119 id. 670, 52 Pac. 150, 499; *Conn.*: 1896, *Builders' Co. v. Cox*, 68 Conn. 380, 36 Atl. 797; *Ga.*: 1886, *Krogg v. R. Co.*, 77 Ga. 202, 213; 1897, *Southern R. Co. v. Kinchen*, 103 id. 186, 29 S. E. 816; *Ill.*: 1897, *Pennsylvania Co. v. Bridge Co.*, 170 Ill. 645, 49 N. E. 215; *Ind.*: 1895, *Treager v. Mining Co.*, 142 Ind. 164, 40 N. E. 907; *Ia.*: 1895, *Waile v. High*, 96 Ia. 742, 65 N. W. 397; 1897, *Irlbeck*

v. Bierl, 101 id. 240, 67 N. W. 200, 70 N. W. 207; 1898, *Schoep v. Ins. Co.*, 104 id. 354, 73 N. W. 825; 1898, *Metropolitan Nat'l Bank v. Conn. St. Bank*, *ib.* 682, 74 N. W. 26; *Kan.*: 1895, *Cherokee Co. v. Dickson*, 55 Kan. 62, 39 Pac. 691; 1896, *First Nat'l Bank v. Marshall*, 56 id. 441, 43 Pac. 774 (bank president); 1897, *Atchison T. & S. F. R. Co. v. Osborn*, 58 id. 768, 51 Pac. 286; 1898, *Atchison T. & S. F. R. Co. v. Cattle Co.*, 59 id. 111, 52 Pac. 71; *Ky.*: 1895, *Louisville & N. R. Co. v. Ellis*, 97 Ky. 330, 30 S. W. 979; 1896, *Waah v. Cary*, — id. —, 33 S. W. 728; 1896, *Tarr Co. v. Kimbrough*, — id. —, 34 S. W. 523; 1896, *East Tenn. Tel. Co. v. Simms*, 99 id. 404, 36 S. W. 171; 1897, *Graddy v. Tel. Co.*, — id. —, 43 S. W. 468; 1897, *C. & O. R. Co. v. Smith*, 101 id. 104, 39 S. W. 832; *Mass.*: 1849, *Cooley v. Norton*, 4 Cush. 95; 1897, *Geary v. Stevenson*, 169 Mass. 23, 47 N. E. 508; 1897, *Gilmore v. Paper Co.*, 169 id. 471, 48 N. E. 623; *Mich.*: 1895, *Ablard v. R. Co.*, 104 Mich. 147, 62 N. W. 172; 1897, *Andrews v. Min. Co.*, 114 id. 375, 72 N. W. 242; 1898, *Maxson v. R. Co.*, 117 id. 218, 75 N. W. 459; *Miss.*: 1898, *State v. Spengler*, — Miss. —, 23 So. 33; *Mont.*: 1898, *Wilson v. Sax*, 21 Mont. 374, 54 Pac. 46; *Nebr.*: 1902, *South Omaha v. Wizensinski*, — Nebr. —, 92 N. W. 1045; *N. H.*: 1894, *Nehonne v. R. Co.*, 67 N. H. 531, 38 Atl. 17; *N. C.*: 1895, *Williams v. Tel. Co.*, 116 N. C. 558, 21 S. E. 298; 1896, *Craven*

how evidenced *before the alleged agent's declarations* can be received as admissions; and therefore the use of the alleged agent's assertions that he is agent would for that purpose be inadmissible, as merely begging the very question.⁴ Nevertheless, they might be received provisionally as verbal acts (*post*, § 1770) indicating that he was acting on another's behalf, not his own, leaving it to subsequent proof to establish his connection as agent with the present party.⁵

It may be added that, conformably to the general doctrine (*ante*, § 4) by which the rules of evidence are no different in criminal cases, the admissions of an agent may equally be received in a *criminal charge* against the principal. But whether the fact thus admitted by the agent would suffice to charge the principal criminally without his personal knowledge or connivance would depend upon the particular rule of criminal law involved.⁶

(2) An *attorney* is an agent to conduct litigation; his admissions, therefore, are under certain circumstances receivable; this application of the principle has already been examined (*ante*, § 1063).

(3) A *partner* charges the partnership by virtue of an agency to act for it; how far his admissions are receivable depends therefore on the doctrines of agency as applied to a partnership.⁷

(4) The use of the admissions of a *deputy sheriff* against his sheriff seems to rest on an application of the theory of agency.⁸

(5) A *husband* or *wife* may, in the ordinary way, become an agent, one for the other, and the agent's admissions are then receivable. But the mere marital relation does not of itself make them agents.⁹

v. Russell, 118 id. 564, 24 S. E. 361; 1898, Albert v. Ina Co., 122 id. 92, 30 S. E. 327; Or.: 1896, North P. Lumber Co. v. W. S. M. L. & M. Co., 29 Or. 219, 44 Pac. 286; 1897, First Nat'l Bank v. Linn Co. Bank, 30 id. 296, 47 Pac. 615; 1897, Wicktorwitz v. Ina Co., 31 id. 565, 51 Pac. 75; Pa.: 1895, Shsfer v. Lacock, 13 Pa. 497, 32 Atl. 46; 1898, Giberson v. Mill Co., 174 id. 369, 34 Atl. 583; S. D.: 1896, Esley v. Birnbaum, 9 S. D. 174, 68 N. W. 290; Tex.: 1898, Houston E. & W. T. R. Co. v. Campbell, 91 Tex. 551, 45 S. W. 2; U. S.: 1886, Steamboat Co. v. Brockett, 121 U. S. 637, 649, 7 Sup. 1039; 1893, Louisville & N. R. Co. v. Stewart, 9 U. S. App. 564, 6 C. C. A. 147, 56 Fed. 808; 1895, Nelson v. Bank, 16 C. C. A. 425, 69 Fed. 802; 1894, St. Louis & S. F. R. Co. v. M'Leiland, 10 Id. 300, 62 Fed. 116; Utah: 1893, Linderberg v. Min. Co., 9 Utah 163, 33 Pac. 692; 1897, Moyle v. Congreg. Soc., 16 id. 69, 50 Pac. 806; Va.: 1895, Rensch v. Cold Storage Co., 91 Va. 534, 22 S. E. 358; 1896, Norfolk & C. R. Co. v. Lumber Co., 92 id. 413, 23 S. E. 737; 1895, Jammison v. R. Co., ib. 327, 23 S. E. 758.

⁴ This is never disputed, except by those attorneys who have to receive their legal training at the hands of the Supreme Court: 1900, Jones v. Harrell, 110 Ga. 373, 35 S. E. 690; 1899, Norberg v. Plummer, 58 Nehr. 410, 78 N. W. 708; 1897, Union G. & T. Co. v. Robinson, 24 C. C. A. 650, 73 Fed. 420; 1898, Gregory v. Loose, 19 Wash. 599, 54 Pac. 33. Of course

this does not prevent the alleged agent from testifying upon the stand to the fact of his agency; for here his testimony is not offered as an admission: 1898, American Expr. Co. v. Lankford, 2 Ind. Terr. 18, 46 S. W. 183; 1897, Wicktorwitz v. Ina Co., 31 Or. 569, 51 Pac. 75.

⁵ 1899, Parker v. Bond, 121 Ala. 529, 25 So. 898; 1898, Nowell v. Chipmen, 170 Mass. 310, 49 N. E. 631.

⁶ 1806, Lord Melville's Trial, 29 How. St. Tr. 550, 765, quoted *ante*, § 4; 1880, R. v. Downer, 14 Cox Cr. 486, 489.

⁷ Some of the complicated problems here arising are discussed in a note to Greenleaf on Evidence, 15th ed., I, § 112.

Whether the admissions of a partner made after dissolution are receivable against the others, has been a much controverted point, probing deeply into the theory of partnership; the negative answer was made by Spencer, C. J., in Walden v. Sherburne, 15 Johns. 409 (1818); the affirmative, by Wilde, J., in Cady v. Shepheri, 11 Pick. 400, 407 (1831).

⁸ 1833, Snowball v. Goodricke, 4 B. & Ad. 541; except so far as by custom the sheriff (by reason of his bond of indemnity from the deputy) is treated as merely the nominal party, in which case (on the principle of § 1076, *ante*) the deputy's admissions are receivable without limitation, as being those of the real party: 1815, Tyler v. Uimer, 12 Mass. 163, 166.

⁹ The cases are collected *post*, § 2232 (marital

(6) An *interpreter* may be made an agent to converse, and then his translation is receivable as an agent's admission, without calling him to the stand. But otherwise his extrajudicial statements are excluded by the Hearsay rule.¹⁰

§ 1079. Same: Co-Conspirators; Joint Tortfeasors. (1) A conspiracy makes each conspirator liable under the criminal law for the acts of every other conspirator done in pursuance of the conspiracy. Consequently, by the principle already exemplified in other relations (*ante*, § 1077) the admissions of a co-conspirator may be used to affect the proof against the others, on the same conditions as his acts when used to create their legal liability:

1843, *Pennefather, C. J.*, in *R. v. O'Connell*, 5 State Tr. n. s. 1, 710: "When evidence is once given to the jury of a conspiracy, against A, B, and C, whatever is done by A, B, or C in furtherance of the common criminal object is evidence against A, B, and C, though no direct proof be given that A, B, or C knew of it or actually participated in it. . . . If the conspiracy be proved to have existed, or rather if evidence be given to the jury of its existence, the acts of one in furtherance of the common design are the acts of all; and whatever one does in furtherance of the common design, he does as the agent of the co-conspirators."

The tests therefore are the same, whether that which is offered is the act or the admission of the co-conspirator; in other words, the question is purely one of criminal law, or of conspiracy as affecting joint civil liability, and its solution is not to be sought in any principle of evidence.¹

privilege). For admissions by either as grantor of property, see *post*, §§ 1080-1086, especially § 1086.

¹⁰ The cases are collected *post*, § 1810 (Hearsay rule). For other questions concerning interpreters, see *ante*, §§ 668, 811.

¹ The following list of cases includes only certain leading English cases and some modern or leading American rulings: *Eng.*: 1794, *R. v. Hardy*, 24 How. St. Tr. 451; 1794, *R. v. Stone*, 25 id. 1 *et passim*; 1817, *R. v. Watson*, 32 id. 80, 359, 538; 1817, *R. v. Brandreth*, ib. 766, 852; 1820, *R. v. Hunt*, 3 B. & Aid. 5, 66; *Ala.*: 1896, *Hunter v. State*, 112 Ala. 77, 21 So. 65; 1897, *Everage v. State*, 113 id. 102, 21 So. 404; 1899, *McLerny v. State*, 120 id. 274, 25 So. 247; 1903, *Collins v. State*, — id. —, 34 So. 993; *Ark.*: 1859, *Clinton v. Estes*, 20 Ark. 216, 225; 1899, *Willis v. State*, 67 id. 284, 54 S. W. 211; *Cal.*: 1896, *People v. Oldham*, 111 Cal. 648, 44 Pac. 312; 1899, *People v. Winters*, 125 id. 325, 57 Pac. 1067; 1900, *People v. Rodiey*, 131 id. 240, 63 Pac. 351; *Colo.*: 1873, *Solander v. People*, 2 Colo. 43, 64; 1888, *Crawford v. People*, 12 id. 290, 293, 20 Pac. 769; *Conn.*: 1897, *State v. Thompson*, 69 Conn. 720, 38 Ati. 868; *Fla.*: 1898, *Mercer v. State*, 40 Fla. 216, 24 So. 154; *Ga.*: 1899, *Carter v. State*, 106 Ga. 372, 32 S. E. 345; *Ill.*: 1887, *Spies v. People*, 122 Ill. 1, 153, 228, 12 N. E. 865, 17 N. E. 898; 1889, *Van Eyck v. People*, 178 id. 199, 52 N. E. 852; *Ind.*: 1901, *Musser v. State*, 157 Ind. 423, 61 N. E. 1; *Kan.*: 1895, *State v. Rogers*, 54 Kan.

683, 39 Pac. 219; *Ky.*: 1895, *Twyman v. Com.*, — Ky. —, 33 S. W. 409; 1901, *Powers v. Com.*, — id. —, 61 S. W. 735; 1901, *Howard v. Com.*, — id. —, 61 S. W. 756; *Mass.*: 1897, *Com. v. Hnnton*, 168 Mass. 130, 46 N. E. 404; 1902, *Com. v. Rogers*, 181 id. 184, 63 N. E. 421; *Miss.*: 1895, *Nicolay v. Mallery*, 62 Minn. 119, 64 N. W. 108; 1903, *State v. Ames*, — id. —, 96 N. W. 330; *Mo.*: 1895, *Hart v. Hicks*, 129 Mo. 99, 31 S. W. 351; 1899, *State v. Harris*, 150 id. 56, 51 S. W. 481; 1903, *State v. Kennedy*, — id. —, 75 S. W. 979; *Nebr.*: 1897, *Farley v. Peebies*, 50 Nebr. 723, 70 N. W. 231; 1903, *Lamb v. State*, — id. —, 95 N. W. 1050; 1903, *O'Brien v. State*, — id. —, 96 N. W. 649; *N. H.*: 1892, *Coburn v. Storer*, 67 N. H. 86, 36 Atl. 607; *N. M.*: 1896, *Borrego v. Terr.*, 8 N. M. 446, 46 Pac. 349; *N. Y.*: 1874, *Keiley v. People*, 55 N. Y. 565, 575; 1897, *People v. Peckens*, 153 id. 576, 47 N. E. 883; *N. C.*: 1898, *State v. Turner*, 119 N. C. 841, 25 S. E. 810; *Or.*: 1897, *State v. Tice*, 30 Or. 457, 48 Pac. 367; 1897, *State v. Magone*, 32 id. 206, 51 Pac. 452; 1898, *State v. Hinkie*, 33 id. 93, 54 Pac. 155; 1899, *State v. Roach*, 35 id. 224, 57 Pac. 1016; 1902, *State v. Aiken*, 41 id. 294, 69 Pac. 683; *Pa.*: 1895, *Wagner v. Heak*, 170 Pa. 495, 32 Ati. 1087; *S. C.*: 1897, *State v. Rice*, 49 S. C. 418, 27 S. E. 452; *Tenn.*: 1827, *Cornwell v. State*, Mart. & Y. 147, 153; 1896, *Wichl v. Robertson*, 97 Tenn. 458, 37 S. W. 274; *Tex.*: 1894, *McKenzie v. State*, 32 Tex. Cr. 568, 577, 25 S. W. 426; 1892, *Logan v. U. S.*, 144 U. S.

In certain aspects, however, the rules of evidence sometimes come to be involved, and a few discriminations must be noted (a) The general principle affecting the *order of evidence* leaves it ultimately to be controlled by the trial Court's discretion, subject to certain provisional rules which obtain unless special considerations overthrow them (*post*, § 1867). In the present application, the rule for conditional relevancy (*post*, § 1871) naturally applies; *i. e.* the statements of A being receivable against B on the hypothesis that A and B have conspired, some evidence of the conspiracy must ordinarily be furnished before offering the statements of A; in a given case, the trial Court's discretion may relax this rule.³ (b) Where the alleged conspiracy was carried into effect by the acts of a *mob* or other *riotous assembly*, the defendant whose instigation and leadership are proved becomes liable for the mob's acts, and thus the conduct and statements of any and all persons in the mob, whether identified or not, become a proper subject of consideration; and a field of somewhat indefinite extent is opened.⁴ But in such cases the utterances of members of the mob or of bystanders may also be receivable (under an exception to the Hearsay rule) for other purposes (*post*, § 1729); and accordingly the precise issue and object of the evidence must be discriminated. Elsewhere (*post*, § 1790) a summary survey is taken of the various questions that may arise in this connection. (c) That the *confession of a principal* is admissible, on the trial of the *accessory*, to evidence the commission of the crime by the principal, seems clear on the present principle, supposing some evidence of the defendant's cooperation to be first furnished.⁴ But whether the *judgment of conviction* of the principal is receivable for the same purpose depends on the doctrine of the effect of judgments.⁵

(2) The admissions of one *joint tortfeasor* are receivable against another,⁶

393, 309, 12 Sup. 617; 1893, *Brown v. U. S.*, 150 Id. 93, 98, 14 Sup. 37; 1895, *Clune v. U. S.*, 159 Id. 590, 16 Sup. 125; 1896, *Wiborg v. U. S.*, 163 Id. 632, 16 Sup. 1127, 1197; 1903, *Connecticut M. L. Ins. Co. v. Hillmon*, 188 Id. 208, 23 Sup. 294; *Utah*: 1898, *State v. Kilburn*, 16 Utah, 187, 52 Pac. 277; *Wash.*: 1896, *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

It is immaterial that the declarant has been acquitted of the charge, for that judgment does not affect the trial in hand: 1898, *Holt v. State*, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S. W. 829 (repudiating the *obiter dictum* in *Dever v. State*, 37 Id. 396, 30 S. W. 1071).

³ The cases vary more or less in their statement of the rule: 1820, *The Queen's Case*, 2 B. & B. 303; 1839, *R. v. Frost*, 4 State Tr. N. S. 35, 229, 244; 1848, *R. v. Cuffey*, 7 Id. 467, 476; 1888, *Farnell Commission's Proceedings*, 9th day, Times Rep. pt. 3, p. 34; 1899, *People v. Compton*, 123 Cal. 403, 56 Pac. 44; 1898, *State v. Thompson*, 69 Conn. 720, 88 Atl. 368; 1903, *State v. Bolden*, 109 La. 484, 33 So. 571; 1902, *Com. v. Rogers*, 181 Mass. 184, 53 N. E. 421; 1897, *State v. May*, 142 Mo. 135, 43 S. W. 687; 1902, *Cohn v. Seidel*, 71 N. H. 558, 53 Atl. 800;

1897, *State v. Moore*, 32 Or. 65, 48 Pac. 468; 1902, *State v. Prater*, 52 W. Va. 152, 43 E. 238.

⁴ 1820, *R. v. Hunt*, 3 B. & Aid. 5, 66; 1821, *Redford v. Birley*, 1 State Tr. N. S. 1071, 1157, 3 Stark. 87 (battery in dispersing a mob; solicitations by persons present to others to join them, admitted); 1843, *R. v. O'Connell*, 5 Id. 1, 244, 262, 276 (seditious assembly; inscription on an arch through which the persons passed, admitted as a part of its conduct; remarks, by persons about an hour after the meeting, excluded; document circulated in various portions of the meeting, received); 1881, *Carr v. State*, 12 Ark. 99, 102; 1854, *Brennan v. People*, 15 Ill. 511, 515 (murder of S. by a crowd of men among whom was the defendant; indications of the crowd's purpose in pursuing S., admitted to ascertain whether they had a common purpose).

⁵ 1899, *Howard v. State*, 109 Ga. 137, 34 S. E. 330; 1899, *Givens v. State*, 103 Tenn. 643, 55 S. W. 1107.

⁶ See some cases collected *post*, § 1388.

⁷ 1809, *R. v. Hardwicke*, 11 East 578, 585 (see quotation *supra*, § 1076; and some of the civil cases cited *supra*, note 1).

on the same principle and with the same limitations as those of conspirators; this is merely the same doctrine in its application to civil liability for torts.

§ 1080. *Privies in Title; General Principle; History of the Principle.* The admissions of one who is privy in title stand upon the same footing as those of one who is privy in obligation (*ante*, § 1077). Having precisely the same motive to make correct statements, and being identical with the party (either contemporaneously or antecedently) in respect to his ownership of the right in issue, his admissions may, both in fairness and on principle, be proffered in impeachment of the present claim. In the following passages, both principle and policy are lucidly expounded from various points of view:

1819, *Henderson, J.*, in *Guy v. Hall*, 3 Murph. 150: "The declarations or confessions of the person making them are evidence against such person and all claiming under him by a subsequent title, and for the plainest reasons. Truth is the object of all trials, and a person interested to declare the contrary is not supposed to make a statement less favorable to himself than the truth will warrant; at least there is no danger of over-leaping the bounds of truth as against the party making the declarations. It is therefore evidence against him, and his subsequent purchaser stands in his situation for he cannot better his title by transferring it to another, or thereby affect the rights of those who have an interest in his confessions. . . . It is asked, Why not swear him? The answer is, The [other] party likes his declarations better. He may, from some motive, vary his statement; and the party offering this evidence is alone to judge."

1832, *Kennedy, J.*, in *Gibbhouse v. Stong*, 3 Rawie 436, 445: "In the case before us the testimony offered and rejected was not of that character which in a technical and legal sense comes under the denomination of hearsay. It comes under what is considered the declarations or admissions of the party to the suit or his privies, that is, those under whom he claims; in respect to which the general rule of law is just as well settled that they shall be received in evidence as that hearsay shall not. All a man's own declarations and acts, and also the declarations and acts of others to which he is privy, are evidence, so far as they afford any presumption against him, whether such declarations amount to an admission of any fact, or such acts and declarations of others to which he is privy afford any presumption or inference against him. . . . The confessions of the party himself (which I do not understand to be denied) have always been considered good and admissible evidence of any fact admitted by them to be true, and may be given in evidence to prove it, notwithstanding the confessions might be such as to show that twenty witnesses were present who could all testify to its existence or non-existence, and who might all appear to be in the court-house at the time when such confessions should happen to be offered in evidence against the party making them. And this rule of admitting the confessions or declarations of the party extends not only to the admission of them against himself, but against all who claim or derive their title from him; in other words, between whom and himself there is a privity. There are four species of privity: privity in blood, as between heir and ancestor; privity in representation, as between testator and executor, or the intestate and his administrators; privity in law, as between the Commonwealth by escheat and the person dying last seized without blood or privity of estate; and privity in estate as between the donor and the donee, lessor and the lessee, vendor and the vendee, assignor and the assignee, etc. . . . Upon this same principle it is, that executors and administrators, as also devisees, legatees, heirs and next of kin, are all bound by the promises, whether written or verbal, of their respective testators or intestates, so far as they may have received estates from them that are liable, and the declarations and admissions of such testators and intestates are uniformly received in evidence against their devisees, legatees, heirs, and next of kin, so as to affect the estates

which have passed to them. Privies in estates, such as vendee and vendor, assignee and assignor, stand upon the same footing in this respect to each other that privies in blood do. I know of no distinction. That which is binding upon the vendor will generally be equally so upon his vendee; and whatever would have been admissible as evidence against the former ought not only to be so against the latter, but ought to have the same effect too. . . . Lord Ellenborough has given the true reason of the rule for admitting the declarations of a party in evidence where he says it 'is founded upon a reasonable presumption that no person will make any declaration against his interest unless it be founded in truth.' If true when made, and therefore receivable in evidence, his selling or disposing of the property afterwards cannot make his former declarations in respect to it untrue, nor furnish any reason that I can perceive which ought to derogate from its character as evidence. But I cannot avoid believing that as long as the great object of receiving testimony is to aid in and to promote the investigation of truth, the declarations or admissions of a vendor or assignor against his interest, made before the sale or assignment, may be more safely relied on and received in evidence against his vendee or assignee than the testimony that would be given by such vendor or assignor himself, if the party claiming in opposition to his vendee or assignee must be compelled to resort to him."

1813, Messrs. Cowen and Hill, in Notes to Phillipps on Evidence, No. 481, p. 611: " [The owner's] estate or interest in the same property, afterwards coming to another, by descent, devise, right of representation, sale or assignment, in a word, by any kind of transfer, whether it be the act of law or the act of the parties, whether the subject of the transfer be real or personal estate, corporeal or incorporeal, choses in possession or choses in action, the successor is said to claim under the former owner; and whatever he may have said affecting his own rights, before departing with his interest, is evidence equally admissible against his successor claiming from him, either immediately or remotely. And in this instance, it makes no difference whether the declarant be alive or dead; though he be a competent witness, and present in court, his admissions are receivable. This doctrine proceeds upon the idea that the present claimant stands in the place of the person from whom his title is derived; has taken it *cum onere*; and as the predecessor might have taken a qualified right, or sold, charged, restricted, or modified an absolute right, and as he might furnish all the necessary evidence to show its state in his own hands, the law will not allow third persons to be deprived of that evidence by any act of transferring the right to another."

This principle is to-day nowhere denied.⁷ But its recognition was slow in coming. Of the fundamental and common doctrines of our law of evidence, this was perhaps the latest to receive judicial recognition. Not until the period 1830-1850 can the full acceptance of the principle be said to have been established, either in England or in the United States. As late as 1824, Mr. Starkie, in his philosophical treatise,⁸ ventured only to say that the admissions of a prior owner were "sometimes" receivable. In 1839, Mr. Esek Cowen and Mr. Nicholas Hill, Jr. (the former then a judge of New York, the latter afterwards), were obliged to devote a long excursus, in their edition of Mr. Phillipps' treatise,⁹ to a demonstration of the various bearings of the principle in its logical completeness. It was mainly through their masterly exposition that clarity of doctrine became thenceforward apparent in the American rulings.

⁷ Except in one traditional respect in New York, firmly fixed too long ago to be now discarded; see § 1083, *post*.

⁸ Evidence, II, 48.
⁹ Note No. 481.

The reasons for the confusion and halting development in the prior generation are now not difficult to detect. Long enough before then, to be sure, a single aspect of the principle had been plainly enough known and constantly applied, — namely, the use of recitals in deeds of preceding proprietors; ¹⁰ for in the substantive law the rights of the successor were defined by the terms of his chain of prior deeds, and it was a simple matter to concede an analogous evidential force, against him, to those parts of the deed which were not strictly definitive of the scope of his title.¹¹ But this was not with full perception of the principle; and in respect to all other forms of admissions, particularly oral ones, there were strong counter-analogies which tended to obscure the further perception of the principle. By the end of the 1700s the rules of evidence were beginning to be more carefully considered than ever before (*ante*, § 8), and the Hearsay rule was in particular strictly enforced. The exceptions to this rule were by no means yet fully established; the scope of the exception for statements of facts against interest was not finally determined till the first quarter of the 1800s (*post*, § 1455). For that exception the requirement was essential that the declarant should be deceased, — a circumstance immaterial for admissions (*ante*, § 1049). Since admissions (as already observed) are commonly though not necessarily against interest at the time of making (*ante*, § 1048), it was natural enough, in this inchoate stage of the conception, to fail to distinguish admissions of parties from the general hearsay exception, then in formation, for statements of facts against interest. Accordingly, even after it began to be perceived that a predecessor's oral statements were assimilable to his deed-recitals as admissions, the notion persisted for a long time that his death was essential (by analogy to the Hearsay exception) for their reception; and not until 1830 or thereabouts, either in England or the United States, was this notion thoroughly dislodged.¹² The thought was, up to that time, that if the person were living, whether he were grantor or were totally disconnected from the cause, his statement was hearsay and his testimony on the stand must be required.

Another doctrine, also, combined to divert judicial attention from the development of the doctrine of admissions; this was the verbal-act doctrine (*post*, §§ 1772-1778). Still looking from the hearsay point of view, the judges perceived, in the early 1800s, that the rule was not applicable to verbal parts of acts necessary to be proved, and in particular to declarations of claim or disclaim accompanying and coloring the occupation of land, where the issue was merely one of possession. Such declarations commonly proceeded from

¹⁰ 1704, *Ford v. Lord Grey*, 1 Salk. 286.

¹¹ The only controversy in this respect was whether the recitals were conclusive, on the principle of estoppel, — a question carefully considered by Mr. J. Story, in 1830, in *Carver v. Jackson*, 4 Pet. 1, 83, cited *post*, § 1256.

¹² 1827, *Gaselee, J.*, in *Hedger v. Horton*, 3 C. & P. 17: "I have always understood that, with respect to real estates, the declarations of a party, made before he parted with his interest,

have been received in evidence, and not his declarations after. But I believe that this has been in cases where the party was dead." And yet, as soon after as 1834, *Parke, J.*, says, in *Woolway v. Rowe*, 1 A. & E. 114, 117: "The point [above ruled] is quite new to me. I always thought the party's interest at the time of the declaration was the ground on which the evidence was admitted." Other authorities are collected *ante*, § 1049.

prior occupants where the proof of adverse possession, in founding a prescriptive title, extended into prior generations; and the propriety of receiving them came soon to be conceded. Now, in most of the cases affecting real property, in which the declaration would have been receivable as an admission, it was also receivable on one or the other of the foregoing principles, *i. e.* either as a statement of a fact against proprietary interest (under the Hearsay exception), or as a verbal part of an act coloring the possession. Hence it was that a generation elapsed, after the opening of the 1800s, before the applicability of the doctrine of admissions was fully conceived; for both counsel and judges were naturally restrained in the channel of their speculations by these competing analogies for the commonest species of admissions.¹³

Dartmouth *v.* Roberts, in 1812,¹⁴ shows an evident logical effort toward the successful appreciation of the notion of a predecessor's admission, in an issue concerning realty. Woolway *v.* Rowe, in 1834,¹⁵ finds the doctrine unquestioned; though Hedger *v.* Horton, in 1827,¹⁶ had shown it still clouded by the other analogies. For issues of personalty, Ivatt *v.* Finch, in 1808,¹⁷ had already opened the way; and a series of rulings on commercial paper, beginning with Kent *v.* Lowen, in the same year,¹⁸ fully developed the principle before 1825. In the United States the development proceeded by almost contemporaneous steps. The English reports were now fully in the hands of the American lawyers and judges; and the ambiguity and hesitation of the Westminster rulings were reflected in the discussions in the United States. In Connecticut, for example, the whole doctrine of predecessors' admissions was expressly under the ban as late as 1815,¹⁹ and not until 1845²⁰ did the new learning receive its settled sanction. In New York the principle was applied in realty issues as early as 1813;²¹ but the rulings vacillated, and as late as 1843, in the much-argued case of Paige *v.* Cagwin,²² the whole doctrine was put in jeopardy, and emerged to survive in only a mutilated form. In Vermont, the New York rule prevailed as late as 1845.²³ In Massachusetts, the principle seems to have been ignored throughout the first quarter of the 1800s.²⁴ In Pennsylvania alone, at the early period of 1782, a precocious but clear perception of the entire principle was found;²⁵ although

¹³ For example, Doe *v.* Jones, in 1808 (*post*, § 1458), might have been decided on the principle of admissions and not of statements against interest; and Stanley *v.* White, in 1811 (*post*, § 1778) and Doe *v.* Pettett (*post*, § 1778) need not have been decided on the verbal-act principle.

¹⁴ 16 East 334. These and the following cases are further cited *post*, §§ 1082-1086.

¹⁵ 1 A. & E. 114.

¹⁶ 3 C. & P. 179.

¹⁷ 1 Taunt. 141.

¹⁸ 1 Camp. 177, by L. C. J. Ellenborough. The formative stage of the conception is interestingly shown by the same judge's ruling, only three years before, in a stronger case for admission (Duckham *v.* Wallis, 5 Esp. 151), excluding

such statements on the express ground that to receive them "would be making the declarations of a third person evidence to affect the plaintiff's title when that person was not on the record." In Kent *v.* Lowen he correctly designated such a person as "one through whom the plaintiff made title"; he had seen the light.

¹⁹ Beach *v.* Catlin, 4 Day 284; Barrett *v.* French, 1 Conn. 354.

²⁰ Smith *v.* Martin, 17 Conn. 399.

²¹ Johnson *v.* McCall, 10 John. 377.

²² 7 Hill 361.

²³ Hines *v.* Soule, 14 Vt. 99; it was repudiated after a decade.

²⁴ Clarke *v.* Waite, 12 Mass. 439; Bridge *v.* Eggleston, 14 id. 245.

²⁵ Morris *v.* Vanderen, 1 Dall. 64.

even here in 1832²⁸ it was still considered open to attack. After the publication of Messrs. Cowen and Hill's commentary, there was no longer room for misunderstanding or debate.

§ 1081. **Same: Decedent; Insured; Co-legatee, Co-heir, Co-executor; Co-tenant; Bankrupt.** The principle just examined may be phrased in this way: When by the hypothesis of the party himself his title as now claimed is identical with that of another person, as a prior holder, the statements of that other person, made during the time of his supposed title, are receivable against the party as admissions.¹ This question of identity of title depends obviously upon the substantive law of property. In this respect it is without the scope of the law of evidence, and does not call for consideration here. But a few of the commoner instances may be briefly examined for illustration's sake; and in particular the relation of grantor and grantee must be examined in detail, because of its many complicated relations with other rules of evidence.

(1) No modern Court doubts that a *decedent*, whose rights are transmitted intact to his successor, is a person whose admissions are receivable against a party claiming the decedent's rights as *heir, executor, or administrator*.² The statutory claim, however, in an action for *death by wrongful act*, of the executor or other representative, is of an anomalous nature; in some features it is an action for a surviving claim of the deceased, while in others it is an action for an injury to the dependent relatives; there is therefore some ground for holding that the deceased's admissions are not receivable.³ It may however equally be argued that, being admissible in one aspect, they should not be excluded because the action has additional aspects;⁴ moreover, they ought in any event to be receivable under the Hearsay exception for statements of facts against interest, as some Courts concede.⁵ In a beneficiary's action for the sum conditioned in a policy of *life-insurance*, there is no legal identity of title between the deceased and the beneficiary, although the beneficiary's right is after all no more than the creation of the insured's contract; hence, unless the beneficiary has in the beginning been made a party to the contract so as to bind himself to be identified with the insured (and some forms of contract attempt this), the insured's admissions would not be receivable against the beneficiary. The distinction sometimes taken between statements before and statements after the policy's execution does not seem to be a sound one. It must be conceded, however, that the situation admits

²⁸ *Giblehouse v. Stong*, 3 Rawle 436, quoted *supra*.

¹ Or, in another form: wherever the other person could by his acts affect the title of the present party, the other person's admissions may be used as evidence in disproof of that title.

² 1836, *Smith v. Smith*, 3 Bing. N. C. 29, 33 (deceased's admissions as to a gift, received; "strictly speaking, the defendant claims under him"). So, too, the administrator *de bonis non* is affected by the admissions of the executor or administrator, who is his direct predecessor; 1874,

Eckert v. Triplett, 48 Ind. 174, 176. Compare § 1076, *ante*.

³ 1898, *Camden & A. R. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634 (undecided).

⁴ 1899, *Georgia R. & B. Co. v. Fitzgerald*, 108 Ga. 507, 34 S. E. 316 (wife's action for husband's death); 1896, *Van Alstine v. Kaniecki*, 109 Mich. 318, 67 N. W. 502 (action by a mother under the liquor-damage act); 1896, *Hughes v. Canal Co.*, 176 Pa. 254, 35 Atl. 190 (wife's action for death of the husband).

⁵ *Post*, § 1461.

of much refinement of reasoning, dependent on the theory of contract.⁶ In any event the use of the insured's declarations as circumstantial evidence of his knowledge of his illness (*ante*, § 266) must be distinguished.

(2) Where a title is created as a joint interest and by a single legal act, it would seem that the admissions of any one of the holders would be receivable against another as party. This would dictate the use of the admissions of a *co-obligee* in a joint contract,⁷ but not of a *co-tenant* of realty,⁸ nor of a *co-trustee*.⁹ It seems also clear, and is conceded on all hands, that a *co-deviser* or *co-legatee* does not hold by a joint title, and therefore his admissions cannot be used to affect another. But it does not follow (as is usually maintained) that they are not to be received at all, even against himself when he is a party.¹⁰ The fact that there can be but a single judgment, for or against the validity of the entire will, constitutes only an imaginary obstacle; for it is not inherently necessary that the case should be proved against each party by the same evidence; a joint promise, for example, could be evidenced against A by his handwriting, against B by his admission, and against C by one who saw the document signed, and yet it must be either a joint promise or none. The refinement of reasoning and scrupulosity of caution which practically shuts out all such evidence of admissions in will-causes seems to be ill-judged. It is nevertheless approved, by most Courts to-day.¹¹ A few Courts are found to withstand it,¹² following what must be regarded as the orthodox view, which receives such admissions as against the party making them.¹³

⁶ Compare the following rulings, *pro* and *con*: 1903, *Sutcliffe v. Iowa S. T. M. Ass'n*, 119 Ia. 220, 93 N. W. 90; 1863, *Rawls v. Ins. Co.*, 27 N. Y. 282, 290; 1890, *Smith v. Benefit Soc'y*, 123 Id. 85, 25 N. E. 197; 1880, *Union Cent. L. I. Co. v. Cheever*, 36 Oh. St. 201, 208; 1879, *Mobile L. I. Co. v. Morris*, 3 Lea 101, 103; 1896, *Fidelity M. L. Ass'n v. Winn*, 96 Tenn. 224, 33 S. W. 1045; 1896, *Mutual Life I. Co. v. Selby*, 19 C. C. A. 331, 72 Fed. 980; 1903, *Connecticut M. L. Ins. Co. v. Hillmon*, 188 U. S. 208, 23 Sup. 294; 1895, *Thomas v. Grand Lodge*, 12 Wash. 500, 41 Pac. 882; 1885, *Schwarzbach v. Ohio V. P. Union*, 25 W. Va. 622, 646; 1899, *McGowan v. Supreme Court*, 104 Wis. 173, 80 N. W. 603; 1902, *Rawson v. Ins. Co.*, 115 Id. 641, 92 N. W. 378.

⁷ 1812, *Bell v. Ansley*, 16 East 141, 143 (joint obligees of an insurance policy).

⁸ 1824, *Osgood v. Manhattan Co.*, 3 Cow. 612, 622; 1825, *Dan v. Brown*, 4 Id. 483, 492. In *St. Louis O. H. & C. R. Co. v. Fowler*, 142 Mo. 670, 44 S. W. 771 (1898), a co-tenant's admissions, as co-plaintiff, were received on the facts.

⁹ 1800, *Davies v. Ridge*, 3 Esp. 101.

¹⁰ 1868, *Shailer v. Bumstead*, 99 Mass. 112, 127 ("Devises or legatees have not that joint interest in the will which will make the admissions of one, though he be a party appellant or appellee from the decree of the probate court allowing the will, admissible against the other legatees; . . . such statements are only admissible when they are made during the prosecution

of the joint enterprise," *i. e.* on the theory of conspiracy).

¹¹ 1893, *Livingston's Appeal*, 63 Conn. 62, 26 Atl. 470; 1902, *Carpenter's Appeal*, 74 Id. 431, 51 Atl. 126; 1898, *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; 1901, *Hertrich v. Hertrich*, 114 Ia. 643, 87 N. W. 689; 1820, *Walk-up v. Pratt*, 5 H. & J. 51, 57; 1900, *Selderbaum v. Schemme*, 157 Mo. 1, 12, 57 S. W. 526; 1901, *Wood v. Carpenter*, 186 Id. 465, 66 S. W. 174; 1901, *Stull v. Stull*, — Nebr. —, 96 N. W. 196 (declarations of an executor not sole legatee, excluded); 1901, *Kennedy's Will*, 167 N. V. 163, 60 N. E. 442 (admissions of one heir not receivable in a will contest, since they are not admissible against the other heirs and there can be but one decree).

¹² 1898, *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285 (it had been left undecided in *Mueller v. Reihan*, 1879, 94 Id. 142, 148); 1902, *Lundy v. Lundy*, 118 Ia. 445, 92 N. W. 39 (admissions of a "principal beneficiary," received); 1841, *Beall v. Cunningham*, 1 B. Mour. 399 (incl. opinion by Roberson, C. J.); 1902, *Gibson v. Sutton*, — Ky. —, 70 S. W. 188 (following *Beall v. Cunningham*); 1902, *Wood v. Zibble*, — Mich. —, 92 N. W. 348 (admissions of the wife-proponent, received). Compare the following: 1902, *Robinson v. Robinson*, 203 Pr. 400, 53 Atl. 253 (legatee's statements, not of real admissions of incapacity, received; prior cases distinguished).

¹³ 1792, *Jones v. Turberville*, 2 Ves. Jr. 11.

(3) The estate of an *insolvent* or *bankrupt* passes to an assignee as the debtor's successor; and it has always been conceded that the debtor's admissions, while his estate was in him, are receivable against the assignee; ¹⁴ whether the date of divestiture should be taken to be that of the act of bankruptcy or that of the appointment of an assignee was at one time a matter of doubt.¹⁵ Where there is no general assignment, but merely a levy by an *individual execution creditor* upon the estate of the debtor, the creditor still is seeking merely to acquire the title of the debtor, and in claiming under him would be affected by his admissions prior to the levy; and this is generally conceded.¹⁶ But this merely evidential use of admissions must be distinguished from the doctrine of estoppel; a creditor is of course not "bound" (for example, by recitals of consideration or the like), in the sense that he may not dispute the truth of the debtor's assertions.¹⁷

§ 1082. *Grantor, Vendor, Assignor, Indorser*; (1) *Admissions before Transfer*; (a) *Realty*; *Admissions against Documentary Title*; *Transfers in Fraud of Creditors*. By the general principle (examined *ante*, § 1080) the statements of a *grantor of realty*, made *while title* was by hypothesis *still in him*, are receivable as admissions against any grantee claiming under him. The history and slow development of this principle have already been noticed (*ante*, § 1080). It is sufficient here to say that the principle is to-day fully and universally conceded, subject only to a modification due merely to its conflict with another principle:

1843, *Walworth, C.*, in *Padgett v. Lawrence*, 10 Paige 170, 180: "As a general rule, declarations made by a person in possession of real estate as to his interest or title in the property, may be given in evidence against those who derive title under him, in the same manner as they could have been used against the party himself if he had not parted with his possession or interest; on the other hand, it is equally well settled that no declarations of a former owner of the property, made after he had parted with his interest therein, or which are overreached by the purchase of the party claiming through or under him, can be received in evidence to affect the legal or equitable title to the premises."¹

¹⁴ 1794, *Bateman v. Bailey*, 5 T. R. 512; 1847, *Ramsbottom v. Phelps*, 18 Conn. 278, 283 ("Debts against an assigned estate stand on the same footing as debts against a deceased person whose estate is represented insolvent; and the admissions of the insolvent debtors are admissible for the same reason that the admissions of a deceased person, made while living, are admissible for the purpose of charging his estate"); 1846, *Compton v. Fleming*, 8 Blackf. 153; and many cases *passim*, §§ 1082-1086, *post*; so also, by exception, in New York: § 1083, par. 3, *post*. *Contra*: 1894, *Bicknell v. Mellett*, 160 Mass. 328, 35 N. E. 1130 (debtor's admissions of receipt of full consideration for a mortgage, not received against the assignee for the mortgagee).

¹⁵ 1824, *Smallcombe v. Bruges*, 13 Price 136, 150 (excluding all admissions after the act of bankruptcy, and not only after the date of the commission).

¹⁶ *Post*, § 1086, par. (b), and cases *passim* in §§ 1082-1086.

¹⁷ 1893, *Milburn v. Phillips*, 136 Ind. 680, 695, 34 N. E. 933, 36 N. E. 360.

¹ The precedents are as follows, and should be read in the light of the remaining remarks of the text of § 1082; where not otherwise noted, the admissions were received without qualification: *England*: 1697, *Sussex v. Temple*, 1 Ld. Raym. 310 (answer in chancery); 1704, *Ford v. Grey*, 1 Salk. 286, 6 Mod. 44 (deed-recitals; see the quotation from this case, *post*, § 1256); 1812, *Dartmouth v. Roberts*, 16 East 334, 339 (answer in chancery by a co-defendant L. in a former suit on the same issue of titles, admitted; "the defendant stood in the same place by derivation of title and by legal obligation as L., and L. upon his oath in a suit against him by the vicar has declared that the tithe is due to the rector and not to the vicar, and now that same person, in effect, is derailing the title of the rector in favor of the vicar; the reading of his answer therefore operates as a contradiction to him"); 1818, *DeWhelpdale v. Milburn*, 5 Price

(1) It is to be noted that, upon this principle, statements made *before*

485, 488 (answer in chancery by a former dean and chapter); 1829, *Madison v. Nuttall*, 6 Bing. 226 (a former rector's written register of tithes, received "as an admission by a preceding rector"); 1832, *Doe v. Austin*, 9 Id. 41, 45 (admissions of the predecessor under whom defendant claimed, received against him); 1834, *Doe v. Cole*, 6 C. & P. 359, 361 (similar ruling to *Madison v. Nuttall*); 1834, *Woolway v. Rowe*, 1 A. & E. 114 (former proprietor's disclaimer of a right of inclosure, admitted); 1834, *Doe v. Seaton*, 2 Id. 171, 179; *Canada*: 1846, *Payson v. Good*, 3 Kerr N. Br. 272, 279; 1873, *Niles v. Burke*, 14 N. Br. 237 (boundaries); 1874, *Hamilton v. Holder*, 15 Id. 222, 225 (but they were excluded in *Carter v. Saunders*, 1864, 6 All. 147, 150); *California*: C. C. P. 1872, § 1849 ("Where, however, one derives title to real property from another, the declaration, act, or admission of the latter, while holding the title, in relation to the property, is evidence against the former"); 1852, *Kilburn v. Ritchie*, 2 Cal. 145, 148, *semble*; 1859, *Stanley v. Green*, 12 Id. 148, 163 ("It matters not whether the declarations relate to the limits of the party's own premises, or the extent of his neighbor's, or to the boundary line between them, or to the nature of the title he asserts"); 1867, *Bollo v. Navarro*, 33 Id. 459, 466; 1877, *McFadden v. Ellmaker*, 52 Id. 343; 1882, *People v. Bliske*, 60 Id. 497, 503, 511; 1898, *Williams v. Harter*, 121 Id. 47, 53 Pac. 405; 1902, *Harp v. Harp*, 136 Id. 421, 69 Pac. 23; *Connecticut* (compare the historical summary *ante*, § 1080): 1805, *Nichols v. Hotchkiss*, 2 Day 121, 126 (excluded, because the grantors were neither dead nor disqualified by interest); 1815, *Barrett v. French*, 1 Conn. 354, 365 (heirs claiming to set aside an ancestress' deed for undue influence; "it has been uniformly decided that the declarations of the grantor, when the grantee is not present, prior or subsequent to the execution," are inadmissible); 1818, *Beers v. Hawley*, 2 Id. 467, 471 (grantor's declaration as to time of a deed's delivery, made before his transfer, admitted against the grantees "who claim under him"; preceding cases ignored); 1826, *Clark v. Beach*, 6 Id. 142, 149 (question not decided); 1829, *Norton v. Pettibone*, 7 Id. 319, 323 (declaration by defendant's ancestor's grantor that he had taken his deed in fraud of his own grantor's creditors, admitted against defendant; *Beers v. Hawley* confirmed; *Barrett v. French* by implication repudiated on this point); 1833, *Fitch v. Chapman*, 10 Id. 8, 12 (declarations of a mortgagor, who had bought in his land with money of the defendant, that he had bought for the defendant, not admitted against the plaintiff, a creditor of the mortgagor, because the latter was still competent as a witness; *Norton v. Pettibone* and *Beers v. Hawley* distinguished on this ground); 1837, *Deming v. Carrington*, 12 Id. 1, 4 (issue as to a boundary; declarations of C., under whom defendant claimed, admitted against defendant, though C. was alive and qualified; distinction made in *Fitch v. Chapman* repudiated; "where such identity exists, they are admissible, although the person making them is alive and competent to testify"); 1845, *Smith v. Martin*, 17 Id. 399, 401 (preceding rule approved; "It seems to be perfectly well settled in this State"); 1847, *Ramsbottom v. Phelps*, 18 Id. 278, 285 (same); 1901, *Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 884 (*Deming v. Carrington* followed); *Illinois*: 1899, *Gage v. Eddy*, 179 Ill. 492, 63 N. E. 1008 (admitted; this ought to discredit *Hart v. Randolph*, 112 Id. 521, 525, 32 N. E. 517, where the contrary statement was *obiter* made); *Indiana Terr.*: 1896, *McCurtain v. Grady*, 1 Ind. T. 107, 33 S. W. 65; *Iowa*: 1876, *Harley v. Osler*, 41 La. 642, 644; *Maine*: 1839, *Crane v. Marshall*, 16 Me. 27, 29; 1861, *Peabody v. Hewett*, 52 Id. 33, 45; *Maryland*: 1813, *Dorsey v. Dorsey*, 3 H. & J. 410, 420, 426; 1826, *Coale v. Harrington*, 7 Id. 147, 156; 1841, *Clary v. Grimes*, 12 G. & J. 31, 35; *Massachusetts*: 1825, *Davis v. Spooner*, 3 Pick. 284, 288 (plaintiff and defendant claimed under deeds from A.; the plaintiff's deed being prior but unrecorded, A.'s admissions, made prior to the second deed, that the first existed, were received against the defendant, "considering that the defendant knew of the conveyance"; purporting to follow *Bridge v. Eggleston*, *post*); 1841, *Proprietors v. Bullard*, 2 Metc. 363, 368 (admissions of predecessor, while owner, received); 1861, *Blake v. Everett*, 1 All. 248, 249 (similar); 1867, *Morrison v. Chapin*, 97 Mass. 72, 77 (similar); *Michigan*: 1878, *Cook v. Knowles*, 38 Mich. 316 (grantor's admissions that his deed was falsely antedated, received; *Cooley, J.*, *diss.*, on the principle of § 1256, *post*); 1891, *Merritt v. Stebbins*, 86 Id. 342, 48 N. W. 1084 (grantor's statements, excluded; *obscure opinion*); *Missouri*: 1891, *Meier v. Meier*, 105 Mo. 411, 422, 430, 16 S. W. 223; 1898, *Boynton v. Miller*, 144 Id. 681, 46 S. W. 754; *Nebraska*: 1892, *Cunningham v. Fuller*, 35 Nebr. 58, 60, 52 N. W. 836; *New Hampshire*: 1821, *Adams v. French*, 2 N. H. 387 (admissions by the defendant's grantor, in a judgment obtained by the plaintiff, received against the defendant); 1826, *Downs v. Lyman*, 3 Id. 486, 487 ("declarations of a person in possession of land, as to the nature of his possession," admissible against "all persons claiming under him"); 1844, *Smith v. Powers*, 15 Id. 546, 563; 1858, *Fellows v. Fellows*, 37 Id. 75, 84 (oral admissions as to non-title, held receivable); 1859, *Little v. Gibson*, 39 Id. 505, 511; 1860, *Harlibart v. Wheeler*, 40 Id. 73, 76 (same); *New Jersey*: 1810, *Townsend v. Johnson*, 2 Penningt. 705 (declarations of defendant's predecessor, as to a boundary line, admitted against him); 1887, *Miller v. Feensne*, 50 N. J. L. 32, 11 Atl. 136; *New York*: 1809, *Jackson v. Bard*, 4 John. 230; 1813, *Jackson v. McCull*, 10 Id. 377; 1837, *Varick v. Briggs*, 6 Paige 323, 327; 1840, *Luce v. Carley*, 24 Wend. 451, 455; 1843, *Padgett v. Lawrence*, 10 Paige 170, 180 (see quotation *supra*); 1867, *Vrooman v. King*, 36 N. Y.

title accrued in the declarant will not be receivable.³ On the other hand, the time of divestiture, after which no statements could be treated as admissions, is the time when the party against whom they are offered has by his own hypothesis acquired the title; thus, in a suit, for example, between A's heir and A's grantee, A's statements at any time before his death are receivable against the heir; but only his statements before the grant are receivable against the grantee.³

(2) The death of the declarant need of course not be shown (*ante*, § 1049); with admissions, that circumstance is immaterial, for a grantor's as well as for those of the party himself. But if the grantor is deceased, the statement may thus become also admissible under the Hearsay exception (*post*, § 1458) for statements of facts against proprietary interest; and under this exception they are admissible for either party.⁴

(3) The principle requiring the production of documentary originals has sometimes been thought to override the principle of admissions, so as to preclude the use of a party's admissions to evidence the contents of a document until the loss of the document is first shown (*post*, § 1255). This doctrine

477, 483; 1877, *Chadwick v. Fonner*, 69 Id. 404, 407; *North Carolina*: 1803, *Clark v. Arnold*, 2 Hayw. 287 (declarations of the defendant's vendor, that he had not paid the purchase-money, not admitted against the defendant; but the Reporter, respectfully explaining this as an error in "the hurry of business," maintains the ruling wrong, as "too clear to need much illustration; . . . I cannot agree to disseminate wrong legal opinions out of respect to the opinion of any one"); 1819, *Guy v. Hall*, 3 Murph. 150 (grantor's declarations, admitting a prior sale, received against the later grantee; see quotation *supra*, § 1080); 1833, *Hoyatt v. Phifer*, 4 Dev. 273 (recitals in a deed, admissible against those claiming under it); 1838, *May v. Gentry*, 4 Dev. & B. 117, 119 (principle applied); 1852, *Satterwhite v. Hicks*, *Buabee L.* 105 (admissions of a debtor-grantor, that he was not indebted to the grantee, admitted against the latter on a creditor's behalf); 1902, *Ratliff v. Ratliff*, 131 N. C. 425, 42 S. E. 887 (grantor's statements before transfer, admitted); *Pennsylvania*: 1782, *Morris v. Vanderen*, 1 Dall. 64, 65 (letters of one P., admitted, since the defendant was lessee of P.'s heirs; the objection overruled was that "the defendant is not to be affected by the conduct of a third person"); 1810, *Bonnet v. Develangh*, 3 Binn. 175, 179 (deed-recitals; "no point of law is better established"); 1818, *Diggs v. Downing*, 4 S. & R. 347, 352 (deed-recital); 1818, *Weidman v. Kohr*, 2 S. & R. 174 ("the privity between that party and the plaintiff renders his confessions evidence against the plaintiff"; here, oral declarations as to the scope of a land-warrant); 1832, *Gibblehouse v. Stong*, 3 Rawle 436, 442 (declarations as to holding in trust, admitted); *Huston, J.*, *diss.* on the principle of § 1256); 1832, *Reed v. Dickey*, 1 Watts 152, 154; *South Carolina*: 1898, *Levi v. Gardner*, 53 S. C. 24, 30 S. E. 617 (admissible to show the character of his possession); *United States*: 1830, *Carver v. Jackson*, 4 Pet. 1, 83 (deed-recitals, admitted; see citation *post*, § 1256); 1876, *Dodge v. Freedman's S. & T. Co.*, 93 U. S. 379, 383 (admissible, but "only to show the character of the possession" and "by what title he holds"; opinion confused; see *post*, § 1256); 1879, *Baker v. Humphrey*, 101 Id. 494 (admissions of grantee as to the object of the conveyance to defeat creditors, received); 1897, *Henderson v. Wsnamsker*, 25 C. C. A. 181, 79 Fed. 736; *Utah*: 1902, *Church of Jesus Christ v. Watson*, 25 Utah 45, 69 Pac. 531; *Vermont*: 1841, *Carpenter v. Hollister*, 13 Vt. 552, 555 (grantor's admissions as to extent of possession, receivable; see *post*, § 1256); 1842, *Hines v. Soule*, 14 Vt. 99, 105 (Carpenter v. Hollister approved); *Virginia*: 1800, *Walthol v. Johnson*, 2 Call 275 (mortgagee's admissions received against the buyer on foreclosure); 1895, *Rensens v. Lawson*, 91 Va. 226, 21 S. E. 347 (boundaries); 1895, *Fry v. Stowers*, 92 Id. 13, 22 S. E. 500 (boundaries); *Wisconsin*: 1866, *Kelley v. Kelley*, 20 Wis. 443, 446; 1901, *Krackeberg v. Leslie*, 111 Id. 462, 87 N. W. 450 ("declarations characterizing or defining his possession and claim," admissible).
³ 1857, *Tyler v. Mather*, 9 Gray 177, 185; 1871, *Noyes v. Merrill*, 108 Mass. 396, 399; 1880, *Stockwell v. Blamey*, 129 Id. 312; 1872, *Bullis v. Montgomery*, 50 N. Y. 352, 358; 1885, *Hutchins v. Hutchins*, 98 Id. 56, 64.
⁴ 1885, *Davis v. Melson*, 66 Ia. 715, 24 N. W. 526. So also the following instance: 1828, *Foreyth v. Kreakbaum*, 7 T. B. Monr. 97, 100 (father's gift to a child, followed by his sale to another; father's declarations before the sale, admitted against the vendee).
⁵ *E. g.*: 1895, *Rensens v. Lawson*, 91 Va. 226, 21 S. E. 347 (deed established for plaintiff by statements against interest of a deceased prior grantor of plaintiff in a suit between the grantor and his grantee).

in its present application would forbid the use of a grantor's admissions of lack of title whenever the party claiming under him had proved a documentary title in his grantor, because the admission would in effect be that some other document divesting that title had existed; and the offeror of the admission, in order to use it, must therefore apply it to some specific deed and prove that deed to be lost. Such is the doctrine that was finally worked out in New York, in a series of confusing rulings often cited elsewhere in fragments (*post*, § 1256). This doctrine, however, still permits the free use of a grantor's admissions either when the title derived from him purports to rest on adverse possession only, or when the admissions concern, not the documentary title, but only the extent of occupied boundaries or some other feature of possession. Thus in some jurisdictions it is common to state the general principle of admissions in a limited form, namely, to be receivable so far as they concern the character or extent of the grantor's possession. This peculiar form is due chiefly to the foregoing doctrine, and also in part to the early traditional confusion (explained *ante*, § 1080) between a grantor's admissions and verbal acts of disclaim coloring a prescriptive possession. But, on the whole, this modified form seems merely fitted to confuse, and can hardly be said to be worthy of sanction. It has now become something more than a local rule of New York; but it has not been widely accepted.⁶

(4) In *Massachusetts*, at an early date, when the theory of predecessors' admissions was as yet everywhere inchoate in conception (*ante*, § 1080), its results were reached, in a special class of cases — namely, *sales in fraud of creditors* — on a different theory; the debtor's declarations before the sale were received as evidence of intent, being admissible either as circumstantial evidence (*ante*, §§ 242, 266) or as exceptions to the Hearsay rule (*post*, § 1729). This theory, sound enough in its application to that specific situation, was plainly enunciated in *Bridge v. Eggleston*, a ruling which had a great vogue and has since served as a precedent in other jurisdictions.⁶ It

⁶ In the foregoing collection of citations, in note 1, its effect is briefly noted where it is recognized; but the rulings which recognize it are collected and more fully stated *post*, §§ 1255-1257, in dealing with the rule for proof of documents. It may be assumed not to be law in jurisdictions where it has not been expressly adopted, as shown in those citations; but only a few jurisdictions have expressly rejected it.

⁶ Many of the following cases apply the doctrine to personalty: *Canada*: 1857, *Doe v. Fraser*, 3 All. N. Br. 417 (defendant's father's declarations, not received to show the indebtedness or intent, unless made at or about the time of the deed); *California*: 1857, *Landecker v. Houghtaling*, 7 Cal. 391 (personalty; doctrine of *Bridge v. Eggleston*, Mass., approved); 1857, *Visher v. Webster*, 8 id. 109, 113 (preceding case approved); *Connecticut*: 1810, *Beach v. Catlin*, 4 Day 284, 292 (realty; debtor's prior declarations of fraudulent intent, excluded, "for the grantee ought not to be affected by the declarations of the grantor, unless they came to his

knowledge"); 1823, *Cook v. Swan*, 5 Conn. 140, 145, 149 (realty; debtor's prior declarations, claiming a debt to the grantee, admitted for the grantee as "part of the *res gesta*," citing *Bridge v. Eggleston*, Mass.); 1840, *Pettibone v. Phelps*, 13 id. 445, 450 (similar); *Illinois*: 1850, *Prior v. White*, 12 Ill. 261, 264 (personalty; mortgagor's declaration of intent, excluded unless knowledge of them prior to the mortgage is brought home to the mortgagee, "as tending to show his participation in the fraudulent scheme"; *Bridge v. Eggleston*, Mass., approved); *Maine*: 1854, *Fisher v. True*, 38 Me. 534, 536 (personalty; debtor's declarations admitted on the theory of *Bridge v. Eggleston*, Mass.); *Massachusetts*: 1815, *Clarke v. Waite*, 12 Mass. 439 (realty; debtor's statements excluded, without discrimination as to the time of their utterance); 1817, *Bridge v. Eggleston*, 14 id. 245, 250 (realty; debtor's declarations admitted, provided by other evidence the grantee's knowledge of the fraud is shown; *Clarke v. Waite* in this light explained; the opinion, however,

is not to be found fault with, provided it does not cause us to ignore the principle of admissions, which equally serves for the same class of cases and additionally covers a more extended scope.

§ 1083. **Same: (b) Personalty; New York Rule.** There is no reason why the general principle (*ante*, § 1080) of transferrors' admissions should not apply as well to the admissions of the vendor and assignor of *personalty* as to those of the grantor of realty. Indeed, the objection, already noticed (*ante*, § 1082, par. 3), due to the supposed infringement of the principle of producing documentary originals, here falls away in substance. Nor has any reason of policy ever been advanced against the use of vendors' admissions which did not equally attack the whole principle of transferrors' admissions; and Senator Lott, in the controlling opinion in *Paige v. Cagwin*,¹ expressly conceded that his opposition rested on those broad grounds and would have effected a total exclusion if precedent had permitted.

(1) Accordingly, the English Courts, and most American Courts, apply the principle consistently, and receive without question all admissions by the vendor of personalty made while title was in him.²

(2) In a few Courts, the early *Massachusetts* doctrine of *Bridge v. Eggleston* (*ante*, § 1082, par. 4) is applied to admit a debtor's declaration before his sale of personalty, on an issue of fraud against his creditors.³

does not treat the grantor's declarations as admissions at all, but as evidence of a fraudulent intent, under the principles of § 1729, *post*, and § 266, *ante*; 1831, *Foster v. Hall*, 12 Pick. 89, 99 (realty; *Bridge v. Eggleston* approved); 1867, *Winchester v. Charter*, 97 Mass. 140, 143 (realty); *New Hampshire*: 1842, *Blake v. White*, 13 N. H. 237, 273 (debtor's declarations, held admissible, on the theory of *Bridge v. Eggleston*); *Oregon*: 1902, *Beers v. Aylsworth*, 41 Or. 251, 69 Pac. 1025; 1902, *Robson v. Hamilton*, *ib.* —, 69 Pac. 651; *Washington*: 1892, *O'Hare v. Duckworth*, 4 Wash. 469, 474 (debtor's declarations admitted; citing *Bridge v. Eggleston*); *Wisconsin*: 1860, *Gillet v. Phelps*, 12 Wis. 437, 439, 446 (debtor's declarations, at the time of the sale, admitted to show his fraudulent intent); 1861, *Bates v. Ableman*, 13 id. 644, 650 (same principle sanctioned); 1861, *Bogert v. Phelps*, 14 id. 81, 95 (same).

Upon this question of evidencing fraudulent intent, another sort of evidence (frequently dealt with in the same rulings) must be distinguished, namely, *other fraudulent sales by the debt at the same time*; this has been already treated in considering circumstantial evidence (*ante*, § 333). One question of substantive law also usually arises in such cases, and must be distinguished from these evidential questions, — whether the knowledge by the creditor of the debtor's fraudulent intent is essential to avoiding the sale; an example may be seen in *Foster v. Hall*, 12 Pick. 89.

¹ *New York, infra*.

² *England*: 1808, *Ivat v. Finch*, 1 Taunt. 141 (trespass for taking three mares, the defendant justifying as lord of the manor; the prior

tenant's admissions that she had given the stock to the plaintiff, received, "because the right of the lord of the manor depended upon her title"); *United States: Ala.*: 1854, *Jennings v. Blocker*, 25 Ala. 415, 422; 1856, *Fralick v. Presley*, 29 id. 457, 462; 1857, *Cole v. Varner*, 31 id. 244, 250; 1862, *Arthur v. Gayle*, 38 id. 259, 267; *Ill.*: 1869, *Randegger v. Ehrhardt*, 51 Ill. 101, 103; *Ind.*: 1858, *King v. Wilkins*, 11 Ind. 346; 1862, *Boone Co. Bank v. Wallace*, 18 id. 82, 85; 1862, *Bunberry v. Brett*, *ib.* 343; 1875, *Campbell v. Coon*, 51 id. 76, 78 (the foregoing cases in effect overrule the early case of *Ashley v. West*, 3 Ind. 170, 172); *Ia.*: 1877, *Moss v. Dearing*, 45 Ia. 530, 532 (grantor's admissions of a debt to grantee, receivable against other creditors); 1897, *Thomas v. McDonald*, 102 id. 564, 71 N. W. 572 (vendor's admissions as to fraudulent intent, received); *Ky.*: 1828, *Forsyth v. Kreakbaum*, 7 T. B. Monr. 97, 100; *Me.*: 1833, *Hatch v. Dennis*, 1 Fairf. 244; 1836, *Greene v. Harriman*, 14 Me. 32 (anomalous; vendor's admissions as to payment, excluded); 1848, *Holt v. Walker*, 26 id. 107; 1855, *McLanathan v. Patten*, 39 id. 142; *Md.*: 1880, *Stockett v. Watkins*, 2 G. & J. 326, 343, *semble* (but here a widow's admissions were held not receivable against her executor who claimed as her husband's administrator *d. b. n.*); *Pa.*: 1826, *Kellogg v. Krauser*, 14 S. & R. 137, 141 (judgment); 1870, *Magee v. Maignel*, 64 Pa. 110; *U. S.*: 1903, *Fourth Nat'l Bank v. Albaugh*, 188 U. S. 734, 23 Sup. 450. For Vermont see *infra*, note 7.

³ The precedents have been already noticed in § 1082, par. 4.

(3) In *New York*, after some vacillation, a rule of exclusion was finally settled upon for the admissions of a vendor of personalty when offered against a purchaser for value. In 1843, in *Paige v. Cagwin*, this doctrine received the sanction of a majority of the Court, and has ever since maintained itself, in spite of repeated attempts to pare it down.⁴ The historical explanation of *Paige v. Cagwin* has been already noticed (*ante*, § 1080). No useful policy seems to support it; and it has thus far remained a distinctly local rule. The rule of *Paige v. Cagwin* is, however, held not to include in its scope the statements of a bankrupt made before assignment.⁵ Moreover, a successful

⁴ 1806, *Waring v. Warren*, 1 John. 340 (admissions of defendant's wife before marriage, received to show title in plaintiff); 1814, *Alexander v. Mahon*, 11 John. 185 (execution-creditor claiming against distraining landlord; the debtor's admissions of the tenancy, excluded; "as C. was a good and competent witness, the plaintiff in error cannot avail himself of his confessions"; no authority cited); 1827, *Hurl v. West*, 7 Cow. 753, 759 (admissions of defendant's vendor, in possession of sheep before the sale, that he was a mere bailee from the plaintiff, excluded; where one is competent as a witness for the party, the latter cannot avail himself of the confessions of the former); citing the preceding case; *Esch Cowen, Esq.*, afterwards judge, approves the ruling in a reporter's note; 1828, *Austin v. Sawyer*, 9 Id. 39 (sale of wheat; the vendor's admissions, before sale, that it belonged to the plaintiff, were received without question; the same reporter notes this as overruling the preceding case); 1831, *Kent v. Walton*, 7 Wend. 256 (action by the second indorsee of a renewal note against the maker; the first indorsee's admissions that the first note was usurious, excluded; no authority cited); 1832, *Whitaker v. Brown*, 8 Id. 490 (action by bearer against the maker of a note to R. or bearer; R.'s admissions that "the defendant was not liable," excluded, following *Hurl v. West*, N. Y., and *Duckham v. Wallis*, Eng., *post*, § 1084; repudiating *Cowen's* note to *Austin v. Sawyer*); 1834, *Gary v. Sprague*, 12 Wend. 41 (hides claimed by the plaintiffs as vendees against parties concerned in various executions against the vendor; to show a fraudulent combination on the part of the defendants' assignors of the judgment claims, the assignors' declarations "while engaged in bringing about the sale" were received as "giving character to the transaction of sale"); 1834, *Bristol v. Dann*, ib. 142 (action by the indorsee against the maker of a partnership note; the payee's admissions that defendant was not a member of the partnership, excluded, following *Whitaker v. Brown*; "the rule seems to be that a party who can call a witness shall not be permitted to prove his declarations; a former owner of real estate, through whom the title has passed, is said to be an exception"); 1841, *Beach v. Wise*, 1 Hill 612 (*Kent v. Walton*, *Whitaker v. Brown*, *Bristol v. Dann*, followed; but the Court, per *Bronson, J.*, declares its dissatisfaction with the distinction excluding the admissions of a vendor of personalty; the decease of the prede-

cessor held to be immaterial); 1844, *Stark v. Boswell*, 6 Id. 405 (doctrine applied); 1843, *Paige v. Cagwin*, 7 Id. 361 (admissions by the payee of a note, not received against a subsequent transferee for value after maturity; rule of exclusion affirmed for transfers of personalty in general, but confined to the case of a transferee for value, and not applied to a "privy by representation, as in cases of bankruptcy, death, and other cases of a similar character"; the decision was rendered by a majority of the Court of Errors, 13 to 7); 1847, *Brisbane v. Pratt*, 4 Denio 63 (preceding rule approved, but here not applied, the plaintiff not being a holder for value); 1852, *Jermain v. Dennistoun*, 6 N. Y. 276 (*Paige v. Cagwin* recognized, but held not to apply to a bank's admission, by pass-book entry, made while holding a note, that it had been paid; the rule is inapplicable where "the previous holder, while he owned the note, put into the hands of the maker, in the usual course of business, written evidence of its payment and discharge"); 1853, *Booth v. Swezey*, 8 Id. 276, 280 (*Paige v. Cagwin* approved, but said *obiter* not to apply to "a written receipt or discharge of debt which had been assigned by a former holder," because that would be "an act of the parties," and not a "mere conversation or *ex parte* admission"); 1854, *Brown v. Mallier*, 12 Id. 118 (*Paige v. Cagwin* recognized); 1858, *Tonsley v. Barry*, 16 Id. 497, 500 (*Booth v. Swezey* followed); 1860, *Foster v. Beals*, 21 Id. 247 (mortgagee's written receipt for part payment of a bond and mortgage, not received against the assignee in good faith for value; *Jermain v. Dennistoun* distinguished, and the *obiter dictum* in *Booth v. Swezey* disapproved; *Comstock, C. J.*, diss.); 1877, *Chadwick v. Fonner*, 69 Id. 404, 407 (*Paige v. Cagwin* approved); 1878, *Von Sachs v. Kretz*, 72 Id. 548, 554 (*Paige v. Cagwin* approved); 1879, *Foote v. Beecher*, 78 Id. 155, 157 (mortgagor's admissions of non-payment of a note, not received against a subsequent assignee of the equity); 1881, *Truax v. Slater*, 86 Id. 630, 632 (declarations of the assignor of a chose in action, held inadmissible); 1900, *Merkle v. Beidlenan*, 165 Id. 21, 58 N. E. 757 (rule of exclusion applied to a mortgagee's declarations; "the case of *Paige v. Cagwin* practically closed the judicial discussion in this State,"—an odd remark, in view of the rulings that occurred since the discussion was "closed").

⁵ 1843, *Paige v. Cagwin*, *supra*; 1878, *Von*

attempt to evade it seems to have been made for the admissions of a vendor offered against his vendee on an issue charging a *sale in fraud of creditors*.⁶ In Vermont, just before the ruling in *Paige v. Cagwin*, the same result had been reached;⁷ but the anomaly was soon repudiated.⁸

§ 1084. *Same: (c) Negotiable Instruments.* The holder of a negotiable instrument receives it from a prior holder free of equities and other defences personal to the prior holder; in this lies the element of negotiability. Consequently, the second holder's title is not identical with and dependent upon that of the first holder; and the admissions of the latter would (on the principle of § 1080), not be receivable against the former. But wherever the element of negotiability is wanting — as where the transfer is made after maturity —, this distinction ceases; identity of title is found; and the admissions are receivable:

1843, *Messrs. Cozen and Hill*, in *Notes to Philipps on Evidence*, No. 481, p. 608: "The distinction that although the party, who acquires a bill or note by endorsement, delivery or otherwise, after it is due or dishonored, or with notice or without consideration, or in any other manner which deprives him of the character of a *bona fide* holder, is so far identified with the previous owner, that his declarations, while owner, may be received against such party; yet, that where the latter is a *bona fide* holder in the course of trade, he cannot be touched by such declarations, not only harmonizes with various other legal consequences growing out of that character, but the cases all speak directly and uniformly upon this branch of hearsay evidence. The principle is, that the *bona fide* holder is not a mere privy in title or estate with the preceding owner, except with regard to certain grounds of defence, which we have noticed. Among them are usury or gaming, or the like vice which nullifies the bill or note absolutely in the hands of the holder, whether *bona fide* or *mala fide*; even this is now qualified by statute in several countries. . . . But in other cases, the *bona fide* holder, by his purchase of the bill or note, stands, in a great measure, independent of the former holder who endorsed or delivered the paper to him. The law disconnects him with the previous title, and takes him into its own

Sacha v. Kretz, 72 N. Y. 548, 554 (bankrupt's admissions of a set-off, made before the assignment, admitted against the assignee; "the qualification found in *Paige v. Cagwin* that the vendee or assignee must be a purchaser for value in order to make the declaration inadmissible, is an essential part of the rule; . . . the assignee in bankruptcy is not a purchaser for value"; repudiating the contrary *obiter dictum* in *Bullis v. Montgomery*, 60 id. 352, 359, that "there is no such identity of interest between an insolvent assignor in trust for creditors and his assignee"). Compare the cases cited *supra*, § 1081.

⁶ 1869, *Cuyler v. McCartney*, 40 N. Y. 221, 226 (personalty; excluded; "It will not do to say that testimony to the assignor's admissions is competent evidence against him; . . . evidence good as against the assignor only does not contribute in any way to defeat their [the assignees'] title"; here they had taken possession); 1876, *Stowell v. Hazelett*, 66 id. 625 (personalty; debtor's declarations admitted against himself); 1888, *Loos v. Wilkinson*, 110 id. 195, 211, 18 N. E. 99 (assignor's declarations admitted; "they were competent against the persons making them, . . . and being competent

against them, they could not have been excluded by the Court"). Yet it must be remembered that both the first and the last of the above cases are still cited as law in later rulings dealing with a related question (*post*, § 1086).

⁷ 1842, *Hines v. Soule*, 14 Vt. 99, 106 (excluded, on the theory that "if a person is still living and can be a witness, he must be called, and that his admissions are not evidence against his vendee or successor"; Bennett, J., *diss.*); 1845, *Ellis v. Howard*, 17 id. 330, 335 (preceding case approved).

⁸ 1853, *Read v. Rice*, 25 Vt. 177 (in a note, C. J. Redfield repudiated the reason given for the ruling in *Hines v. Soule*); 1856, *Hayward Rubber Co. v. Duncklee*, 30 id. 29, 39 (*Hines v. Soule* "has heretofore been considerably impugned"; "admissions made by the assignor of a chattel or personal contract prior to the assignment" are receivable against an assignee taking by that title); 1874, *Downs v. Belden*, 46 id. 674, 677 (preceding case approved); 1875, *Alger v. Andrews*, 47 id. 238, 241 (expressly announces that the decision in *Hines v. Soule* is overruled, "and for many years has not been regarded by the bench and bar of this State as declaring the true law of the subject").

charge, as deriving a right from itself. And hence, among other privileges, while it cuts him clear of all the previous hostile acts of his predecessor, it forbids that his declarations shall be used in derogation of those rights which he professed to confer."

This logical application of the theory of transferors' admissions was finally worked out in England, after some confusion of rulings, and since *Barrough v. White* has not been disputed.¹ In the United States it would to-day probably be everywhere recognized, except in New York.²

§ 1085. *Same*: (2) *Admissions after Transfer; Realty and Personal*: 'n general. On the general principle (*ante*, § 1080), statements made by the transferor of realty or of personalty, *after transfer of title*, are not receivable as admissions against the transferee. This much is never disputed, in the general application of the principle.¹ There may, however, be other principles

¹ Where not otherwise stated, the instrument was not overdue when transferred: 1808, *Kent v. Lowen*, 1 Camp. 177, L. C. J. Ellenborough (usury; letters of the payee, at the time of making the note, admitted as "an act done by C. & Co., who were the payees of the note and through whom the plaintiff made title"); 1824, *Pocock v. Billing*, Ky. & Mo. 127, 1 C. & P. 230, 2 Bing. 239, L. C. J. Beat (declarations of a former holder of a bill, if made while the holder, receivable); 1824, *Coster v. Symons*, 1 C. & P. 148, L. C. J. Abbott (declarations of the payee, admitting that the bill was discharged by a later one, received, as "a declaration of the party under whom the plaintiff claims title"); 1824, *Peckham v. Potter*, 1 C. & P. 232, L. C. J. Gifford (payee's admissions of fraud in the consideration, admitted); 1824, *Shaw v. Broom*, 4 Dowl. & R. 730, K. B. (rule apparently conceded that the transfer must have been after maturity in order to make admissions receivable); 1825, *Barrough v. White*, 6 id. 379, 4 B. & C. 325, K. B. (payee's declarations as to lack of consideration for a note payable on demand, excluded, unless the plaintiff "had been identified with A., by showing that he had taken the note without consideration, or after it was due"; *Pocock v. Billing* practically repudiated); 1825, *Smith v. DeWruitz*, Ky. & Mo. 212, L. C. J. Abbott (declarations held inadmissible "against a holder who had acquired the bill before it was due"); 1827, *Helger v. Horton*, 3 C. & P. 179, Gaselee, J. (payee's declarations excluded, but not on the preceding principle); 1830, *Beauchamp v. Perry*, 1 B. & Ad. 89 (rule of *Barrough v. White* followed); 1831, *Haddan v. Mills*, 4 id. 486, C. J. Tindal (rule of *Barrough v. White* followed); 1839, *Phillips v. Cole*, 10 A. & E. 106, 112 (same). The converse doctrine, that the admissions would be excluded even if the transfer was after maturity, appeared at an early stage: 1805, *Duckham v. Wallis*, 5 Esp. 251, L. C. J. Ellenborough (admissions of payment, excluded; "It would be making the declarations of a third person evidence to affect the plaintiff's title when that person was not on the record"); but this rested on the early ignorance of the theory of admissions (as noted *ante*, § 1080), and was practically repudiated in the above line of rulings.

² *Conn.*: 1846, *Roe v. Jerome*, 18 Conn. 138, 151; 1847, *Ramsbottom v. Phelps*, 1b. 278, 285; *Ill.*: 1846, *Williams v. Judy*, 8 Ill. 282 (admitted; here usury made the note void; but it had become due before assignment); *Ind.*: 1852, *Blount v. Riley*, 3 Ind. 471; 1854, *Abbott v. Muir*, 5 id. 444 (non-negotiable note); 1855, *Stoner v. Ellis*, 6 id. 152, 153 (statutory defence); *Me.*: 1832, *Shirley v. Todd*, 9 Greenl. 83; 1833, *Hatch v. Dennis*, 1 Fairf. 244 (leading opinion; the chief argument opposed by counsel to the decision was that the payee of a negotiable instrument was not a party to the record and therefore was a competent witness; but the theory of privity of title was held to be paramount to this); 1852, *Parker v. Marston*, 34 id. 386 (unindorsed note); *Mass.*: 1833, *Sylvester v. Crisp*, 15 Pick. 92, 94; 1855, *Bond v. Fitzpatrick*, 4 Gray 88, 92; *Okl.*: 1899, *Frick v. Reynolds*, 6 Okl. 638, 52 Pac. 391 (indorser's declarations as to unsoundness of horse for which note was given, made before transfer, admitted against subsequent holder, if not bona fide); *Vt.*: 1856, *Miller v. Bingham*, 29 Vt. 82, 88. *Undecided*: 1827, *Ross v. Knight*, 4 N. H. 236, 237 (citing *Pocock v. Billing*). In *New York*, the exclusionary rule of *Paige v. Cagwin* of course applies to choses in action, including overdue commercial paper, as well as to other personalty; the cases are placed *ante*, § 1083. The Federal Supreme Court has once recognized this anomalous rule: 1876, *Dodge v. Freedman's S. & T. Co.*, 93 U. S. 379, 383 (inadmissible; following *Paige v. Cagwin*).

³ The cases collected *ante*, §§ 1082-1084, almost all imply this result also: *England*: 1842, *Lord Trimlestown v. Kemmis*, 5 Cl. & F. 749, 779 (abstract of title; statements "after he had parted with his interest," excluded); *Canada*: 1876, *Phillips v. Trueman*, 16 N. Br. 391; *California*: 1875, *Tompkins v. Crane*, 50 Cal. 478; 1893, *Ord v. Ord*, 99 id. 523, 525, 34 Pac. 83; 1901, *Banning v. Marleau*, 133 id. 485, 65 Pac. 864; *Georgia*: 1861, *Howard v. Snelling*, 32 Ga. 195, 203; 1875, *Porter v. Allen*, 54 id. 623 (even against a donee); 1891, *Blalock v. Miland*, 87 id. 573, 13 S. E. 551 (similar); 1895, *Bowden v. Achor*, 95 id. 243, 22 S. E. 271; 1896, *Ogden v. Dodge Co.*, 97 id. 461, 25 S. E.

of evidence upon which such statements can be brought in; these are pointed out elsewhere (*post*, § 1087). Moreover, where the transfer is attacked as being in fraud of creditors, a special application of the principle of admissions may come into play; but this, being complicated with other questions, must now be examined separately.

§ 1086. **Same: Transfers in Fraud of Creditors.** Where the transfer is attacked as *voidable* because of being made with the *intent to defraud creditors*, a variety of special considerations become applicable; and the efforts of the Courts to solve this puzzling problem have naturally been attended with some inconsistency and confusion. The source of it lies in the circumstance that distinct principles of evidence may apply in certain conditions, and that opposite results would be reached according to the principle invoked. At the outset, the cases obviously must be separated in which the debtor-trans-

- 321; *Illinois*: 1854, *Simpkins v. Rogers*, 15 Ill. 397; 1866, *Dunaway v. School Directors*, 40 Ill. 247; 1869, *Randegger v. Ehrhardt*, 51 Ill. 101, 103; 1881, *Bennett v. Stout*, 93 Ill. 47, 51; 1884, *Bentley v. O'Bryan*, 111 Ill. 53, 62; 1892, *Hart v. Randolph*, 142 Ill. 521, 525, 32 N. E. 517 (even though title still in possession); 1893, *Francis v. Wilkinson*, 147 Ill. 370, 384, 35 N. E. 150; 1895, *Miller v. Meers*, 155 Ill. 284, 40 N. E. 577; 1897, *Shea v. Murphy*, 164 Ill. 614, 45 N. E. 1021; *Indiana*: 1837, *Doe v. Moore*, 4 Blackf. 445 (even as against judgment-vender, after date of judgment-lien accruing); 1861, *Kleth v. Kerr*, 17 Ind. 284, 286; 1861, *Wyune v. Glidewell*, ib. 446, 448; 1874, *Burkholder v. Casad*, 47 Ind. 418, 421; 1875, *Harness v. Harness*, 49 Ind. 364 (even as against the donee of an advancement; *Woolery v. Woolery*, 29 Ind. 249, and *Hamlyn v. Nesbit*, 37 Ind. 284, repudiated); 1875, *Campbell v. Coon*, 51 Ind. 76, 78; 1876, *Garner v. Graeva*, 54 Ind. 188, 192; 1882, *Somers v. Somers*, 85 Ind. 599; 1887, *Joyce v. Hamilton*, 111 Ind. 163, 167, 12 N. E. 294; 1895, *Robbins v. Spencer*, 140 Ind. 483, 40 N. E. 263; *Iowa*: 1868, *O'Neil v. Vanderburg*, 25 Ia. 104, 107; 1881, *McCormicks v. Fuller*, 56 Ia. 43, 46, 3 N. W. 800; 1895, *Neuffer v. Moehn*, 96 Ia. 731, 65 N. W. 334; *Kentucky*: 1901, *Fuqua v. Bogard*, — Ky. —, 62 S. W. 480; *Louisiana*: 1829, *Dismukes v. Mangrove*, 8 Mart. n. s. La. 375, 378; *Maine*: 1831, *Hackett v. Martin*, 8 Greenl. 77, 79 (commercial paper); *Maryland*: 1811, *Thomas v. Denning*, 3 H. & J. 242 (assignor's declaration after an alleged assignment of a bond, received; but apparently on the ground that the assignment was not sufficiently evidenced); *Massachusetts*: 1808, *Bartlett v. Delprat*, 4 Mass. 702, 707 (father's declarations denying a deed, not received against claimant under the deed, in favor of devisee of the father); 1817, *Bridge v. Eggleston*, 14 id. 245, 250 ("afterwards, he has no relation to the estate he has conveyed"); *Michigan*: 1896, *Vyn v. Keppel*, 108 Mich. 244, 65 N. W. 966; *Minnesota*: 1895, *Kurtz v. R. Co.*, 61 Minn. 18, 63 N. W. 1; *Nebraska*: 1895, *Consolidated T. L. Co. v. Fien*, 44 Nebr. 387, 62 N. W. 1112; *New Hampshire*: 1825, *Copp v. Upham*, 3 N. H. 159 (admissions of a mortgagor, after assignment of his interest, not received for the mortgagee against the assignee; but the present principle is not invoked); *New York*: 1822, *Frear v. Everton*, 20 John. 142 (debt); 1867, *Vrooman v. King*, 36 N. Y. 477, 483 (the offeror must show affirmatively that title was still in the declarant); 1893, *Jones v. Jones*, 137 id. 610, 614, 33 N. E. 479; 1894, *Holmes v. Hooper*, 141 id. 64, 67, 36 N. E. 180 (note); 1902, *Wagner v. Grimm*, 160 id. 421, 62 N. E. 569; *North Carolina*: 1846, *Ward v. Saunders*, 6 Ired. 382, 387 (but here received, when made before actual execution of the deed, which had been falsely anti-dated); *North Dakota*: 1896, *Arnegaard v. Arnegaard*, 7 N. D. 475, 75 N. W. 797; *Ohio*: 1889, *Hillis v. Ludwig*, 46 Oh. St. 373, 378, 24 N. E. 596; *Oregon*: 1895, *Joseph v. Furnish*, 27 Or. 260, 41 Pac. 424; *Pennsylvania*: 1805, *Irwin v. Bear*, 4 Yeates 262 (recitals in a patent); 1810, *Bonnet v. Develaugh*, 3 Binn. 175, 179; 1815, *Packer v. Gonualus*, 1 S. & R. 525, 535, 537; 1817, *Wolf v. Carothers*, 3 id. 240, 245; 1822, *Patton v. Goldsborough*, 9 id. 47, 55; 1825, *Babb v. Cleason*, 12 id. 328; 1825, *Morton v. M'Laughlin*, 13 id. 107; 1863, *Pringle v. Pringle*, 59 Pa. 281, 289; 1898, *McCullough v. R. Co.*, 186 id. 112, 40 Atl. 404 (by a grantor, after transfer, but during possession); *Tennessee*: 1852, *Carnahan v. Wood*, 2 Swan 500, 502; *United States*: 1848, *Many v. Jagger*, 1 Blatchf. 372, 376; *Vermont*: 1829, *Hullard v. Billings*, 2 Vt. 309, 312; 1842, *Hines v. Soule*, 14 Id. 99, 105; 1901, *Davis v. Buchanan*, 73 Vt. 67, 50 Atl. 545; 1901, *Ellis v. Watkins*, 73 id. 371, 50 Atl. 1105 (note); *Virginia*: 1854, *Smith v. Betty*, 11 Gratt. 752, 763; 1883, *Barbour v. Duncanson*, 77 Va. 76, 83; 1885, *Daily v. Warren*, 80 id. 512, 519; 1895, *Brock v. Brock*, 92 id. 173, 175, 23 S. E. 224; *West Virginia*: 1874, *Houston v. McCluney*, 8 W. Va. 135, 156; *Wisconsin*: 1895, *Matteson v. Hartman*, 91 Wis. 485, 65 N. W. 58.

ferror's statements are offered (a) against the transferee, and (b) against the creditor attacking the transfer and levying upon the property as still belonging to the debtor. The former situation, being the most common and the most involved, may be examined first:

(a) Where the transferrer's statements, made after the transfer of title, are offered against the transferee (usually consisting in plain admissions of fraud, or in assertions that the property is still his), it is clear that upon the principle of the preceding section, straightforwardly applied, they are inadmissible. This much is always conceded. But there may be other ways of dealing with the evidence, by some of which (with or without the presence of special circumstances) the evidence may legitimately become admissible. At least five distinct theories, leading to that result, have been advanced by various Courts. Of these, the first three below enumerated invoke the principle of Admissions in one aspect or another; while the remaining two appeal to other established modes of evading the operation of the Hearsay rule. Of the five, it may be said that to-day the second would be nowhere disputed, and thus rarely arises for application by a Supreme Court. Of the other four, the third is also undisputed, but its requirements are more stringent than the others, and therefore it practically competes against them, because commonly the Courts which follow it repudiate the others. Nevertheless all five rest on established general doctrines and could conceivably be accepted by the same Court, so as to admit the evidence if it satisfied any one of the five. Finally, as between the competing theories, the third holds to-day the leading place, with the fourth apparently in next place for favor and tending to overtake. In some Courts, a pleasing eclecticism inclines them now to one and now to another theory; while on the part of a few Courts there is a sibylline obscurity of expression which baffles the attempt to interpret precisely their views.

The five theories, then, are as follows:

(1) The theory of *Carnahan v. Wood*, occasionally followed (in some other Court) seems to rest on this sequence of thought: Retention of possession is *prima facie* fraudulent; fraud avoids the transfer; the title is still in the debtor; therefore, his admissions are made while title is still in him, and (on the principle of § 1082, *ante*) are receivable:

1852, *McKinney, J.*, in *Carnahan v. Wood*, 2 Swan 500, 502: "It is true, in general, that the declaration of a party, made after he has parted with his interest in the subject-matter of litigation, cannot be received to disparage the title or right of a party, acquired in good faith previous to the time of making such declaration. But this very just and reasonable principle must be taken as inapplicable to cases of fraudulent sales of property. If, for example, a conveyance is made, absolute upon its face, and the vendor continues to retain the possession of the property as before, this being *prima facie* evidence of fraud, a creditor impeaching such conveyance on the ground of fraud, may be admitted to prove the declarations of the vendor, thus retaining the possession, in relation to the ownership, or to the character of his possession of the property. The fraudulent conveyance, though valid as between the parties, is void as to creditors of the vendor. So far as relates to them, the right of property remains unchanged in the vendor."

Upon this theory, the rule would limit the debtor's statements to those made while retaining possession. As a theory, it is possible; but it produces a suspicion that somewhere within its sequence the fallacy of begging the question is committed. Moreover, it would seem that at least it applies only when the transferee is a party to the cause.

(2) The second theory is that the transferor's statements are receivable when made *in the presence of the transferee* and impliedly assented to by his silence; in other words, it invokes the established principle of assenting silence (*ante*, § 1071), and receives the statements as the transferee's own admissions, made his by adoption. No Court disputes this, and in the opinions it is a proviso often noted in passing. It is mentioned here, because it is a frequently feasible method of using the evidence, though it invokes a distinct aspect of the principle of Admissions and is applicable in special circumstances only.

(3) The third theory is that of admissions by *co-conspirators* (*ante*, § 1079). When a conspiracy, on the part of transferor and transferee, to defraud the former's creditors, can somehow be established, the former's admissions are received against the latter, irrespective of being made before or after transfer or during possession, or of the transferor's being a party to the cause. Retention of possession becomes important only as one circumstance in the evidence of conspiracy. Moreover, the evidence of conspiracy must of course (*ante*, § 1079) be independent of the declarations desired to be admitted:

1860, *Woodruff, J.*, in *Cuyler v. McCartney*, 40 N. Y. 221, 227: "[The admissibility of these declarations is insisted upon for the reason] that other evidence showed that the assignor and assignees were combined in a conspiracy to defraud the creditors of William T. Cuyler, and therefore the acts and declarations of either conspirator, while carrying the common intent into execution, and in furtherance thereof, are competent evidence to affect all the co-conspirators. This rule is not questioned. . . . [But] it is not and cannot be successfully claimed that mere proof that assignor and assignee have concurred in an assignment providing for the payment of debts, establishes a conspiracy within the rule. Delivering and accepting such an assignment establishes a common intent, but not a common intent to defraud. If mere proof of concurrence in the execution and delivery of the assignment established a common intent within the principle making the acts and declarations of the conspirators, while carrying their common design into execution, evidence against each other, then the rule first above stated [*i. e.* that declarations after transfer of title are inadmissible] is made a nullity. No sooner is an assignment made than the assignor may, by his acts or declarations out of court, defeat it, if he be dishonest enough to collude with any creditor, or to resent any dissatisfaction with the trustees, and defeat it by such means. To make such admissions or declarations competent evidence, it must stand as a fact in the cause, admitted or proved, that the assignor and assignees were in a conspiracy to defraud the creditors. If that fact exist, then the acts and declarations of either, made in execution of the common purpose, and in aid of its fulfilment, are competent against either of them. The principle of its admissibility assumes that fact. It necessarily follows that those declarations or admissions cannot be received to prove the fact itself. . . . So far then, as the admission of the evidence in this case, of declarations subsequent to the assignment, is sought to be sustained as evidence of the common fraud, on the ground of conspiracy, the argument wholly fails. . . . A conspiracy cannot be proved against three, by evidence that one admitted it, nor against

assignees by proof that the assignor admitted it; it is a fact that must be proved by evidence, the competency of which does not depend upon an assumption that it exists."

This theory is entirely sound so far as it goes. The only criticism to be made is that, though it is in itself entirely consistent with the ensuing two theories, yet the Courts which employ it commonly repudiate, expressly or impliedly, the remaining two, as well as the first above examined. Those may be or may not be unsound; but no Court need suppose that the recognition of this one is inconsistent with the recognition of the others; *i. e.* that the rejection of evidence because it does not satisfy the present one requires its absolute rejection without regard to the satisfaction of the others.

(4) The fourth theory appeals to the *verbal-act* doctrine (*post*, § 1772), and to that particular application of it which receives declarations by one in *possession of property as coloring the nature of the possession* and thus giving it a fraudulent or an honest complexion. The effect of this, when the transferor's declarations make for fraud, is to help to fortify the presumption of ownership from possession, and to fix fraud upon the transferrer. The declarations do not affect the transferee, whose knowledge of the fraud is otherwise to be established (unless the presumption of ownership from possession be thought to satisfy). The theory has been thus expounded:¹

1835, *Gaston, J.*, in *Askew v. Reynolds*, 1 Dev. & B. 367, 369: "The possession of the slaves, having in this case been retained by the debtor, for eight or nine months after the execution of his bill of sale, was sufficient to impress upon the transaction the character of a fraudulent transfer, unless, from other facts and circumstances, another character could clearly be assigned to it. The plaintiff offered evidence, tending to remove the legal presumption, and to establish an actual *bona fide* intention, which was properly submitted to the jury. The evidence is not set forth in the case made, but it must have tended to show, that the debtor retained the possession as the agent or bailee of the purchaser. The nature of that possession then became an important inquiry. Was it in truth a possession as the agent or the bailee of the purchaser, or colorably only as such, and actually as the beneficial temporary or permanent owner? If the first, the apparent repugnance between the title and the possession might be explained, and honestly accounted for; but if the second, then such colorable possession was but part of the machinery of the fraud. . . . Generally the acts or declarations of a grantor, after the conveyance made, are not to be received to impeach his grant; the rights of the grantee ought not to be prejudiced by the conduct of one who at the time is a stranger to him and to the subject-matter of those rights. But the acts and declarations in this case were those of the possessor of the property, — were connected with that possession, and formed a part of its attendant circumstances. They were collateral indications of the nature, extent, and purposes of that possession. They were to be admitted, not because of any credit due to him by whom they were done or uttered, but because they qualified and characterized, or tended to qualify and characterize, the very fact to be investigated."

This theory can hardly be impugned in its logic. Reduced to a rule, it admits the declarations when made during possession, whether or not the debtor is a party to the cause.

¹ For another good exposition of it, see the quotation *post*, § 1779, from *Burgert v. Borchert*, 59 Mo. 80. The general principle of verbal acts in possession as affecting the *presumption of ownership*, apart from the case of sales in fraud of creditors, is fully expounded in passages quoted *post*, § 1778.

(5) The fifth theory is based on the same principle as *Bridge v. Eggleston* (*ante*, § 1082, par. 4), but carries its logic further. A part of the issue being the debtor-transferrer's intent, all his *conduct and declarations which indicate his intent* when dealing with the property are to be receivable (on the principle of § 1729, *post*, and § 266, *ante*), — an ordinary application of established principles having a larger scope:

1823, *Porter, J.*, in *Guidry v. Grivot*, 2 Mart. N. S. La. 13, 15: "To set aside the conveyance, three things were necessary, — fraud on the part of the vendor, fraud on the part of the vendee, and an injury to the party claiming. The acts and declarations of the first are surely as good and as high evidence as any other that can be given to prove fraud in him. They are of course not sufficient to show the vendee acted from the same motives; for then, as it was justly said in argument, every purchaser would hold at the mercy of him from whom he bought. But it is not a good objection to the introduction of evidence that it does not make out at once the whole of the case in support of which it is presented."

This theory is a legitimate one, and attracts by its simplicity. Its natural limitation, when reduced to a rule, is that the transferrer must be in possession at the time; for otherwise his utterances would be of a past, and not a present, intent in dealing with the property, and therefore inadmissible (*post*, § 1729). The only objection can be the one intimated in *Bridge v. Eggleston* (*ante*, § 1082, par. 4) that the declarant has after the nominal transfer a motive to deceive; but this objection is over-nice, because he has equal motives to deceive before the transfer, and because the likelihood after the transfer that he will wish to falsify for the creditor (his natural antagonist, who now offers the declarations) is relatively small.

Of these theories, so far as they compete in their limitations, it cannot be said that, from the point of view of practical policy, the more liberal ones are to be disparaged.² The more light that is thrown on such transactions, the

² Where nothing is noted, in the citations below, as to the debtor's possession, it is because the fact does not appear. All rulings which clearly appear to go upon the fourth theory above (verbal acts in possession) are placed under that head, *post*, § 1779. For *Massachusetts* and *Pennsylvania* additional cases will thus be found in § 1779, *post*, reaching the opposite result, on the verbal-act theory. For *Alabama*, *Missouri*, and *North Carolina*, all the cases whatever have been placed together in § 1779, *post*, because of their inextricable confusion of rulings; a few of the other jurisdictions represented below are by no means consistent in their rulings: *New Brunswick*: 1843, *Doak v. Johnson*, 2 Kerr 319 (declarations of the grantor's son in possession, not admitted for the grantor's creditor); 1858, *Lawton v. Tarratt*, 4 All. 1, 9 (debtor's declarations before and after the sale, admitted; no definite rule stated); 1890, *McManus v. Wells*, 29 N. Br. 449 (grantee's declarations excluded, though a party to the fraud, in an action against the sheriff for the debtor's escape; *Tuck, J.*, diss.); *Alabama* (*post*, § 1779); *California*: 1859, *Paige v. O'Neal*, 12 Cal. 483, 484, 496 (excluded, on the doctrine of *Bridge v. Eggleston*, Mass.); 1859, *Visher v. Webster*, 13 id. 53, 61 (declarations excluded where there was "no such clear and unequivocal possession as to admit them" on the ground of *res gesta*); 1860, *Cohn v. Mulford*, 15 id. 50, 52 (similar to *Paige v. O'Neal*); 1864, *Long v. Dollarbide*, 24 id. 218, 227 (declarations after an assignment, said never to be admissible); 1864, *Cahoon v. Marshall*, 25 id. 197, 202 (held inadmissible, unless perhaps when made in possession with the vendee's consent); 1864, *Jones v. Morse*, 36 id. 205 (foregoing qualification not noticed); 1869, *Spanagel v. Dallinger*, 38 id. 278, 282, 284 (declarations after possession taken by the grantee, held inadmissible); 1874, *Hutchings v. Castle*, 48 id. 152, 156 (similar); 1894, *Murphy v. Mulgrew*, 102 id. 547, 552, 36 Pac. 857 (personalty; vendor's declaration, after sale but in possession, admitted; following *Cahoon v. Marshall*); 1895, *Emmons v. Barton*, 109 id. 662, 670, 42 Pac. 303 (grantor's declarations while in possession of the realty, held inadmissible; suggesting that for personalty the rule was different); 1898, *Banning v. Marleau*, 121 id. 240, 53 Pac. 692 (personalty; debtor's declarations "after the sale," excluded);

better. There is just as much risk of injuring an honest creditor as of dispossessing an honest buyer. There is in common experience a great deal

1898, *Henderson v. Hart*, 122 id. 332, 54 Pac. 1110 (personalty; debtor's declarations, after title and possession gone, excluded); 1901, *Bush & M. Co. v. Helbing*, 134 id. 676, 66 Pac. 987 (husband's declarations of claim, while in possession, admitted, on the theory of conspiracy, in a suit to set aside a deed to his wife); *Connecticut*: 1786, *Woodruff v. Whittlesey*, Kirby 60, 32 ("though a person may confess for himself, he cannot for another"; here the time of the declarations did not appear); 1815, *Barrett v. French*, 1 Conn. 354, 365 (grantor's declarations after transfer, said to be inadmissible); 1844, *White v. Wheaton*, 16 id. 530, 535 (same); *Georgia*: 1877, *Oatis v. Brown*, 59 Ga. 711, 716 (declarations while retaining possession, admitted "as part of the *res gestae* of the fraudulent enterprise"); 1880, *Williams v. Hart*, 65 id. 201, 207 (rule of the preceding case applied); 1884, *Powell v. Watts*, 72 id. 770, 774 (admitted, where the debtor remained in possession contrary to the terms of the conveyance; no precedent cited); *Idaho*: 1903, *Meyer v. Munro*, — *Ida.* —, 71 Pac. 969 (declarations of mortgagor, after execution, held admissible only where the mortgagee is "a party to a common unlawful purpose"); *Illinois*: 1860, *Wheeler v. McCorristen*, 24 Ill. 40 (declarations after possession and title transferred, excluded); 1861, *Rust v. Mansfield*, 25 id. 336, 339 (preceding case approved; it does not appear who had possession); 1861, *Myers v. Kinzie*, 26 id. 36 (like *Wheeler v. McCorristen*); 1866, *Miner v. Phillips*, 42 Ill. 123, 130 (like *Wheeler v. McCorristen*); 1869, *Gridley v. Bingham*, 51 id. 153 (preceding case approved; but here it did not appear who had possession); 1895, *Milling v. Hillenbrand*, 156 id. 310, 40 N. E. 941 (like *Wheeler v. McCorristen*); *Indiana*: 1849, *Caldwell v. Williams*, 1 Ind. 405, 409 (admitted on the theory of conspiracy, following *Waterbury v. Sturlevant*, N. Y.); 1877, *Tedrowe v. Esher*, 56 id. 443 (same); 1881, *Kennedy v. Divine*, 77 id. 490, 493 (same); 1884, *Daniels v. McGinnis*, 97 id. 549, 551 (same); 1885, *Riehl v. Evansville Foundry Ass'n*, 104 id. 70, 73, 3 N. E. 633 (same); 1886, *Hunsinger v. Hofer*, 110 id. 390, 393, 11 N. E. 463 (admissible "wherever it appears, either by direct or circumstantial evidence, that the grantor and the grantee were acting in concert"); 1896, *Higgins v. Spahr*, 145 id. 167, 43 N. E. 11 (same; provided that a *prima facie* case of fraud must first be made out to the satisfaction of the Court); moreover, where the grantor and grantee are joined as defendants, *e. g.* when they are husband and wife, it is held that the husband's admission is at least receivable against himself: 1880, *Braker v. Kelsey*, 72 Ind. 51, 56; 1883, *Hogan v. Robinson*, 94 id. 138, 145; 1885, *Riehl v. Evansville Foundry Ass'n*, 104 id. 70, 73, 3 N. E. 633; 1893, *Vansickle v. Sherk*, 150 id. 413, 50 N. E. 381 (admissible, "where he is a party to the suit . . . to show his motive or purpose in making the conveyance"; though not as against the grantee; this is virtually on the fourth theory above); *Iowa*: 1859, *Savery v. Spaulding*, 8 Ia. 239, 250 (debtor's declarations as to the amount of goods on hand, excluded); 1865, *Blake v. Graves*, 18 id. 312, 314 (declarations in possession, admitted; the remaining in possession will "be deemed such evidence of a conspiracy," or at least will be deemed "such a connection with the property" as to invoke the *slibboleth res gestae*); 1876, *Hurley v. Oaler*, 44 id. 612, 644, *semble* (theory of conspiracy employed to admit the declarations); 1878, *Keystone Mtg. Co. v. Johnson*, 50 id. 142, 144 (declarations after title and possession gone, excluded); 1879, *Benson v. Lundy*, 52 id. 265, 3 N. W. 149 (same); 1881, *McCornicks v. Fuller*, 56 id. 43, 46, 8 N. W. 800 (declarations in possession, excluded, there being no issue as to defrauding creditors; distinguishing *Blake v. Graves*, where the possession was held to be evidence of fraudulent conspiracy); 1884, *Bixby v. Carskadon*, 63 id. 164, 170, 18 N. W. 875; *s. c.*, 70 id. 726, 728, 29 N. W. 626 (same as *Benson v. Lundy*); 1883, *Bener v. Edgington*, 76 id. 105, 109, 40 N. W. 117 (same); 1890, *Turner v. Harlin*, 80 id. 691, 695, 45 N. W. 758 (same); 1897, *Thomas v. McDonald*, 102 id. 564, 71 N. W. 572 (same); *Kansas*: 1895, *Burlington Nat'l Bank v. Beard*, 55 Kan. 773, 42 Pac. 320, *semble* (declarations by debtor in possession, receivable to show intent); *Kentucky*: 1833, *Doyle v. Sleeper*, 1 Dana 531, 532, *semble* (declarations after title gone, but during possession, excluded); 1842, *Christopher v. Covington*, 2 B. Mour. 357, 359 (same); *Louisiana*: 1823, *Guidry v. Guivot*, 2 Mart. n. s. la. 13, 15 (admissible; see quotation *supra*); 1824, *Martin v. Reeves*, 3 id. 22 (same; explaining *Higlander v. Fluke*, 5 Mart. 442, 448); *Maine*: 1854, *Fisher v. True*, 38 Me. 534, 537 (declarations after title and possession gone, excluded); *Massachusetts*: 1804, *Alexander v. Gould*, 1 Mass. 165 (declarations after sale and during possession, held inadmissible, even where other evidence of the fraud of the vendee was in the case; *Sedgwick, J., semble, contra*); 1815, *Clarke v. Waite*, 12 id. 439 (similar for realty; excluded); 1817, *Bridge v. Eggleston*, 14 id. 245, 250 (realty; excluded, because "he is interested to have such title defeated by his creditors," and because "afterwards he has no relation to the estate he has conveyed"); 1859, *Aldrich v. Earle*, 13 Gray 578 (realty; *Bridge v. Eggleston* followed); 1861, *Taylor v. Robinson*, 2 All. 562 (realty; similar); 1867, *Winchester v. Charter*, 97 Mass. 140, 142 (realty; declarations after execution of the deed and during possession, excluded); 1873, *Holbrook v. Holbrook*, 113 id. 74 (prior cases approved); 1882, *Roberts v. Medberry*, 130 id. 100 (same; but compare § 1779, *post*, where this case is cited); *Michigan*: 1896, *Muncey v. Sun Ins. Office*, 109 Mich. 542, 67 N. W. 563 (insurance policy; assignor's declarations excluded); *Miss-*

more likelihood that the unscrupulous debtor will try to trick his creditor than that he will endeavor to overturn an honest sale by making evidence

Mississippi: 1840, Ferriday v. Selsler, 4 How. 506, 520 (grantor's declaration after execution of the deed, held inadmissible); 1876, Taylor v. Webb, 54 Miss. 36, 43 (declarations made "after he had parted with the land," excluded); Missouri (see post, § 1779); Nebraska: 1888, Campbell v. Holland, 22 Nebr. 587, 594, 35 N. W. 871 (declarations after transfer of title, excluded); theory of conspiracy, doubted as inapplicable; opinion by Cobb, J.); 1889, White v. Woodruff, 25 id. 797, 799, 805, 41 N. W. 785 (similar declarations, held admissible, in an opinion by the same judge, citing no precedents at all); 1889, Williams v. Eikenberry, ib. 721, 724, 41 N. W. 770 (declarations by the debtor, after the vendee had taken possession, held inadmissible, except as contradicting the debtor's testimony on the stand; opinion by Reese, C. J.); 1889, Sloan v. Coburn, 26 id. 607, 609, 42 N. W. 726 (declarations after transferring title and possession, admitted to show the debtor's "intention at the time they made the transfer," on the authority of the preceding case, no other being cited; opinion by Reese, C. J.); 1894, McDonald v. Bowman, 40 id. 269, 273, 58 N. W. 704 (debtor's declarations, after a mortgage but in possession, admitted as indicative of his intent to defraud); Nevada: 1883, Hirschfeld v. Williamson, 18 Nev. 66, 1 Pnc. 201 (declarations after possession and title transferred, excluded); New Hampshire: 1842, Blake v. White, 13 N. H. 267, 273 (debtor's declarations admitted, on the theory of Bridge v. Eggleston, Mass., supra, § 1082, par. 4, without discrimination as to their utterance before or after transfer; this is sound, upon the fourth theory above noted); New York: 1809, Phoenix v. Dey, 5 John. 412, 426 (personalty; declarations after title and possession gone, excluded); 1814, Osgood v. Manhattan Co., 3 Cow. 612, 622 (same); 1834, Sprague v. Kneeland, 12 Wend. 161 (similar; place of possession obscure); 1834, Cray v. Sprague, ib. 41 (see the citation supra, § 1083; this ruling does not involve the precise question, but has been cited as authority in the later rulings); 1837, Waterbury v. Starveant, 18 id. 353 (assignor's admissions, six months after the conveyance, as to the fraudulent intent, held admissible, on the theory of conspiracy; though the reversal of the judgment casts doubt on this point); 1851, Adams v. Davidson, 10 N. Y. 309, 313 (assignor's declarations, in possession, admitted to show fraud; this ruling is in the later opinions sometimes disapproved, sometimes distinguished); 1864, Ball v. Loomis, 39 id. 412, 416 (declarations after possession and title transferred, excluded); 1869, Cuyler v. McCartney, 40 id. 221, 227 (assignor's declarations, held admissible, even after possession surrendered to the assignee; if a conspiracy to defraud is shown, otherwise not; but the declarations themselves cannot suffice to evidence the conspiracy; see quotation supra); 1872, Newlin v. Lyon, 49 id. 661 (similar); 1874, Tilson v. Terwilliger, 56 id. 273, 276 (assignor's declarations, after renewing possession, not received as evidence of fraud); 1878, Burnham v. Brennan, 74 id. 597 (declarations after title and possession transferred, excluded); 1881, Coyne v. Weaver, 84 id. 386, 392 (declarations after sale and delivery of possession, excluded; Cuyler v. McCartney approved); 1881, Tabor v. Van Tassel, 86 id. 642 (Cuyler v. McCartney approved); 1888, Loos v. Wilkinson, 110 id. 195, 211, 18 N. E. 99 (assignor's declarations, while in possession, held admissible "as bearing upon the questions of fraud," and as "part of a fraudulent scheme concocted by the three brothers, grantor and grantee"; Cuyler v. McCartney cited, but its limitations not observed); 1888, Bush v. Roberts, 111 id. 278, 282, 18 N. E. 732 (similar to Tabor v. Van Tassel); 1892, Kain v. Larkin, 131 id. 300, 312, 30 N. E. 105 (Cuyler v. McCartney approved); 1899, Lent v. Shear, 160 id. 462, 469, 55 N. E. 2 (declarations "after the transfer of both title and possession," excluded, there being no evidence of conspiracy); North Carolina (see post, § 1779); North Dakota: 1898, Paulson Mercantile Co. v. Seaver, 8 N. D. 215, 77 N. W. 1001 (admissible only on the theory of conspiracy; this to be otherwise evidenced); Oregon: 1884, Krewson v. Purlom, 11 Or. 266, 3 Pac. 822 (vendor's declarations, after possession and title gone, held inadmissible "in the absence of any proof of fraud or collusion"); Pennsylvania: 1829, Wilbur v. Strickland, 1 Rawle 458, 460 (admitted, after evidence of continued possession, "to show that the transfer to S. was entirely colorable, fraudulent, and void"; but the principle was conceded that the fraudulent combination must first be otherwise evidenced); 1834, McKee v. Gilchrist, 3 Watts 230, 232 (principle of fraudulent conspiracy, held applicable); 1860, McDowell v. Rissell, 37 Pa. 164, 169 (declarations during possession, held admissible; "there must be some evidence of a common purpose or design; but a very slight degree of concert or collusion is sufficient"); 1863, Pringle v. Pringle, 59 id. 281, 289 (declarations during possession, excluded, there being no claim or evidence of fraudulent conspiracy); 1869, Hartman v. Diller, 62 id. 37, 43 (declarations admitted, after fraudulent collusion was otherwise evidenced); 1869, Pier v. Duff, 63 id. 59, 64 ("if there be any, even very slight evidence of complicity between the grantor and grantee in a design to defraud creditors," the grantor's declarations are admissible; the opinion also speaks loosely of admitting declarations by a possessor in general, to prove the character of the possession); 1903, Boyer v. Weiner, 204 id. 295, 54 Atl. 21 (conspiracy rule applied); compare also the casea post, § 1779; South Dakota: 1903, Aldona v. Olverson, — S. D. —, 95 N. W. 917 (action by the wife for property taken by a creditor of the husband; declarations after transfer, excluded); Tennessee: 1833, Perry v. Smith, 4 Verg. 323 ("No posterior act of N. without the participation of S.

for his creditor. Any theory which, by invoking some legitimate principle of evidence, will admit more of the debtor's utterances is practically to be commended and employed. The effort should be to open, and not to close, any available avenue of evidence.

(b) When the transferrer's declarations (admitting that he has transferred and confirming the transfer as honest and valid) are offered by the transferee against the creditor, they are plainly admissible (on the principle of §§ 1080, 1081, *ante*), because the creditor claims only under the debtor, and thus all the latter's admissions, before levy on his alleged property, are admissions of a predecessor in title.³ But some Courts, applying the verbal-act theory (in par. 4, *supra*), admit on that ground declarations during possession, ignoring the present principle.⁴

§ 1087. *Same: Other Principles affecting Grantors' Declarations as to Property, discriminated.* Statements of a grantor not admissible under any of the foregoing principles (in §§ 1082-1086) may nevertheless be admissible by virtue of other principles of evidence, resting on different conditions. The chief of these are (1) the Hearsay exception for *statements of facts*

could defeat the transaction"); 1846, *Trotter v. Watson*, 6 Humph. 509, 513 (the debtor's retention of possession inconsistent with a deed being "a badge of fraud which of itself connects him with the claimant in the suspicion of a confederacy to defeat creditors," his declarations are admissible; but not otherwise); 1852, *Carnahan v. Wood*, 2 Swan 500, 503 (see quotation *supra*); 1871, *Vance v. Smith*, 2 Heisk. 843, 353 (debtor's declarations, not admitted against beneficiaries "who had no knowledge of such declarations, and no agency in causing them to be made"); *Texas*: 1836, *Hamburg v. Wood*, 68 Tex. 168, 176, 18 S. W. 623 (declarations during possession, admissible "when a *prima facie* case of combination or conspiracy has been made by other evidence"; and the vendor's remaining in possession with the vendee's consent makes a "*prima facie* case of fraud"); *United States*: 1885, *Winchester & P. M. Co. v. Creary*, 116 U. S. 161 (the "common purpose to defraud" must be "first established by independent evidence," and the declarations must "have such relation to the execution of that purpose that they fairly constitute a part of the *res geste*"); 1885, *Jones v. Simpson*, ib. 609, 6 Sup. 538 (preceding rule applied); 1893, *Grimes D. G. Co. v. Malcolm*, 7 C. C. A. 426, 58 Fed. 670 (debtor's declarations, after mortgage executed and delivery made, excluded); *Vermont*: 1833, *Denton v. Perry*, 5 Vt. 382, 388 (declarations after title and possession gone, excluded); 1833, *Edgell v. Bennett*, 7 id. 534, 537 (same); 1845, *Ellis v. Howard*, 17 id. 330, 335 (same); 1856, *Hayward Rubber Co. v. Duncklee*, 20 id. 29, 40 (same); *Virginia*: 1828, *Clayton v. Anthony*, 6 Rand. 285, 290, 300 (declarations during possession, admitted, partly on the principle that a "community of purpose" had been evidenced, partly as declarations of fraudulent intent accompanying the act

of sale; *Coalter, J.*, diss., on the facts); *Washington*: 1898, *Anderson v. White*, 18 Wash. 638, 52 Pac. 231 (admissible only on the theory of conspiracy); *Wisconsin*: 1861, *Bates v. Ableman*, 13 Wis. 644, 645, 650, 721, 728 (debtor's declaration during possession after assignment, excluded; "we see no principle of evidence upon which they could be admitted"); 1861, *Bogert v. Phelps*, 14 id. 88, 95 (similar; "in order to affect the vendee, his knowledge of and participation in the fraud of the vendor must also be proved"; though when offered on the principle of *Gillet v. Phelps*, *supra*, § 1082, par. 4, they may be admissible if "shortly after the sale, if made so near the time of it as fairly to indicate what was then passing in his mind"); 1861, *Grant v. Lewis*, lb. 487, 489 (declarations while still in possession, held admissible "for the purpose of showing fraud in the sale if they have that tendency"; preceding cases ignored); 1869, *Knapp v. Schneider*, 24 id. 70, 73 (preceding case approved, but the ruling held inapplicable, since here the declarant purported to be not a vendor but an agent to buy for the plaintiff); *Wyoming*: 1896, *Toms v. Whitmore*, 6 Wyo. 220, 44 Pac. 56 (admissible only on the theory of conspiracy).

³ 1867, *Whitaker v. Wheeler*, 44 Ill. 440, 442 (trover against a sheriff levying); 1855, *Cavin v. Smith*, 21 Mo. 444 (debtor's admissions, while in possession, that his title was only conditional, received against attaching creditor); 1855, *Burgess v. Quimby*, ib. 508 (same); 1822, *Johnson v. Patterson*, 2 Hawks 183. *Contra*: 1896, *Bertr id v. Heaman*, 11 Mani. 205, 208 (Dubuc, J., diss.; here, a garnishment); 1899, *Marshall v. May*, 12 id. 381 (preceding case approved).

⁴ These rulings are collected *post*, § 1779, note.

against proprietary interest (*post*, § 1458); here the declarant must be shown to be deceased or otherwise unavailable, and other limitations apply; (2) the verbal-act doctrine, as applied to *declarations in possession* (*post*, § 1778); here the issue must be one of possession, but it is immaterial whether the declarant is dead, or whether the declarations are against or for his interest; (3) the same doctrine, as applied to the *presumption of ownership from possession* (*post*, § 1779); the application of this doctrine to transfers in fraud of creditors has been specially noted in the foregoing section, but it may become equally applicable to declarations by other grantors; (4) the Hearsay exception for *ancient deed-recitals*, which are admissible in a limited class of cases irrespective of privity of title (*post*, § 1573); (5) the Hearsay exception for *statements by deceased persons about a land-boundary*; these are receivable by a rule which takes three very different forms in different jurisdictions (*post*, §§ 1563-1570). Moreover, (6) the exclusionary rule must be noted, which forbids the use of a grantor's assertions of claim to be used in *rebuttal of his admissions* disclaiming title (*post*, § 1133); these sometimes lead to confusion, in that they might be admissible as coloring an adverse possession, if the issue is one of prescriptive title (on the principle of § 1778, *post*), but would be inadmissible on an ordinary issue of title to rebut admissions.

Distinguish also three principles not affecting the use of oral declarations, and yet often involved in the present class of cases: (a) the principle of circumstantial evidence that *possession of a part of a tract of land* may be evidence of possession of the whole of the tract (*ante*, § 378); (b) the principle of circumstantial evidence that the *execution of an old deed or lease* may be evidence of *possession of the land itself* (*ante*, § 157); (c) the rule of authentication of documents that *age, custody, and possession* may be sufficient evidence of the genuineness of a document purporting to be an old deed (*post*, §§ 2137 ff.).

SUB-TITLE III: TESTIMONIAL REHABILITATION (SUPPORTING AN IMPEACHED WITNESS).

CHAPTER XXXVI

INTRODUCTORY.

§ 1100. Distinction between (1) Admissibility of Evidence to Rehabilitate or Support a Witness, and (2) Stage of the Examination at which such Evidence can be offered.

§ 1101. Arrangement of Topics.

A. AFTER IMPEACHMENT OF MORAL CHARACTER.

§ 1104. (a) Proving Good Character in Support, in General.

§ 1105. Same: (1) after evidence of General Character.

§ 1106. Same: (2) after evidence of Particular Instances of Misconduct, by Cross-examination or Record of Conviction.

§ 1107. Same: (3) after evidence of Bias, Interest, or Corruption.

§ 1108. Same: (4) after evidence of Self-Contradiction (Inconsistency).

§ 1109. Same: (5) after Contradiction by other Witnesses.

§ 1110. Same: Other Principles, distinguished.

§ 1111. (b) Discrediting the Impeaching Witness; (1) Cross-examining to Rumors of Misconduct; (2) Contradicting the Rumors; (3) Impeaching his General Character.

§ 1112. (c) Explaining away the Bad Reputation: (1) Reputation due to Malice, etc.; (2) Witness' Veracity Unimpaired; (3) Witness Reformed.

B. AFTER IMPEACHMENT BY PARTICULAR ACTS OF MISCONDUCT.

§ 1116. Denial of the Fact; Innocence of a Crime proved by Record.

§ 1117. Same: Explaining away the Fact; Reformed Good Character in support.

C. AFTER IMPEACHMENT BY BIAS, INTEREST, SELF-CONTRADICTION, OR ADMISSIONS.

§ 1119. Denial of the Fact; Explaining away the Fact; Good Character in Support; Putting in the Whole of Conversation, etc.

D. REHABILITATION BY PRIOR CONSISTENT STATEMENTS.

1. Witnesses in general.

§ 1122. General Theory.

§ 1123. History.

§ 1124. Offered (1) In Chief, before any Impeachment.

§ 1125. Offered (2) after Impeachment of Moral Character.

§ 1126. Offered (3) after Impeachment by Inconsistent Statement.

§ 1127. Offered (4) after Impeachment by Contradiction.

§ 1128. Offered (5) after Impeachment by Bias, Interest, or Corruption; Statements of an Accomplice.

§ 1129. Offered (6) after Impeachment as to Recent Contrivance.

§ 1130. Same: Statements Identifying an Accused, or Fixing a Time or Place.

§ 1131. Offered (7) after Cross-examination or Impeachment of any Sort.

§ 1132. Consistent Statements are themselves not Testimony; Impeached Witness himself may prove them.

§ 1133. Party's Statements of Claim, to rebut his Admissions.

2. Special Classes of Witnesses.

§ 1134. Complaint of Rape; History.

§ 1135. Same: (1) First Theory: Explanation of an Inconsistency; Fact of Complaint is admissible.

§ 1136. Same: Consequences of this Theory; Details not admitted; Complainant must be a Witness.

§ 1137. Same: (2) Second Theory: Rehabilitation by Consistent Statement.

§ 1138. Same: Consequences of this Theory; Details are Admissible; Complainant must be a Witness, and Impeached.

§ 1139. Same: (3) Third Theory; Spontaneous or Res Gestæ Declarations, as Exception to Hearsay Rule.

§ 1140. Same: Summary.

§ 1141. Complaint in Travail by Bastard's Mother.

§ 1142. Owner's Complaint after Robbery or Larceny.

§ 1143. Statements by Possessor of Stolen Goods.

§ 1144. Accused's Consistent Exculpatory Statements.

INTRODUCTORY.

§ 1100. **Distinction between (1) Admissibility of Evidence to Rehabilitate or Support a Witness, and (2) Stage of the Examination at which such Evidence can be offered.** In the process of rehabilitating an impeached witness, there are four possible stages of the case at which the attempt may be made; the *cross-examination* of the impeaching witness, the *re-examination* of the impeached witness, the direct examination of a *new witness* called in rebuttal, and the *reopening* of the case after both sides have closed. There are certain rules to be observed, for convenience' sake, as to the appropriate stage for certain kinds of evidence; some evidence must properly be put in at a specific appropriate stage or not at all, other evidence at another stage, and so on. Thus the question may arise whether the evidence offered in rehabilitation is offered at an improper stage of the trial. With such questions there is no present concern; they are dealt with under the general subject of Order of Evidence (*post*, §§ 1866-1900).¹

But the present subject is the *relevancy of the evidence* in itself, assuming that it is offered at the proper stage. We are concerned with the application of the general principles of relevancy to facts offered to rehabilitate an impeached witness, — whether a fact is relevant, whether it is provable by other witnesses or only by cross-examination, and the like.

§ 1101. **Arrangement of Topics.** Having in view the various qualities already noticed as affecting and impeaching the credibility of a witness, and the various kinds of facts and modes of testimony available to prove those qualities, the next inquiry is how such impeaching evidence can be met and denied or explained away by other evidence. The processes available are based on the logical possibilities, already noticed (*ante*, §§ 34, 35), of the modes of argument available for an opponent; though the special features of the position of one sustaining an impeached witness complicate the processes. But it is not feasible to follow completely any orderly analysis of the various sorts of supporting evidence; for some of them are so closely associated with the principles affecting certain sorts of impeaching evidence that it is practically more useful to treat the two in the same place. Moreover, in theory two arrangements are open to choice, neither of which can practically be employed throughout. The topics might be considered either according to the various kinds of impeaching evidence to be met, or according to the various kinds of rehabilitating evidence used to meet them. Either of these, if exclusively followed, would cause the separation of practically related topics and consequent inconvenience. Accordingly, the former grouping is followed chiefly for the first three ensuing topics (A, B, and C), and the latter for the last topic (D).

¹ Compare also the rule for curing one irrelevancy by another (*ante*, § 15).

A. REHABILITATION AFTER IMPEACHMENT OF MORAL CHARACTER.

§ 1104. (a) *Proving Good Character in Support; in general, inadmissible until impeached.* Good character for veracity is as relevant to indicate the probability of truth-telling as bad character for veracity is to indicate the probability of the contrary. But there is no reason why time should be spent in proving that which may be assumed to exist. Every witness may be assumed to be of normal moral character for veracity, just as he is assumed to be of normal sanity (*ante*, § 484). Good character, therefore, in his support is excluded *until his character is brought in question* and it becomes worthwhile to deny that his character is bad.¹

It has been said, to be sure, by a few Courts that where, without actually introducing testimony, the opponent has effectively insinuated the witness' impeachment, his good character is then proper in rebuttal. But this extension is exceptional and perhaps strained.² Moreover, the exception when an accused in a criminal case takes the stand is apparent only; for it is as an accused that he may offer his good character in chief (*ante*, § 56), and that character must concern the trait involved in the charge (*ante*, § 59); and thus since only his character for veracity can (in most jurisdictions) affect him as a witness (*ante*, § 922), his evidence of character at that stage will not usually be the same as that which he could later offer in his own support as a witness.³

The question thus always arises, under this general rule, When is the witness' character brought into question by the opponent, so as to open the way to evidence of good character in denial? This must depend on the nature of the opponent's impeaching evidence. It may be a direct assault on the wit-

¹ This, as a general principle, is universally accepted; all the rulings in the ensuing sections assume it. The following statutes reaffirm it: Alaska C. C. P. 1900, § 671 (like Or. Annot. C. 1892, § 842); Ark. Stats. 1894, § 2961 (inadmissible "until his general reputation has been impeached"); Cal. C. C. P. 1872, § 2053 (not admissible until character "is impeached"); Ida. Rev. St. 1887, § 6084 (like Cal. C. C. P. § 2053); Ky. C. C. P. 1895, § 599 (inadmissible "until his general reputation has been impeached"); Mont. C. C. P. 1895, § 3381 (like Cal. C. C. P. § 2053); Or. C. C. P. 1892, § 842 (like Cal. C. C. P. § 2053). It has been said in *Connecticut* that such evidence should always be admitted on behalf of the woman in a rape charge, even without any attempt at impeachment: 1830, *State v. DeWolf*, 8 Conn. 93, 100 ("it would not be going too far, perhaps," to declare such a rule; but here left undecided); 1833, *Rogers v. Moore*, 10 id. 14, 17 (said to be settled). In the same State a peculiar tradition also admits such evidence, even without impeachment, in favor of a "stranger," before any impeachment of character has been attempted: 1830, *State v. DeWolf*, 8 Conn. 93, 101 (a deaf-and-dumb person was treated as in effect a stranger); 1833, *Rogers v. Moore*, 10 id. 14, 17;

1850, *Merriam v. R. Co.*, 20 Id. 354, 364; 1881, *State v. Ward*, 49 Id. 429, 433, 442 (not allowed for one resident in the State). In *New Hampshire*, it is held that the party to a divorce suit may offer good character in support without waiting for impeachment: 1842, *Kimball v. Kimball*, 13 N. H. 222, 225; 1899, *Warner v. Warner*, 69 Id. 137, 44 Atl. 908.

² 1856, *Com. v. Ingraham*, 7 Gray 46, 48 (admissible whenever by questions of the opponent the general character has been attempted to be impeached, even though the opposing witness answers favorably; because "in the manner in which the answer is given though in language apparently favorable to the witness, yet there might be conveyed the impression of doubt and uncertainty as to his reputation"); 1869, *State v. Cherry*, 63 N. C. 493, 495 (admitting it where the opponent had asked the witness himself about his bad character, and he had refused to answer).

³ 1896, *Hays v. State*, 110 Ala. 60, 20 So. 322 (excluding the accused's character as to veracity in a larceny prosecution); and cases cited *ante*, §§ 59, 890, 923, 925. For the character of a *deceased person* in homicide, the woman in *rape and seduction*, and other uses of character not of a witness, see *ante*, §§ 62-79.

ness' character, in which case no doubt exists. But it may be evidence of a doubtful or ambiguous import, — for example, of bias, of a prior self-contradiction, of an error of fact, and so on through the whole series of kinds of discrediting evidence. It is obvious that the theory of each of these kinds of evidence must be considered before it can be said whether it affects the witness' character. In the ensuing applications of the rule, therefore, the result will depend much on the respective theories of Impeachment by Contradiction (*ante*, § 1000), by Self-Contradiction (*ante*, § 1017), and by Bias, Interest, or Corruption (*ante*, §§ 943-969).

§ 1105. *Same*: (1) **After evidence of General Character.** A direct impeachment of moral character by opposing testimony (reputation or personal opinion) plainly satisfies the rule and opens the way for the opposite party to rehabilitate his witness by testimony to his good character. No one has ever doubted this.¹

But the character of a witness may also be expressly impeached (*ante*, §§ 977-988), not merely by his reputation or by others' personal opinion of his character, but by particular acts of misconduct indicating a bad character. This may be done in two ways: (*a*) by extrinsic testimony of conviction of crime; (*b*) by answers on cross-examination of the witness himself as to instances of moral misconduct. These two modes are therefore also to be considered.

§ 1106. *Same*: (2) **After evidence of Particular Instances of Misconduct, by Cross-examination or Record of Conviction.** At first sight, there would seem to be here also no doubt about the propriety of rebutting by evidence of good character. The facts offered reflect directly upon the witness' moral character, and an issue upon that character seems clearly to be opened. Such is the natural answer to this question:

1838, *Nelson, C. J.*, in *People v. Rector*, 19 Wend. 610 (after pointing out that good character, though an essential element of testimony, is assumed, and must first be attacked by the opponent): "Now what is the ground and reason for allowing a party to introduce general evidence in reply to fortify and support a witness who has been impeached? It surely is not because the impeachment has been effected by the testimony of witnesses, or by general evidence as to character, or in a particular way. — all this of itself can be of no importance; but it is because the impeachment, the effect of the proof, in whatever way introduced, tends directly to overcome the presumption of good character upon which the party had a right in the first instance to rely; because a material part of his proof is struck at by shaking confidence in the integrity and truth of the witness upon whom it depends. . . . If that [impeachment] can be removed, the presumption revives, and the facts are again sustained upon the good character of the witness. Regarding, then, the principle upon which testimony in reply to the impeachment of a witness is admitted, and the grounds and reasons upon which it rests, the Court should rather look to the effect of the impeachment than to the mode and manner in which it is brought about. It can be of little concern to a party whether the moral character of his witness is destroyed by the testimony of others called to speak to it, or by a cross-

¹ The following minor points may be noted here: 1860, *Prentiss v. Roberts*, 49 Me. 127, 137 (it is immaterial that the testimony attacking the witness' general character is offered in the

shape of the opponent's admissions); 1850 *Morse v. Palmer*, 15 Pa. 51, 55 (the supporting character may cover another time or place than the impeaching one).

examination; the effect upon him, to the extent of the impeachment, is exactly the same; he loses the benefit of the evidence in both cases, and for the same cause, — the discredit of the witness. . . . There may indeed be more difficulty in the reply, in the case of an impeachment by cross-examination, than from general evidence. . . . But there is no intrinsic difficulty rendering a vindication impossible; the offer of the proof assumes that it is within the power of the party; cases may very well occur of particular vices and weaknesses, which cast a cloud over the moral character of the man and tend *prima facie* to impeach his truth and integrity, but whose veracity could be vindicated by the concurrent testimony of all his neighbors and acquaintances. . . . But it is urged that, as the witness is upon the stand, he may be examined himself in explanation of the impeaching facts. The obvious answer to this is that the character of the witness for truth in the given case is proposed to be sustained by the evidence in reply notwithstanding the existence of the facts called out on the cross-examination. The case supposes explanation impossible, but that still his character for truth may be upheld by his neighbors and acquaintances."

Yet, on strict principle, this result is fallacious. The whole solution turns on the logical distinction between Explaining away and merely Denying (*ante*, § 34). Consider, first, questions on cross-examination. The misconduct, by hypothesis, being relevant and being proved by the witness' own admission on the stand, demonstrates the bad disposition behind it. If there had been any explanation of the act, the witness could give it (*post*, § 1117). But testimony to general good reputation explains away nothing; the damaging conduct is proved out of his own mouth. Testimony to his good reputation could only avail on the hypothesis that an attacking witness to bad reputation was speaking falsely and that the reputation was really good; but here it is by proved conduct and direct inference bad. Furthermore, records of convictions of crime similarly exhibit the bad character directly, and cannot be explained away by testimony as to good repute. Such is the rule that best accords with the correct analysis of the situation:

1814, *Ellenborough*, L. C. J., in *Dodd v. Norris*, 3 Camp. 519: "The questions put to herself on cross-examination there was an ample opportunity of explaining, as far as the truth would permit, when she came to be re-examined."¹

1838, *Bronson*, J., in *People v. Rector*, 19 Wend. 600: "Why should such evidence be received, when the witness is on the stand to give any explanation of his conduct which the truth of the case will permit? G. was not obliged to proclaim his own infamy. . . . But aside from this consideration, if there was anything to extenuate his conduct in abandoning his family and living in adultery, he was at liberty to state it. He stood there to make a picture of himself, and it is not to be presumed that he would draw it in darker colors than the truth of the case absolutely required. Neither the party who produces a witness nor the witness himself has any right to complain that compurgators are not allowed, when there has been no impeachment beyond the facts disclosed by the witness himself."

¹ There is, however, a great deal to be said for the following answer to Lord Ellenborough: 1823, *Bate v. Hill*, 1 C. & P. 100 (Park, J., allowed corroboration by character; Note by the Reporters: "The course allowed by Mr. Justice Park in the present case is much more conducive to the attainment of justice. . . . Lord Ellenborough says that it is to be set right in re-examination. This looks very well in theory. Those used to courts of justice well know that

if the character of a party seduced is attacked in her cross-examination, though the witness may deny the things insinuated, a jury often believe that though denied there is some foundation for the insinuation, if witnesses are not called to convince them of the contrary. It is a little too much to allow a defendant to blast the character of a person he has seduced by his insinuations and then not to allow her to clear her character by the best means in her power").

Of these opposing views, however, the former commands the most support among the Courts.³

³ The authorities on both sides are as follows: *England*: 1753, Murphy's Trial, 19 How. St. Tr. 693, 724 (allowed after proof of an indictment); 1808, Hamfield v. Massey, 1 Camp. 460 (Ellenborough, L. C. J.; seduction; after evidence that the daughter had previously had a child by another man, good-character evidence was rejected, the contradiction of the specific charge being declared sufficient for the purpose); 1814, Dodd v. Norris, 3 Camp. 519 (Ellenborough, L. C. J.; seduction; the daughter, on cross-examination, admitted indecent conduct with the defendant; good-character evidence rejected, as no general attack on it was thus involved; a re-examination declared sufficient for rehabilitation); 1817, R. v. Clarke, 2 Stark. 241 (rape; after an admission by the prosecutrix that she had been twice in the House of Correction, evidence of her good character since then was held admissible, to "repeal the inference which might be drawn from her former misconduct," and "show that the witness is not so unworthy of credit as she might have been considered to be if these circumstances had not intervened"); 1821, Hute v. Hill, 1 C. & P. 100, Park, J. (facts like Dodd v. Norris, *supra*; character admitted); 1829, Provis v. Reel, 5 Bing. 435, 438 (deceased attesting witness' good character received "if it were imputed to S. that, having caused a will to be executed imperfectly, he had added an attesting witness after the death of the testator, — that in effect he had committed a forgery, [*i. e.*] if his moral character were thus attacked"); 1836, Doe v. Harris, 7 C. & P. 330 (Coleridge, J.; attorney drawing the will; after a cross-examination in which "it was sought to impeach his character," evidence of good character was excluded); *Ala.*: 1860, Lewis v. State, 35 Ala. 386 (admitted, after evidence of abhorrent); *Cal.*: 1874, People v. Ah Fat, 48 Cal. 61, 64 (admitted, after impeachment by an offer of the witness to give testimony for money); 1875, People v. Amanacus, 50 id. 233 (admitted, after an admission that he had been convicted of felony); *Conn.*: 1833, Rogers v. Moore, 10 Conn. 14 (excluded; yet it does not appear how the cross-examination affected his character, except as indicating a share in a fraudulent grant at issue in the case); 1881, State v. Ward, 49 id. 429, 432, 442 (excluded; the witness had been testified to as an accomplice in an alleged larceny admitted to show intent in the larceny charged); *Id.*: 1899, State v. Owens, 109 Ia. 1, 79 N. W. 462 (not admitted after a cross-examination not resulting in answers involving misconduct); *La.*: 1886, State v. Boyd, 36 La. An. 374 (obscure); 1892, State v. Fruge, 44 id. 163, 10 So. 621 (admitted, after questions as to former prosecution); *Id.*: 1869, Vernon v. Tucker, 30 Md. 456, 462 (allowable after "matter brought out on cross-examination," if it "amounts to an impeachment of the character for truth"); *Mass.*: 1829, Russell v. Coffin, 8 Pick. 143, 154 (admissible if the answers "impeach his general character"); 1855, Harrington v. Lincoln, 4 Gray 563, 567 (left undecided; in this case, however, the fact

brought out was merely a charge of crime; and the witness' farther answer stating his acquittal was held to remove the effect of the original answer); 1875, M. Carty v. Leary, 118 Mass. 510 (cross-examination as to intoxication of the plaintiff witness at other times than the assault in question; character for sobriety excluded, because it "would not have removed the imputation which resulted from his own testimony on the stand"; the preceding cases not cited); 1884, Gerts v. Fiechburg H. Co., 137 id. 77, 78 (record of conviction of crime; reputation for veracity admitted; good opinion by Holmes, J.); *Mich.*: 1888, Hitecock v. Moore, 70 Mich. 112, 114 (slander; good character excluded, after cross-examination to specific facts; "such specific facts cannot be met . . . with evidence of general reputation"); *N. Y.*: 1838, People v. Rector, 19 Weid. 569, 584, 595 (admitted; Hronson, J., diss. and allowing it only (1) for deceased attesting witnesses — *semble*, to wit: only — charged with fraud, and (2) for a witness who wishes to show a reform since the past delinquencies brought out on cross-examination; in this case, the witness admitted leading a dissolute life; see quotations *supra*); 1842, Carter v. People, 2 Hill 317 (the witness admitted having been arrested on a charge of counterfeiting; good character for truth allowed); 1842, People v. Hulse, 3 id. 309, 314 (affirming People v. Rector, though Hronson, J., the month before of the Court, still expresses a liking for his doctrine in that case as discenter; the rule here affirmed as law admits the supporting character after an attack "drawing out extrinsic facts going to general character on the cross-examination"); 1852, People v. Gay, 7 N. Y. 378, 381 (affirming People v. Hulse; the attack must consist in evidence on cross-examination going to impeach his general character; People v. Hulse is said to have overruled "in effect" the preceding cases, but this is clearly erroneous, as Welles, J., diss., points out at 382; the only point overruled is that of People v. Carter, which treats a mere arrest or charge as involving moral character, — a point expressly denied in the present case); 1856, Stacy v. Graham, 14 id. 492, 501 (admitted after witness' admission of corruption; no authorities cited; Wright, J., diss.); 1890, Young v. Johnson, 123 id. 226, 234 (rape; character excluded, after proof of the woman's loose conduct); *Oh.*: 1876, Webb v. State, 29 Oh. St. 351, 358 (admitted, after evidence of conviction of crime); 1894, Wick v. Baldwin, 51 id. 51, 36 N. E. 671 (cross-examination to conviction of crimes; reputation for truth admitted); *Pa.*: 1839, Bradlee v. Brownfield, 9 Watts 124 (after cross-examination; opinion apparently self-contradictory, looking both ways); *Tenn.*: 1885, Hoard v. State, 15 Len 313, 323 (admitted, after cross-examination to character); 1900, Warfield v. R. Co., 104 Tenn. 74, 55 S. W. 304 (admissible after cross-examination affecting veracity); *Tex.*: 1899, Smith v. State, — Tex. Cr. — , 80 S. W. 363, *semble* (allowable, after cross-examination to character, only if the wit-

§ 1107. *Same*: (3) *After evidence of Bias, Interest, or Corruption.* An act of Corruption directly affects moral character; and the corroboration should therefore depend upon the rule for acts involving character.¹ But Bias and Interest clearly do not involve any issue on the moral character of the witness, and there is no occasion for testimony to good character.²

§ 1108. *Same*: (4) *After evidence of Self-Contradiction.* The exposure of an error of a witness on a material point by his own self-contradictory statements is a recognized mode of impeachment (*ante*, § 1017), and serves as a basis for the further inference that he is capable of having made errors on other material points. This possibility of other errors, however, is not attributed specifically to any definite defect; it may be supposed to arise from a defect of knowledge, of memory, of bias, or of interest, or, by possibility only, of moral character (*ante*, § 1017). Thus, though the error may conceivably be due to dishonest character, it is not necessarily, and not even probably, due to that cause. If now we regard this remote contingency as important, it follows that he should be allowed to rebut this inference by evidence of good character. But if we regard this remote contingency as too slender to be taken into account, we shall refuse to believe that any issue of character is involved. It is according to these two opposing views of the situation that Courts admit or exclude such evidence. The former view is represented in the following passages:

1838, *Cowen, J.*, in *People v. Rector*, 19 Wend. 583: "With great deference I ask, Do not discrepancies of statement in themselves go to general character? They are not like contradicting a witness on the fact itself, nor do they bring the matter to a mere test of memory. How do they operate in common understanding? Either to evince a dangerous levity and versatility, or downright dishonesty in representing a matter of fact."

1870, *Frazer, J.*, in *Clem v. State*, 33 Ind. 427: "The sole object in asking a witness whether he had made statements elsewhere not in accordance with his testimony, and upon his denial calling other witnesses to show that he did make such statements, is to create a belief that he is not a credible witness. Impeachment of a witness by proof of his bad character is intended to accomplish exactly and only the same thing. The statements and the bad character are alike immaterial, except for the single purpose of affecting the credit of the witness, and it is not easy to say that the two methods are not about equally efficient in accomplishing the end. In either case, the credibility of the witness is impaired. . . . If it is just in the one case that a party should be permitted to establish the credit of his witness by showing his good character, it is alike just in the other case."

ness is a stranger in the community); 1899, *Luttrell v. State*, 40 id. 651, 51 S. W. 930 (admissible, after evidence of misconduct); *Vt.*: 1848, *Paine v. Tilden*, 20 Vt. 554, 564 (admitted, where the "character of the witness is attacked . . . by cross-examination"); 1892, *Stevenson v. Gunning's Estate*, 64 id. 601, 609, 25 Atl. 697; *Va.*: 1877, *George v. Plicher*, 28 Gratt. 299, 312, 315 (*semble*, admissible); 1895, *Reynolds v. R. Co.*, 92 Va. 400, 23 S. E. 770 (an endeavor on cross-examination to show that the plaintiff's injuries existed before the accident, held not a sufficient impeachment); *Wis.*: 1903, *Kraimer*

v. State. — *Wis.* — 93 N. W. 1097 (admissible, after impeachment by conviction of crime).

¹ The cases have been placed in the foregoing section.

² 1898, *First Nat'l Bank v. Com. U. Ass. Co.*, 33 Or. 43, 52 Pac. 1050 (bias). A *Chinese witness* is by Federal statute in certain cases required to be corroborated (*post*, § 2066); it would seem therefore that his good character for veracity ought in such cases to be received in chief. *Contra*: 1901, *Woey Ho v. U. S.*, 48 C. C. A. 703, 109 Fed. 888 (in discretion).

The opposite view is represented by the following passage:

1860, *Wardlaw, J.*, in *Chapman v. Cooley*, 12 Rich. L. 659: "The greatest rogue, under circumstances supervised by his neighbors, may simulate the course of honesty; one of good principles and the fairest reputation may be utterly unworthy of credit in his statements of some transaction. Monomania is a state of mind universally recognized, and it may preclude one completely from the perception and narration of the truth. Intense ignorance or superstition, or some affection, may produce the same consequences. The great improbability of a narrative may produce disbelief, without impairing the confidence of the hearers in the probity of the narrator. A wise and good man may fail in his remembrance of any fact, and especially of its attendant circumstances. Surely, then, character and credit are distinct things, and every assault on the credit of a witness does not involve the imputation of perjury to him, nor, indeed, any reflection on his reputation."

The latter view seems to be much more in harmony with the needs of the situation. Considering the usual remoteness of the inference as to moral character, and the minor value of reputation-evidence in modern times, it is not worth while to cumber the trial with it for so trifling an occasion of use. As a matter of rule, the various jurisdictions are divided between the two views.¹

¹ *Ala.*: 1848, *Hadjo v. Gooden*, 13 Ala. 718, 720 (admitted); 1860, *Lewis v. State*, 35 Id. 380, 386 (same); 1895, *Holley v. State*, 105 Id. 100, 17 So. 102 (same); 1896, *Towns v. State*, 111 Id. 1, 20 So. 598 (same); *Cal.*: 1874, *People v. Ah Fat*, 48 Cal. 61, 64 (undecided); 1884, *People v. Bnsh*, 65 Id. 129, 3 Pac. 590 (excluded; no cases cited); *Conn.*: 1833, *Rogers v. Moore*, 10 Conn. 14, *semble* (excluded); *Fla.*: 1898, *Mercer v. State*, 40 Fla. 216, 24 So. 154 (admitted); *Ga.*: Code 1895, § 5292, P. C. § 1026 (allowable); 1853, *Stamper v. Griffin*, 12 Ga. 456 (excluded); 1879, *McEwen v. Springfield*, 64 Id. 159, 165 (admitted); 1886, *Pulliam v. Cantrell*, 77 Id. 563, 568, 3 S. E. 280 (same); 1903, *Clark v. State*, 117 Id. 254, 43 S. E. 853 (statute applied); *Ind.*: 1866, *Paxton v. Dye*, 26 Ind. 394 ("if by statements inconsistent with material evidence given by him in the body of his testimony, and which statements he does not admit that he made," admitted); 1868, *Clark v. Bond*, 29 Id. 555 (admitted); *Harris v. State*, 30 Id. 131 (admitted); 1870, *Clem v. State*, 33 Id. 418, 427 (admitted, after careful reconsideration of the subject; see quotation *supra*); 1886, *Louisville N. A. & C. R. Co. v. Frawley*, 110 Id. 18, 26, 9 N. E. 594 (admitted); 1893, *Board v. O'Conner*, 137 Id. 622, 35 N. E. 1006, 37 N. E. 16 (same); *Ill.*: 1867, *State v. Archer*, 73 Ill. 320, 323, 35 N. W. 241 (excluded); 1899, *State v. Owens*, 109 Id. 1, 79 N. W. 462 (excluded); *Ky.*: 1859, *Vance v. Vance*, 2 Metc. 581 (excluded); *La.*: 1886, *State v. Boyd*, 38 La. An. 374 (admitted); *Md.*: 1873, *Davis v. State*, 38 Md. 15, 49 (admissible); *Mass.*: 1829, *Russell v. Coffin*, 8 Pick. 143, 154 (excluded); 1856, *Brown v. Mooers*, 6 Gray 451 (same); *Com. v. Ingraham*, 7 Id. 46, 48 (same); *Mo.*: 1880, *State v. Cooper*, 71 Mo. 436, 442 (obscure); *N. Y.*: 1842, *People v. Hulse*, 3 Hill 309, 313 (excluded; no special exception allowed for rape cases; *Cowen, J.*, diss.); 1847, *Starks v. People*, 5 Den. 106, 108 (excluded); 1856, *Stacy v. Graham*, 14 N. Y. 492, 498, 501 (admitted; no precedents cited; but here there were also admissions of corruption, and not merely self-contradictions); *N. C.*: 1874, *Iser v. Dewey*, 71 N. C. 14 (admitted); *Oh.*: 1876, *Webb v. State*, 29 Oh. St. 351, 357 (excluded; pointing out that "if the impeaching evidence should appear from the conduct of the witness, or his contradictory statements made during his examination," his character would clearly be inadmissible, and yet the situation would be precisely the same); *Or.*: 1874, *Glaze v. Whitely*, 5 Or. 164, 167 (admitted); 1882, *Sheppard v. Yocum*, 10 Id. 402, 413 (overruling the preceding decision, as representing an inferior rule); 1898, *First Nat'l Bank v. Com. U. Ass. Co.*, 33 Id. 43, 52 Pac. 1050 (excluded); *Pa.*: 1839, *Bradde v. Brownfield*, 9 Watts 124, *semble* (excluded); 1853, *Werts v. May*, 21 Pa. 274, 279 (same); *S. C.*: 1839, *Farr v. Thompson*, *Cheves* 37, 39, 43 (admitted, as it is "impossible to resort" to such testimony "without making a direct attack on the veracity and character of the witness"); 1860, *Chapman v. Cooley*, 12 Rich. L. 654, 658 (excluded; the preceding case being distinguished and in effect overruled); 1888, *State v. Jones*, 29 S. C. 201, 230 (excluded); 1897, *State v. Rice*, 49 Id. 418, 27 S. E. 452 (excluded); *Tex.*: 1857, *Burrell v. State*, 18 Tex. 713, 730 (admitted); 1900, *Renfro v. State*, 42 Tex. Cr. 393, 56 S. W. 1015 (not allowed where the cross-examiner merely used the prior statement to refresh the witness' memory); *Vt.*: 1840, *State v. Roe*, 12 Vt. 93, 97, 111 (admitted); 1848, *Paine v. Tiiden*, 20 Id. 554, 564 (same); 1848, *Sweet v. Sherman*, 21 Id. 23, 29 (same); 1892, *Stevenson v. Gunning's Estate*, 64 Id. 601, 608, 25 Atl. 697 (same); *Va.*: 1877, *George v. Pilcher*, 28 Gratt. 299, 311, 315 (ad-

§ 1109. Same: (5) **After Contradiction by other Witnesses.** Contradiction by opposing witnesses has for its purpose to show an error by the first witness, so that from this error may be argued a capacity to commit errors upon other points as well (*ante*, § 1000). But here, as with the mode of impeachment just dealt with, it is only by contingency that Moral Character may be thought to be reflected upon. Thus, the same arguments *pro* and *con* as in the foregoing subject may here be raised, except that, since the insinuation against Moral Character is here more remote, the grounds for treating it as in issue and admitting rebutting evidence of good character are weaker. The mixed arguments of logic and policy for rejecting it are seen in the following passages:

1839, *Earle, J.*, in *Farr v. Thompson*, Cheves S. C. 43: "It is obvious that it [*i. e.* proof that the facts are otherwise] may be resorted to without in the slightest degree impugning the veracity of the witness, so long as men view the same transaction in different lights, form different conclusions from the same premises, pay more or less attention to the same occurrences taking place before their eyes, and have memories more or less retentive."

1884, *Walker, J.*, in *Tedens v. Schumers*, 112 Ill. 263, 266: "If the practice sanctioned the calling of witnesses to prove general character whenever a witness is contradicted, it would render trials interminable. The greater portion of the time of courts would be liable to be engaged in the attack and support of the characters of witnesses. If permitted, each of the contradicting witnesses would have the same right; and not only so, but all of the supporting witnesses on each side contradicting each other would be entitled to the same privilege. It is thus seen that the rule must be limited to cases where witnesses are called to impeach the general character of a witness; otherwise, instead of reaching truth by the verdict, it would tend to stifle it under a large number of side issues calculated to obscure and not to elucidate them."

1884, *Holmes, J.*, in *Gertz v. Fückburg R. Co.*, 137 Mass. 77, 78: "The purpose and only direct effect of the [impeaching] evidence are to show that the witness is not to be believed in this instance. But the reason why he is not to be believed is left untouched. That may be found in forgetfulness on the part of the witness, or in his having been deceived, or in any other possible cause. The disbelief sought to be produced is perfectly consistent with an admission of his general character for truth, as well as for the other virtues; and until the character of a witness is assailed, it cannot be fortified by evidence."

No Court favoring admission seems to have attempted a reasoned justification of its policy; and the great majority of jurisdictions agree in excluding such evidence.¹

missible, where "material facts" are the subject of the error); *W. Va.*: 1899, *State v. Staley*, 45 W. Va. 792, 32 S. E. 198 (admissible).

¹ *Eng.*: 1808, *Durham v. Beaumont*, 1 Camp. 207 (a mere conflict of testimony; excluded); *Ala.*: 1853, *Newton v. Jackson*, 23 Ala. 335, 344 (admitted); 1875, *Mobile & G. R. Co. v. Williams*, 54 id. 168, 172 (excluded; the preceding case not cited); 1894, *Funderberg v. State*, 100 id. 36, 14 So. 377 (excluded); 1900, *Truener v. State*, 124 id. 59, 27 So. 272 (mere contradiction, not used to impeach, insufficient); 1900, *Bell v. State*, *ib.* 94, 27 So. 414 (excluded); 1901, *Lusk v. State*, 129 id. 1, 30 So. 33 (bastardy; complainant's character admitted, after

impeachment upon her assertion that she had not kept company with other men; but this would be justifiable under the principle of § 1106, *ante*); *Conn.*: 1833, *Rogers v. Moore*, 10 Conn. 14 (excluded); *Fla.*: 1886, *Saussey v. R. Co.*, 22 Fla. 327, 330 (excluded); *Ga.*: 1895, *Miller v. R. Co.*, 93 Ga. 480, 21 S. E. 52 (excluded; good opinion by Bleckley, C. J.); 1897, *Bell v. State*, 100 id. 78, 27 S. E. 669 (excluded); 1899, *Anderson v. R. Co.*, 107 id. 500, 33 S. E. 644 (excluded); *Ill.*: 1884, *Tedens v. Schumers*, 112 Ill. 263, 266 (excluded; see quotation *supra*); *Ind.*: 1863, *Pruitt v. Cox*, 21 Ind. 15; *Johnson v. State*, *ib.* 329 (excluded); 1881, *Presser v. State*, 77 id. 274, 280 (same); 1882, *Braun v.*

§ 1110. **Same; Other Principles distinguished.** The witness' good moral character, though it may be inadmissible in some of the foregoing situations, may nevertheless be receivable from some other point of view, — particularly in a charge of rape (*ante*, § 62), seduction (*ante*, § 76), or defamation (*ante*, §§ 66, 76).¹ Whether the proof of the character shall be by reputation (*post*, § 1608) or by personal opinion (*post*, § 1980) involves still other principles.

§ 1111. (b) **Discrediting the Impeaching Witness; Cross-Examining to Rumors of Misconduct.** In the foregoing sections, the object of the evidence offered in support was to establish the witness' good character, in *direct denial* of its impeachment, by bringing other witnesses to testify to the good reputed character. But the existence of the bad reputed character may also be *denied indirectly, i. e.* by discrediting the impeaching witness. This process raises certain special questions of its own.

(1) One mode of doing it is to *impeach the impeaching witness' own moral character*, or bias, or other quality affecting credibility, thus making the impeacher in turn an impeached witness. How far this can be done, with special reference to an impeaching witness, and to the necessity of ending the mutual recrimination at some reasonable point, has been already considered (*ante*, § 894).

(2) Another and more effective mode is to probe the grounds of the impeacher's *knowledge* as to the other's bad reputation, by requiring him to *specify the particular rumors of misconduct, or statements of individuals*, that have led him to assert the existence of the bad reputation. In theory, this rests upon the general principle (*ante*, § 994) that every witness may be discredited by exhibiting the inadequacy of his sources of knowledge. If a

Campbell, 86 id. 516 (same); 1886, Louisville N. A. & C. R. Co. v. Frawley, 110 id. 18, 27, 9 N. E. 594 (same); *Id.*: 1887, State v. Archer, 73 Ia. 320, 323, 35 N. W. 241, *semble* (excluded); Ky.: 1859, Vance v. Vance, 2 Metc. 581 (excluded); La.: 1895, State v. Desforges, 48 La. An. 73, 18 So. 912 (admissible, where a direct conflict exists and practically the integrity and veracity of the witnesses are involved); Md.: 1869, Vernon v. Tucker, 30 Md. 456, 463 (excluded); 1873, Davis v. State, 38 id. 15, 50, 59, 74 (allowable, after a showing of error on a material point; no authority cited; Stewart and Bowie, JJ., diss., citing the preceding case); Mass.: 1829, Russell v. Coffin, 8 Pick. 143, 154 (excluded); 1855, Heywood v. Reed, 4 Gray 574, 576, 581 (excluded; although incidentally the witness appeared as fraudulent assignor of property); 1856, Brown v. Mooers, 6 id. 451 (excluded; even though knowledge of the falsity appears); Com. v. Ingraham, 7 id. 46, 48, *semble* (inadmissible); 1884, Gertz v. Fitchburg R. Co., 137 Mass. 77 (see quotation *supra*); N. Y.: 1838, People v. Hector, 19 Wend. 569, 586 (excluded); 1842, People v. Hulse, 3 Hill 309, 313 (same); 1847, Starks v. People, 5 Den. 106, 108 (same); N. C.: 1854, March v. Harrell, 1 Jones 329, 331, *semble* (admitted); 1874, Isler v. Dewey, 71 N. C. 14 (same); Or.: 1874, Glaze v. Whitley, 5 Or. 164, 167 (admissible); 1882, Sheppard v. Yocum, 10 id. 402, 413 (by implication overruling the preceding decision); Pa.: 1839, Braddee v. Brownfield, 9 Watts 124 (excluded; even though the error involve a falsity); S. C.: 1839, Farr v. Thompson, Cheves 37, 43 (excluded); 1860, Chapman v. Cooley, 12 Rich. 654, 660, *semble* (same); 1892, State v. Jones, 29 S. C. 201, 230, *semble* (same); Tenn.: 1837, Richmond v. Richmond, 10 Yerg. 343, 345 (admitted; but here the argument was that there had been false swearing); Tex.: 1894, Texas & P. R. Co. v. Raney, 86 Tex. 363, 25 S. W. 11 (excluded); 1900, Jacobs v. State, 42 Tex. Cr. 353, 59 S. W. 1111 (excluded); U. S.: 1898, Spurr v. U. S., 31 C. C. A. 202, 87 Fed. 701 (excluded); 1902, Louisville & N. R. Co. v. M'Clish, 53 id. 60, 115 Fed. 268 (excluded; good opinion by Day, J.); Vt.: 1892, Stevenson v. Gunning's Estate, 64 Vt. 601, 608, 25 Atl. 697 (excluded; in effect overruling the apparently opposite ruling in Mosley v. Ius. Co., 55 id. 142, 152 (1882), where the error involved a perjury); Va.: 1877, George v. Pilcher, 28 Gratt. 299, 311, 315 (admitted); Wash.: 1896, State v. Nelson, 13 Wash. 523, 43 Pac. 637 (excluded).

¹ Compare generally §§ 55-79, *ante*, for the use of character other than in impeachment of a witness.

witness to another's bad reputation is speaking from a veritable knowledge of such a repute, he ought to be able to specify some of the rumored misconduct or some of the individual opinions that have gone to form that reputation. If he cannot do this, his assertion may be doubted :

1684, *Braddon's Trial*, 9 How. St. Tr. 1127, 1170 ; *Witness* : "The Wednesday and Thursday both, it was the common talk of the town all day long" ; *Wilkins, J.* : "Name one that spake it to you" ; *Witness* : "I cannot ; it was the women as they came in and out of my shop, and as they went up and down the town" ; *Counsel, Mr. Wallop* : "My lord, we leave it with your lordship and the jury ; he swears he then heard such a report" ; *Wilkins, J.* : "Do you believe that this man can speak truth when he says it was reported all about their town for two days before it was done, and yet cannot name one person that spake it?" ; *Witness* : "I keep a public shop, and do not take notice of every one that comes in and out, to remember particularly" ; *Wilkins, J.* : "You heard it up and down the town, you say ; surely you might remember somebody."

1849, *Fletcher, J.*, in *Bates v. Barber*, 4 Cush. 109 : "In point of principle it would seem proper to make this inquiry, because the witness is called on to state what is the reputation of the person impeached, what is his character for truth by report, what is said as to his character for truth ; and it may be very material and important to know from whom in particular the reports come, and what persons they were who spoke against the character of the person impeached. Upon such inquiry, it may appear that all the persons from whom the witness has heard anything against the person impeached are his personal enemies, and so situated in regard to him that their speeches and reports against him are entitled to no consideration whatever. The inquiry may also be proper in order to test the extent and means of information possessed by the witness in regard to the character of the party impeached for truth and veracity ; by allowing such inquiry, it may perhaps be made to appear that the imputed bad character is wholly fictitious and got up for a particular purpose."

1865, *Cooley, J.*, in *Annis v. People*, 13 Mich. 517 : "There is no case where a thorough cross-examination is more important to an elucidation of the truth than where a witness is giving an answer to a general question which calls both for matter of fact and matter of opinion. If a witness can shield himself behind an answer so general that, even if false, the person who knows that fact cannot testify with definiteness on the subject, we may well believe that bad men will frequently resort to this species of evidence where the truth will not warrant it. And in nothing may parties be more easily mistaken than in judging of the general reputation of another for truth and veracity. They may either be mistaken in assuming the speech of one or two to be the voice of the community ; or they may confound a reputation for something else with a reputation for untruth ; or they may misconstrue reports ; or they may honestly be mistaken in regard to their import. Nothing is more common in practice than to see a witness placed upon the stand to impeach the general reputation of another for veracity, when a cross-examination demonstrates that the reports only relate to a failure — probably an honest one — to meet obligations, while the party's real reputation for truth is above suspicion. Nothing short of a cross-examination which compels the impeaching witness to state both the source of the reports and their nature will enable the party either to test the correctness of the impeaching evidence or to protect the witness who is assailed, if he is assailed, unjustly."

The objections to such an inquiry are, first, the consumption of time and confusion of issues, and, secondly, the multiplication of petty scandal and the creation of hard feeling between the impeached witness and the innocent third persons whose names are brought into the dispute against their will and whose remarks may have been made in confidence. The first objection is no more serious here than for other cross-examination of all sorts. But

the second objection undoubtedly discloses one of the unfortunate and degrading features of character-testimony. An answer, to be sure, is that, since testimony based on personal knowledge is now almost universally excluded (*post*, § 1980), and since reputation-testimony is notoriously so easily fabricated and its fabrication can be exposed only in this way, it would be inexpedient to destroy the only security against false impeaching testimony. The reply, however, to this may well be that it is better to go back to personal-knowledge testimony rather than to give a monopoly to a kind so easily fabricated and so inseparable from the vice of retailing neighborhood-scandal in court. But the reasons above quoted are universally accepted (except by a few Courts which do not appreciate the reasoning); on cross-examination of the impeaching witness he may be asked as to the specific persons who have spoken against the impeached witness, and (usually) as to what misconduct they specified.¹

This kind of *discrediting* examination is to be distinguished from the preliminary *direct* examination which some Courts require before a witness to reputation may speak as qualified (*ante*, § 691). The principle beneath both is the same. But there the object is to ascertain whether he is a qualified witness at all, while here he has already qualified and spoken, and the object is to discredit the sources of his knowledge. Distinguish also the cross-examination of a witness to *good reputation*, concerning rumors of misconduct which he has heard (dealt with *ante*, § 938); this rests on an application of the same general principle, but it aims at the impeachment, not the support, of the impeached witness.

(3) May the impeaching witness, after naming certain persons or reports,

¹ Except as otherwise noted, the following rulings allow cross-examination as to the persons speaking against the impeached witness: *Conn.*: 1900, *Messenger v. Bridgetown*, 33 N. Sc. 291 (cross-examination of a witness to bad reputation, as to the opinion of "individual neighbors," allowed); *Ala.*: 1873, *Sonneborn v. Bernstein*, 49 Ala. 171; 1884, *Jackson v. State*, 77 id. 18, 24 (whether he had not heard good reports from some, allowed); *Conn.*: 1849, *Weeks v. Hull*, 19 Conn. 377 (good opinion by Church, C. J.); *Fla.*: 1878, *Robinson v. State*, 16 Fla. 835, 840; *Ga.*: *Code* 1893, § 5293 ("opinions of single individuals" may only be asked about "upon cross examination in seeking for the extent and foundation of the witness' knowledge"); *Ia.*: 1897, *State v. Allen*, 100 Ia. 7, 69 N. W. 274 (but here excluding questions in which the examiner himself specified certain persons); *Ky.*: 1902, *Barnes v. Com.*, — Ky. —, 70 S. W. 827 (and the answers are of course not to be excluded because they involve unfavorable rumors); *Me.*: 1841, *Phillips v. Kingfield*, 19 Me. 375, 381 ("for how long a time, and how generally, the unfavorable reports had prevailed, and from what persons he has heard them"); *Mich.*: 1865, *Annis v. People*, 13 Mich. 511, 516 (allowing also questions as to what specific persons said; see quotation *supra*); 1874, *Hamilton v. People*, 29 id. 173, 185, *semble*; *Miss.*: 1884,

Pickens v. State, 61 Miss. 563, 567, 35, *French v. Sale*, 63 id. 386, 393; *Mo.*: —, *Day v. State*, 13 Mo. 422, 426, *semble* (excluding; apparently treating it as an attempt to introduce hearsay); *N. H.*: 1838, *State v. Howard*, 9 N. H. 487; 1851, *Titus v. Ash*, 24 id. 331; *N. Y.*: 1827, *Lower v. Winters*, 7 Cow. 265; 1830, *People v. Mather*, 4 Wend. 257, per *Marcy, Sen.*; 1835, *Bakeman v. Rose*, 14 id. 105, 110, 18 id. 150 (here also direct examination allowed, in the trial Court's discretion, because the impeaching witness had volunteered the statement that some persons spoke for, and some against, the other witness); *N. C.*: 1872, *State v. Perkins*, 66 N. C. 126; *Oh.*: 1862, *McDermott v. State*, 13 Oh. St. 335 (allowable to "ascertain from the witnesses their means of knowing her general reputation, the origin and character of any and all reports prejudicial to her, the extent to which those reports had prevailed, the time when and the persons from whom the witnesses had heard them, and, in short, everything which reflects the nature and general prevalence of the reputation"); *Vt.*: 1858, *Willard v. Goodenough*, 30 Vt. 396 ("the cross examination may extend to every matter of fact within the witness' knowledge bearing on the fact of the bad character to which he has testified"). Compare the rule about a *divided reputation* (*post*, §§ 1612, 1613).

be *contradicted* and shown to speak incorrectly on those points? The answer to this is usually negative,² on the theory that the contradiction concerns a collateral point (*ante*, § 1004). But this result seems unsound, for the denial can usually be summary and effective, and the effect on the impeaching witness' credit is so direct that it cannot be termed collateral (*ante*, § 994).

§ 1112. (c) **Explaining away the Bad Reputation**; (1) **Reputation due to Malice, etc.**; (2) **Witness' Veraciousness unimpaired**; (3) **Witness Reformed**. Still another mode of meeting an impeachment of bad reputed character is, not to deny it directly by showing good reputed character, nor to deny it indirectly by discrediting the impeacher, but to *explain it away* by circumstances which diminish its significance, on the general logical principle of Explanation (*ante*, § 34).

(1) Conceding the reputation to exist, it may be argued that the reputation is untrustworthy because it has *originated* in the malice of a few persons or because it rests on supposed facts of conduct which render it unmerited. But this course is open to all the evils of contradiction on collateral points (*ante*, § 1002), and would not be allowed;¹ except so far as it can be pursued on cross-examination of the reputation-witness (according to § 1111, par. 2, *ante*).

(2) Conceding the reputation, in a jurisdiction where general bad character is relevant (*ante*, § 923), it may still be claimed that the witness' reputation for the trait of *veracity remains unimpaired*, so that the general bad character does not signify anything against his credibility. This seems to be generally conceded;² it does not involve proof of particular facts, and therefore is not obnoxious to other principles (*ante*, § 979).

(3) Conceding the reputation, and the actual character as then indicated by it, the claim may be made that the witness has since that time *reformed*, and has exhibited and now possesses the disposition of a generally good or veracious man. This, so far as it can be shown by reputation and without going into particular facts, would seem to be allowable;³ though usually the same purpose is practically attained by simply adducing opposing witnesses to deny the bad character.

¹ 1873, *Sonneborn v. Bernstein*, 49 Ala. 172; 1889, *Robbins v. Spencer*, 121 Ind. 596, 22 N. E. 660; 1862, *McDermott v. State*, 13 Oh. St. 3.

² 1890, *Hollingsworth v. State*, 53 Ark. 387, 393, 14 S. W. 1 (that the reputation was due to a specific vice only, excluded, on the theory that "it would extend controversies beyond all reason" to permit such issues to be raised, even on cross-examination of the impeaching witnesses; the latter clause is unsound); 1830, *People v. Mather*, 4 Wend. 257 (evidence was excluded, to explain away evidence of a witness' bad reputation, that the reports against him originated from a particular body of men who had spread false rumors as to certain conduct; good opinion by Marcy, *See*).

³ 1838, *People v. Rector*, 19 Wend. 569, 579, 588; 1883, *Anon.*, 1 Hill S. C. 258 (O'Neill, J.: "the party in whose favor he has testified may inquire whether, notwithstanding his bad character in other respects, he has not preserved his character for truth; and if this inquiry is answered affirmatively, the jury may seize upon it as the floating plank in his general wreck, and believe him"); 1851, *Wayne, J.* (the others not touching the point), in *Gaines v. Relf*, 12 How. U. S. 555. But compare the following: 1898, *Barnwell v. Hannegan*, 105 Ga. 396, 31 S. E. 116 (must involve general character only, under C. C. § 5293).

³ See the cases cited *post*, § 1117.

B. REHABILITATION AFTER IMPEACHMENT BY PARTICULAR ACTS OF MISCONDUCT.

§ 1116. Denial of the Fact; Innocence of a Crime admitted on Cross-examination or proved by Record of Conviction. There are but two ways, as already noted, in which a witness' particular acts of misconduct can be proved to discredit his character, — his own admission on cross-examination (*ante*, § 981), and a record of a judgment of conviction for a crime (*ante*, § 980). Obviously, he cannot deny a fact shown by the former mode.¹ But may he deny a fact attempted to be established in the latter mode? The thing actually proved against him is the judgment of conviction; but is the judgment conclusive to establish the fact of the crime? (1) The technical fact that it is here used as between other parties ought not to be an objection; for it is not used against him as a party or as concluding him in respect to a legal right. Moreover, if this objection does not prevent the judgment being offered in evidence, as it certainly does not, it need not prevent the usual effect of conclusiveness being allowed for it. It is therefore correct and not unfair to exclude any attack by other witnesses on the judgment. But the rule against proving particular facts by outside testimony (*ante*, §§ 979, 1002) is not the proper ground for this exclusion; that applies only to the party offering to raise an issue; it cannot apply to exclude testimony in denial by one against whom testimony to a fact has been offered; to allow one party to adduce evidence and to forbid the other to refute it would be grossly unfair.² (2) This being so, and the judgment being conclusive, the witness' own denials of guilt, on re-examination, would be equally inadmissible;³ though it has sometimes been thought, proceeding in part on the erroneous theory just noted, that they are receivable.⁴ (3) May not a pardon for the crime be admitted as negating guilt? If a pardon were always granted on the ground of discovery of innocence, the answer would clearly be in the affirmative, especially since the objection of raising new issues by other witnesses is here practically obviated. But as a pardon has no such necessary significance (since it is usually granted for other reasons than innocence), Courts would probably be found excluding it.⁵ Nevertheless, it seems more proper to conclude that, since a pardon may signify innocence, it should be received. Certainly a reversal of the judgment would be.⁶

¹ See the cases in notes 3 and 4, *infra*.

² For the right to explain, see the next section. Where the witness has not admitted but has denied the imputation on cross-examination, there is no occasion to call other witnesses to corroborate this denial: 1860, Tolman v. Johnstone, 2 F. & F. 66 (Cockburn, C. J., after consulting the other Judges).

³ 1874, State v. Lang, 63 Me. 215; 1876, State v. Watson, 65 id. 79; 1878, Com. v. Gallagher, 126 Mass. 55; 1884, Gertz v. Fitchburg R. Co., 137 id. 77, 80; 1897, Lamourenx v. R. Co., 169 id. 338, 47 N. E. 1009 (quoted in the next section); 1863, Gardner v. Bartholomew, 40 Barb. 326 (on the theory that it is the crime that

impeaches, but that the record of conviction is conclusive of the offence).

⁴ 1902, Reed v. State, — Nehr. —, 92 N. W. 321; 1878, Sims v. Sims, 75 N. Y. 473 (on the theory that the conviction is used as evidence of the crime, but is not conclusive in a civil case; and yet the opinion in a preceding passage maintains that it is the sentence and not the crime that disqualifies).

⁵ On the analogy of the cases cited *ante*, § 980.

⁶ 1899, State v. Duplechain, 52 La. An. 448, 26 So. 1000 (that the conviction had been set aside, and the case nolle prossed, allowed); and see the intimations in cases cited *ante*, § 980.

§ 1117. **Same: Explaining away the Fact; Reformed Good Character in Support.** Conceding the fact of misconduct, as shown by the witness' own cross-examination or by a judgment of conviction of crime, what *explanations* can be made, to diminish or repel the inference of bad moral character suggested thereby?

(1) As against misconduct proved by either of the above modes, the inference of bad character may be met by testimony denying the fact to be inferred, *i. e.* by *affirming the witness' good reputation*. This kind of evidence has been already considered (*ante*, § 1106).

(2) Again, equally after either of those modes of proof, the claim may be made that, while the moral character may then have been bad, as indicated by the fact of misconduct, nevertheless the witness has *reformed* and possesses now a good character. This can certainly be done by the ordinary method of showing his present reputation;¹ and may also properly be done (the objection of confusion of issues not applying) by the witness' own statement on re-examination.²

(3) After proof of a *judgment of conviction*, may the witness be allowed to *explain the circumstances of the offence*, as extenuating the act and diminishing its significance? The conclusiveness of the judgment seems here to be no objection. It is true that no issue could be allowed to be joined on the witness' explanations, and thus there would be no security against false statements by him. Nevertheless, having regard to the publicity of one's discredit on the stand and the necessity of guarding against the abuses of the impeachment-process and of preventing the witness-box from becoming a place of dread and loathing, it would seem a harmless charity to allow the witness to make such *protections* on his own behalf as he may feel able to make with a due regard to the penalties of perjury.³

(4) When, by the allowable process (*ante*, § 981) of *questioning upon cross-examination*, discrediting facts are brought out, there is usually but one type

¹ Cases cited *ante*, § 1106, and the following: 1817, *R. v. Clarke*, 2 Stark. 241 (quoted *ante*, § 1106); 1886, *Mynatt v. Hudson*, 66 Tex. 66, 68, 17 S. W. 396.

² 1855, *Holmes v. Stater*, 17 Ill. 453 (reform shown); 1881, *Conley v. Meeker*, 85 N. Y. 618, *semble* (conviction for crime shown; the witness' statement that he had reformed and led an honest and orderly life, admitted); 1898, *Tennessee C. I. & R. Co. v. Haley*, 29 C. C. A. 328, 85 Fed. 534 (that an ex-convict was a "trustee," allowed).

³ *Accord*: 1899, *South Cov. & C. S. R. Co. v. Beatty*, — Ky. —, 50 S. W. 239 (witness allowed to explain circumstances of his arrest and conviction); 1900, *State v. McClellan*, 23 Mont. 532, 59 Pac. 924 (explanation why he had been in jail, allowed); 1838, *Chase v. Blodgett*, 10 N. H. 22, 24. *Contra*: 1897, *Lamoureux v. R. Co.*, 169 Mass. 338, 47 N. E. 1009 (Holmes, J.: "Upon redirect examination the witness was asked to state the circumstances, the evidence being offered to show the extent of the wickedness involved in the act, and to show the

circumstances. This evidence was excluded. Logically, there is no doubt that evidence tending to diminish the wickedness of the act, like evidence of good character, which is admissible, does meet, as far as it goes, the evidence afforded by the conviction, since that discredits only by tending to show either general bad character, or bad character of a kind more or less likely to be associated with untruthfulness. Nevertheless, the conviction must be left unexplained. Obviously, the guilt of the witness cannot be retried. It is equally impossible to go behind the sentence to determine the degree of guilt. Apart from any technical objection, it is impracticable to introduce what may be a long investigation of a wholly collateral matter into a case to which it is foreign, and it is not to be expected or allowed that the party producing the record should also put in testimony to meet the explanation ready in the mouth of the convicted person. Yet, if one side goes into the matter, the other must be allowed to also").

of fact that admits on principle of any explanation, *i. e.* whose force may be obviated, not by denial, but by the production of other facts, namely, the admission of an indictment or arrest or other charge of misconduct. In the jurisdictions where this is allowed to be brought out on examination (*ante*, §§ 982, 987), it is no more than fair that the witness should be allowed to explain that the arrest or charge was unfounded; for the arrest or indictment is only an *ex parte* mode of inducing belief in the objective fact, *i. e.* the misconduct itself. But it would introduce all the evils of collateral issues (*ante*, § 979) if the showing were allowed to be made by extrinsic testimony; moreover, as the original fact is brought out on cross-examination of the witness himself, fairness is satisfied by confining the explanation within the limits of a re-examination of the witness himself.⁴

(5) As for *other facts drawn out on cross-examination*, supposing them open to any real explanation, it would doubtless be desirable to allow, in the trial Court's discretion, such explanation of them by the witness as seems worth listening to and does not require too much time.⁵ In the same way, where such facts have improperly been received or insinuated on the *cross-examination of a supporting witness* to the good reputation of the impeached witness (*ante*, § 988), an explanation or a denial from the impeached witness himself should be allowed, because the opportunities for abuse in that use of cross-examination are great and every means of counteracting them should be freely allowed.⁶

C. REHABILITATION AFTER IMPEACHMENT BY BIAS, INTEREST, SELF-CONTRADICTION, ADMISSIONS.

§ 1119. Denial of the Fact; Explaining away the Fact; Putting in the whole of a Conversation, etc.; Good Character in Support. The modes of rehabilitation after impeachment by evidence of bias, interest, or self-contradiction, are better considered elsewhere. A brief summary here suffices:

(1) A *denial* of the fact of bias or the like, by other testimony, is always allowable; for any testimony of the opponent admissible to prove a discred-

⁴ 1795, *R. v. Jackson*, Dnhlin, *Ridgeway's* Rep. 63, 87 (the witness was asked whether he had been tried for perjury, and was allowed to explain that he had been acquitted and on what grounds; here a witness to corroborate him as to these facts was also admitted); 1834, *R. v. Noel*, 6 C. & P. 336 (the witness having been charged with keeping a gaming-house, he was allowed to explain that he was innocent); 1882, *Driscoll v. People*, 47 Mich. 417, 11 N. W. 221 (explaining the reasons for an arrest, allowed); 1892, *Hill v. State*, 91 Tenn. 521, 523, 19 S. W. 674 (protestation of innocence of an offence for which witness had been indicted, allowed); 1902, *Stewart v. State*, — Tex. Cr. —, 67 S. W. 107 (witness allowed to state the disposal of indictments used to discredit him, but not to explain the details of the charges).

⁵ 1899, *Sayles v. Fitzgerald*, 72 Conn. 391, 44 Ad. 733 (to show bias, plaintiff testified that

defendant's witness had been discharged by the former for drunkenness; plaintiff's testimony on cross-examination as to specific acts of witness' drunkenness, allowed to be contradicted by witness); 1898, *Ellis v. State*, 152 Ind. 326, 52 N. E. 82 (testimony "in excuse and extenuation" excluded); 1886, *State v. Starnes*, 94 N. C. 976, *semble* (allowing explanation of particular misconduct; but here the question put on cross-examination was otherwise objectionable). Compare the rule for *curative irrelevancies* (*ante*, § 15); and the rule for a witness' right in general to *volunteer explanations* (*ante*, § 785).

⁶ 1882, *Abernethy v. Com.*, 101 Pa. 322, 328 (where, on cross-examination of a witness to good character, derogatory facts had come out, an explanation of them was allowed in answer).

iting fact must of course in fairness be allowed to be met by testimony denying the alleged fact. The only apparent (not real) exceptions could be the cases of proof by record of conviction (where the principle of conclusiveness of judgments applies) and of cross-examination by the opponent; but the former does not here come into use, and the latter involves the rule in regard to improper contradictions on collateral matters (dealt with *ante*, § 1007), and in regard to self-contradictions on collateral matters (dealt with *ante*, § 1046).

(2) The modes of *explaining away* impeaching facts of the present sorts are considered already elsewhere, — including their application to evidence of Bias, Interest, or Corruption (*ante*, §§ 952-969); to evidence of Self-Contradictions or Inconsistent Statements (*ante*, §§ 1044-1046); to evidence of Admissions (*ante*, § 1058); and in regard to all of these, by offering good character in support of the impeached witness (*ante*, §§ 1107-1109).

There remains now to be considered the method of supporting a witness, after any kind of impeachment, by prior consistent statements.

D. REHABILITATION BY PRIOR CONSISTENT STATEMENTS.

1. Witnesses in General.

§ 1122. **General Theory.** Under the head of Explanation, in dealing with the various modes of Impeachment (character, bias, interest, corruption, contradiction, self-contradiction), it would have been logically proper to consider, with reference to each of these modes, how far the effect of the impeaching evidence might be explained away or rebutted by the circumstance that the witness had, at a former time, told a consistent or similar story. Whether he could in this manner effect anything towards rehabilitating his credit must depend on the kind of impeaching evidence that has been offered; for clearly this mode of explanation may be relevant and forceful for some kinds of impeaching facts, but not for others. It is, however, more convenient, for the sake of clearness and comparison, to consider the various uses of this kind of explanatory evidence here in one place.

§ 1123. **History.** Down through the 1700s the notion prevailed that a witness could always be corroborated, without any limitation, by the circumstance of having made at other times statements consistent with the testimony delivered by him in court. This practice was based on a loose instinctive logic, popular enough to-day, that there is some real corroborative support in such evidence; and the only objection then thought of was the Hearsay rule.¹ This rule does not in truth apply to prohibit such evidence (*post*,

¹ *Ante* 1726, Gilbert, Evidence, 68, 150 ("Though hearsay may not be allowed as direct evidence, yet it may be in corroboration of a witness' testimony, to show that he affirmed the same thing before on other occasions and that the witness is still consistent with himself; [he then makes an exception for former sworn testimony.] for if a man be of that ill mind to swear falsely at one trial, he may well do the same on

the other on the same inducements; but what a man says in discourse without premeditation or expectation of the cause in question is good evidence to support him"). The following instances occur: 1679, Knox's Trial, 7 How. St. Tr. 763, 790; 1696, Sir John Freind's Trial, 13 id. 32; 1753, Squires' Trial, 19 id. 270; 1754, Causing's Trial, ib. 397 (of a defendant not testifying); 1767, Buller, Trials at Nisi Prius,

§§ 1131, 1792), as is now clearly understood; but there are other and serious objections to its indiscriminate admission in chief, and before any impeachment whatever. These objections began to be felt and offered by the end of the 1700s;² but it was not until the 1800s that any definite discriminations were settled upon and accepted; and even to-day there is much difference of judicial opinion as to the extent to which such evidence may be considered.

§ 1124. Offered (1) in Chief, before any Impeachment. When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it. Such evidence would be both irrelevant and cumbersome to the trial:

1836, *Story, J.*, in *Ellicott v. Pearl*, 10 Pet. 439: "His testimony under oath is better evidence than his confirmatory declarations not under oath; and the repetition of his assertion does not carry his credibility further, if so far as his oath."

1878, *Reade, J.*, in *State v. Parish*, 70 N. C. 612: "It can scarcely be satisfactory to any mind to say that, if a witness testifies to a statement to-day under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath. . . . The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth. Indeed it has never been supposed by any writer or judge that the repetition had any force as substantive evidence to prove the facts, but only to remove an imputation upon the witness. . . . If he stood before the court unimpeached, it was unnecessary and mischievous to encumber the court and oppress the defendant with his garrulousness out of court and when not on oath."¹

294 (like Gilbert); 1770, Boston Massacre Trial, Chandler's Amer. Crim. Tr. I, 303, 361; and cases cited in § 1364, *post* (history of the hearsay rule). *Luttrell v. Reynell*, 1 Mod. 282 (1671), is usually cited as an instance of the old rule; yet apparently it represents an aspect of the rule still acknowledged as law, namely, that an accomplice's similar statements, made before promise of pardon, are admissible to rebut the inference that his testimony was composed under influence of the promise (*post*, § 1126).

² 1776, *Halliday v. Sweeting*, cited 3 Dong. El. C. 163 (former consistent statements, admitted at the trial; but held inadmissible on a motion for a new trial). The MS. cases cited by McNally (Evidence, 378) indicate that in Ireland, by 1795, the admission was being frequently opposed; but it was maintained through the century.

¹ *Accord* (and many of the cases in the ensuing sections also concede this): 1783, *R. v. Parker*, 3 Dong. 242 (excluded; but this case says nothing as to the conditions on which to-day such evidence is recognized as admissible); 1811, *Redesdale, M. R.*, in *Berkeley Peerage Case*, as cited in *Phillips, Evidence*, 5th Am. ed., 307 (not admissible for "confirming" testimony); *Ala.*: 1895, *Chilton v. State*, 103 Ala. 98, 16 So. 797; 1895, *Sanders v. State*, ib. 4, 16 So. 935; 1897, *James v. State*, 115 id. 83, 22 So. 565; *Cal.*: 1895, *People v. Schmitt*, 106 Cal.

48, 39 Pac. 204; *Shamp v. White*, ib. 220, 39 Pac. 537; *Conn.*: 1830, *State v. DeWolf*, 8 Conn. 93, 100 (left undecided); 1896, *Builders' Co. v. Cox*, 68 id. 380, 36 Atl. 797 (excinded); 1898, *Baxter v. Camp*, 71 id. 245, 41 Atl. 803 (same); 1900, *Palmer v. Hartford D. Co.*, 73 id. 182, 47 Atl. 125 (same); *Ind.*: 1837, *Coffin v. Anderson*, 4 Blackf. 395, 398; 1882, *Bristow v. Bristow*, 82 Ind. 276; *Ky.*: 1871, *Sullivan v. Norris*, 8 Bush 519 (deposition); 1898, *Franklin v. Com.*, 105 Ky. 237, 48 S. W. 986; *La.*: 1899, *State v. Carter*, 51 La. An. 442, 26 So. 385; 1903, *State v. Wheat*, 111 La. —, 35 So. 955; *Me.*: 1831, *Ware v. Ware*, 8 Greenl. 55; 1853, *Smith v. Morgan*, 38 Me. 468; 1875, *Sidlefinger v. Bucklin*, 64 id. 371; *Mass.*: 1836, *Deshon v. Ins. Co.*, 11 Metc. 199, 209; 1868, *Com. v. James*, 99 Mass. 438, 440, *semble*; 1897, *Burns v. Stuart*, 168 id. 19, 46 N. E. 399; *Miss.*: 1901, *Williams v. State*, 79 Miss. 555, 31 So. 197; *Mo.*: 1883, *State v. Grant*, 79 Mo. 113, 133; *Mont.*: 1903, *Farleigh v. Kelley*, — Mont. —, 72 Pac. 756 (absent attesting witness); *N. Y.*: 1826, *Jackson v. Etz*, 5 Cow. 314, 320; 1834, *People v. Vane*, 12 Wend. 78; 1840, *Robb v. Hackley*, 23 id. 50; 1900, *People v. Smith*, 162 N. Y. 520, 56 N. E. 1001; *N. C.*: 1878, *State v. Parish*, 79 N. C. 610; 1897, *Burrett v. R. Co.*, 120 id. 517, 26 S. E. 819; *Rittenhouse v. R. Co.*, ib. 544, 26 S. E. 922; *Pa.*: 1823, *Henderson v. Jones*, 10 S.

§ 1125. **Offered (2) after Impeachment of Moral Character.** When a bad reputation for veracity has been introduced to impeach, proof of consistent statements is equally irrelevant and useless. Even assuming the existence of the bad character alleged, a depraved witness may well have repeated a story consistently. The bad character indicates some probability of untrustworthiness; the evidence of repetition does not attempt to meet the charge of bad character or diminish its effect, but evades it by retorting with the irrelevant fact that the witness has been consistent. A few Courts only have seen fit to admit the evidence.¹

§ 1126. **Offered (3) after Impeachment by Inconsistent Statements.** The field in which the controversy is most vigorous and the opposing reasons most plausible is that of impeachment by prior inconsistent statements. On behalf of the admission of the supporting evidence, the earlier and conventional argument is that if a contradictory statement counts against the witness, a consistent one should count for him, — a bit of loose logic which is natural and plausible:

1815, *Tilghman, C. J.*, in *Packer v. Gonsalus*, 1 S. & R. 536: "Both being without oath, one [statement] is as good as the other, and the jury will judge of his credit on the whole."

1879, *Smith, C. J.*, in *Jones v. Jones*, 79 N. C. 240: "The admissibility of previous correspondent accounts of the same transaction to confirm the testimony of an assailed witness delivered on the trial rests upon the obvious principle that, as conflicting statements impair, so uniform and consistent statements sustain and strengthen his credit before the jury. . . . Again, the accuracy of memory is supported by proof that, at or near the time when the facts deposed to have transpired and were fresh in the mind of the witness, he gave the same version of them that he testified to on the trial."¹

The answer to this argument is simply that, since the self-contradiction is conceded, it remains as a damaging fact, and is in no sense explained away by the consistent statement. It is just as discrediting, if it was once uttered,

& R. 323, 324; 1835, *Craig v. Craig*, 5 Rawle 91; 1847, *McKee v. Jones*, 6 Pa. 425, 429; 1877, *Hester v. Com.*, 85 Id. 139, 158, *semble*; 1890, *Crooks v. Bunn*, 136 Id. 368, 371, 20 Atl. 529; 1897, *Frazier v. Linton*, 183 Id. 166, 38 Atl. 589; S. D.: 1903, *Tenney v. Rapid City*, — S. D. —, 96 N. W. 96; *Tenn.*: 1852, *Nelson v. State*, 2 Swan 237, 258 (the accused's or a witness' deposition before the examining magistrate, not to be read for him); U. S.: 1858, *U. S. v. Holmes*, 1 Cliff. 104; *Va.*: 1901, *Repass v. Richmond*, 99 Va. 508, 39 S. E. 160.

¹ 1873, *Sonneborn v. Bernstein*, 49 Ala. 168, 171 (admitted); 1888, *Mason v. Vestal*, 86 Cal. 398, 398, 26 Pac. 213 (excluded); 1868, *State v. Vincent*, 24 Ia. 570, 574 (excluded); 1853, *Gates v. People*, 14 Ill. 433, 439 (left undecided); 1873, *Stolp v. Blair*, 68 Id. 541, 543 (excluded); 1875, *Sieleingier v. Bucklin*, 64 Me. 373, 375 (excluded); 1849, *State v. Dove*, 10 Ire. 469, 473 (admitted); 1854, *March v. Harrell*, 1 Jones L. 329 (same); *State v. Thomason*, ib. 274 (same); 1823, *Henderson v. Jones*, 10 S. & R. 323 (ad-

mitted); 1839, *Munson v. Hastings*, 12 Vt. 346, 347, 350 (excluded, after impeachment as to no knowledge of a Supreme Being or of the obligation of an oath); 1841, *Gibbs v. Linsley*, 13 Id. 208, 215 (same; general bad character). In New York the evidence was at first received: 1826, *Jackson v. Etz*, 5 Cow. 314, 320; 1834, *People v. Vane*, 12 Wend. 78; 1838, *People v. Rector*, 19 Id. 569, 583 (admissible after "general impeaching evidence"); but later decisions repudiated these: 1840, *Robb v. Hackley*, 23 Id. 50. Besides the above Courts, those mentioned *post*, § 1130, which admit prior consistent statements after "any impeaching evidence" would of course admit them after an impeachment of general character. For their use after impeachment by particular crimes, see *post*, § 1131.

² This latter argument is unsound, for no one has ever thought of requiring that the consistent statements, to be admissible, should have been made freshly after the event; except in rape cases (*post*, § 1134).

even though the other story has been consistently told a score of times. This answer has weighed with many Courts :

1835, *Gibson, C. J.*, in *Craig v. Craig*, 5 Rawle 97: "As rebutting, it cannot be pretended that they disprove the fact of [self-]contradiction, or that they remove the imputation of inconsistency; for it follows not, because the witness had sometimes told the tale delivered by him at the bar, that he had never told a different one. If it be supposed that they rebut the inference to be drawn from the fact of contradiction by decreasing its force, they still leave the witness more exposed than ever to the charge of vacillation; and how he is confirmed by being left in a predicament so unfavorable to his veracity is not easy to comprehend."

1858, *Bigelow, J.*, in *Com. v. Jenkins*, 10 Gray 488: "It did not relieve the difficulty, or in any degree corroborate the last story told by the witness, to show that previously he had made similar statements of the transaction. . . . The utmost that could be claimed for it in this view would be that it rendered the last statement more probable and worthy of credit, because, although the witness had made a contradictory statement, he had made another statement similar to those to which he had testified before the jury. But such a corroboration is altogether too slight and remote; indeed, if admitted and followed out to its legitimate results, it might properly lead to a protracted inquiry to ascertain which of the two statements had been made most frequently by the witness; and when this was determined, then it would be necessary to ask the jury to believe the witness if he had repeated the statement made before them a greater number of times than the contradictory one which had been proved to impeach his evidence. It is obvious that such a course of inquiry would furnish no means by which the credit due to the testimony of a witness could be satisfactorily ascertained."

But this answer, forceful as it seems at first sight, is itself in one respect based on a fallacy. "The imputation on his veracity," says Mr. Phillipps,³ and others use similar terms, "results from the fact of his having contradicted himself, and this is not in the least controverted . . . by the evidence in question." But is it a *proved fact* that he has uttered the self-contradiction? And may not the consistency of his other statements help with the jury to controvert the assumption that he did utter the contradiction? The jury have still to determine whether they will believe the witnesses who say that he did in fact utter it; and if his consistency at other times can assist them in reaching a conclusion upon this fundamental point, it is relevant. That it may so assist them has been clearly pointed out by at least two Courts :

1871, *Cooley, J.*, in *Stewart v. People*, 23 Mich. 74: "This question appears to us to be one of no ordinary difficulty. If it were an established fact that the witness had made the contradictory statements, we should say that the supporting evidence here offered was not admissible. If a witness has given different accounts of an affair on several different occasions, the fact that he has repeated one of these accounts oftener than the opposite one can scarcely be said to entitle it to any additional credence. A man untruthful out of court is not likely to be truthful in court; and where the contradictory statements are proved, a jury is generally justified in rejecting the testimony of the witness altogether. But in these cases the evidence of contradictory statements is not received until the witness has denied making them, so that an issue is always made between the witness sought to be impeached and the witness impeaching him. The jury, therefore, before they can determine how much the contradictory statements ought to shake the credit of the witness, are

³ Evidence, 5th Am. ed., 307.

required first to find from conflicting evidence whether he made them or not. . . . Now there are many cases in which, if evidence is given of statements made by a witness in conflict with those he has sworn to, his previous statements should not only be received in support of his credit, but would tend very strongly in that direction. If, for instance, the witness is himself the prosecutor, and has already made sworn complaint, there could be no doubt, we suppose, that the pendency of this complaint, its contents and the relation of the witness to it, might be put in evidence, and that they would raise a strong probability that the testimony as to conflicting accounts, as having been given about the same time, was either mistaken or corrupt. Suppose a person to be testifying in a case in which he had spent a considerable period of time and a large sum of money in pursuing an alleged criminal to conviction, and he is confronted with evidence of his own conflicting statements; the rule would be exceedingly unjust, as well as unphilosophical, which should preclude his showing, at least by his own evidence, such circumstances of his connection with the case as would make the impeaching evidence appear to be at war with all the probabilities. And other cases may readily be supposed in which, under the peculiar circumstances, the fact that the witness has always previously given a consistent account of the transaction in question might well be accepted by the jury as almost conclusive that he had not varied from it in the single instance testified to for the purpose of impeachment. — It is impossible to lay down any arbitrary rule which could be properly applied to every case in which this question could arise; but we think that there are some cases in which the peculiar circumstances would render this species of evidence important and forcible. The tender age of the principal witness might sometimes be an important consideration; and the fact that the previous statement was put in writing — as it was in this instance — at a time when it would be reasonably free from suspicion might very well be a controlling circumstance. We think the circuit judge ought to be allowed a reasonable discretion in such cases, and that though such evidence should not generally be received, yet that his discretion in receiving it ought not to be set aside except in a clear case of abuse.”³

This argument seems irrefragable. It does not deny the correctness of the preceding argument, which points out that a consistent statement does not explain away a self-contradiction; but it shows that argument to rest upon the assumption that there has been a self-contradiction, and it reminds us that consistency of statement may serve to overthrow that assumption. This third view, however, has rarely been noticed. Most Courts accept or reject this kind of evidence according as they are moved by the first or the second arguments above.⁴

³ A similar exposition is made by Johnson, J., in *Lyles v. Lyles*, 1 Hill Eq. S. C. 78 (1833).

⁴ *Eng.*: 1754, *Canning's Trial*, 19 How. St. Tr. 508, and *passim* (admitted); *Ala.*: 1852, *Nichols v. Stewart*, 20 Ala. 358, 361 (excluded); 1873, *Sonneborn v. Bernstein*, 49 id. 168, 171, *semble* (same); 1895, *Jones v. State*, 107 id. 93, 16 So. 237 (same); *Cal.*: 1874, *People v. Doyell*, 48 Cal. 85, 90 (excluded); 1887, *Barkly v. Copeland*, 74 id. 1, 4 (same); 1891, *Mason v. Vestal*, 88 id. 396, 398, 26 Pac. 213 (same); *Ga.*: 1889, *McCord v. State*, 83 Ga. 521, 531, 10 S. E. 437, *semble* (excluded); *Ill.*: 1873, *Stolp v. Blair*, 68 Ill. 541, 543 (left undecided); *Ind.*: 1837, *Coffin v. Anderson*, 4 Blackf. 395, 398 (admitted, and in the following five cases); 1842, *Beauchamp v. State*, 6 id. 299, 308; 1853, *Perkins v. State*, 4 Ind. 222; 1867, *Dalley v. State*, 28 id. 285; 1876, *Brookbank v. State*, 55 id. 169, 172; 1881, *Carter v.*

Carter, 79 id. 466; 1885, *Hodges v. Bales*, 102 id. 494, 500, 1 N. E. 692 (excluded); 1888, *Ligansport & P. G. T. Co. v. Heil*, 118 id. 135, 136, 20 N. E. 703, *semble* (same); 1892, *Hobbs v. State*, 133 id. 404, 407, 32 N. E. 1019 (admitted); 1897, *Reynolds v. State*, 147 id. 3, 46 N. E. 31, *semble* (admitted); 1897, *Hinshaw v. State*, ib. 234, 47 N. E. 158 (same); *Ia.*: 1868, *State v. Vincent*, 24 Ia. 570, 574 (excluded); *La.*: 1894, *State v. Cady*, 46 La. An. 1346, 1349, 16 So. 193 (same); *Ma.*: 1874, *State v. Reed*, 62 Me. 147 (admitted); *Md.*: 1871, *McAteer v. Horsey*, 33 Md. 439, 465 (left undecided); *St.* 1874, c. 386, Pub. Gen. L. 1868, art. 35, § 2 (prohibits such corroboration for parties to the cause: quoted *ante*, § 488); 1890, *Mallonee v. Duff*, 72 id. 283, 287, 19 Atl. 708 (statute applied); *Miss.*: 1858, *Com. v. Jenkins*, 10 Gray 485, 487 (excluded); 1890, *Hewitt v. Corey*, 150 Mass. 445,

From the foregoing prohibition, however (as obtaining in most Courts), must be distinguished the case where the impeaching inconsistency consists, not in an express statement, but in *conduct* (*ante*, §§ 1040, 1042) implying an inconsistency; for here the implication may convincingly be removed by statements at or about the time which explain the conduct and refute the imputation that the present explanation is an afterthought.⁵

It is sometimes said, by Courts admitting consistent statements, that they must have been *uttered before the self-contradiction*; ⁶ though this seems

23 N. E. 223 (same); *Mich.*: 1868, *Brown v. People*, 17 Mich. 429, 435 (excluded); 1871, *Stewart v. People*, 23 id. 63, 74 (admissible or not in the trial Court's discretion; see quotation *supra*); *Miss.*: 1870, *Head v. State*, 44 Miss. 731, 751 (excluded); *Mo.*: 1896, *State v. Taylor*, 134 Mo. 109, 35 S. W. 92 (excluded); 1903, *State v. Hendricks*, 172 id. 654, 73 S. W. 194 (similar statements of a dying declarant, excluded); *Mont.*: 1901, *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884 (excluded); *N. H.*: 1833, *French v. Merrill*, 6 N. H. 465, 467 (admitted; but treated as involving a question of recent fabrication); 1860, *Reed v. Spaulding*, 42 id. 14, 117, 122 (excluded; the preceding case in this aspect discredited); 1866, *Judd v. Brentwood*, 46 id. 430 (excluded); *N. Y.*: the evidence was at first received: 1826, *Jackson v. Etz*, 5 Cow. 314, 320; 1834, *People v. Vane*, 12 Wend. 78; 1836, *People v. Moore*, 15 id. 420, 423; 1838, *People v. Rector*, 19 id. 569, 583, per Cowen, J.; *Brunson, J., diss.*; but later decisions repudiated these and declared the evidence inadmissible: 1840, *Robb v. Haekley*, 23 Wend. 50; *Dudley v. Bolles*, 24 id. 465, 472; *N. C.*: 1822, *Johnson v. Patterson*, 2 Hawks 183 (admitted); *State v. Twitly*, ib. 449 (same, and in following cases); 1848, *State v. George*, 8 Ire. 324, 328; 1849, *Hoke's Ex'rs v. Fleming*, 10 id. 261, 266; *State v. Dove*, ib. 469, 473; 1854, *March v. Harrell*, 1 Jones L. 329; *State v. Thomason*, ib. 274; *Pa.*: 1807, *Turnbull v. O'Hara*, 4 Yeates 446, 451, *semble* (admitted); 1815, *Packer v. Gonsalus*, 1 S. & R. 526, 536 (same); 1821, *Foster v. Shaw*, 7 id. 156, 162 (same); 1823, *Henderson v. Jones*, 10 S. & R. 322 (same); 1835, *Craig v. Craig*, 5 Rawle 91 (treating the matter as doubtful); 1847, *McKee v. Jones*, 6 Pa. 425, 428 (admitted); 1890, *Crooks v. Bunn*, 136 Pa. 368, 371, 20 Atl. 529 (admitted, but qualified as "sometimes and in some circumstances competent"); *S. C.*: 1833, *Lyles v. Lyles*, 1 Hill Eq. 77 (admitted); 1848, *State v. Thomas*, 3 Strubb. 269, 271 (excluded, where "inconsistencies were apparent" in his testimony); *Tenn.*: 1848, *Story v. Saunders*, 8 Humph. 663, 666, *semble* (excluded); 1855, *Dossett v. Miller*, 3 Sneed 72, 76 (admitted; not citing the preceding case); 1860, *Queener v. Morrow*, 1 Coldw. 123, 134 (same); 1872, *Third Nat'l Bank v. Robinson*, 1 Bnxt. 479, 484 (same); 1880, *Hayes v. Cleatham*, 6 Lea 1, 10 (same); 1890, *Glass v. Bennett*, 89 Tenn. 478, 481, 14 S. W. 1085 (same); 1891, *Graham v. McReynolds*, 90 id. 673, 694, 18 S. W. 272 (reviewing the cases and discrediting *Story v. Saunders*); *Tex.*: 1894, *Goode v. State*, 32 Tex. Cr. 505, 508, 24 S. W. 102

(admitted); 1898, *Red v. State*, 39 id. 414, 40 S. W. 408 (admissible, when "shortly after the occurrence and before any inducement to falsify his testimony"); *U. S.*: 1816, *Wright v. DeLyne*, 1 Pet. C. C. 199, 203 (admitted); 1834, *Ellicott v. Pearl*, 1 McLean 206, 211 (excluded); 1836, *Ellicott v. Pearl*, 10 Pet. 412, 439 (same); 1850, *Conrad v. Griffey*, 11 How. 480, 490, *semble* (admissible); 17: 1839, *Munson v. Hastings*, 12 Vt. 346, 350, *semble* (excluded); 1841, *Gibbs v. Linsley*, 13 id. 208, 215 (same); 1848, *State v. Flint*, 60 id. 307, 310, 319, 14 Atl. 178 (same); 1899, *Lavigne v. Lee*, 71 id. 167, 42 Atl. 1093 (same); *Wash.*: 1900, *State v. Coates*, 22 Wash. 601, 61 Pac. 726 (admitted where the contradictory statement was made under duress).

⁵ 1890, *Hewitt v. Corey*, 150 Mass. 445, 23 N. E. 223 (11 testified that a horse, the subject of an alleged conversion, was his wife's, not his own; his former inclusion of the horse in a chattel mortgage is shown in impeachment; he is allowed to show, in explanation, that it was so included by mistake, and that he so told the mortgagees shortly afterwards); 1880, *Zell v. Com.*, 94 Pa. 258, 266, 273 (poisoning K.; R. testified to severe illness while calling at K.'s house at the same time; to discredit this, it was shown that on her way walking home she met two friends and did not mention the illness; to explain away this, evidence was admitted that on her way home she did stop at another friend's and told of her illness); 1859, *State v. Demin*, 32 Vt. 158, 161 (arson); the identifying witnesses' former testimony at the preliminary examination being less positive and suggesting recent contrivance, evidence was admitted of their having caused the defendant's arrest immediately after the fire, as indicating a complete recognition at the time). The following case shows the distinction between this and the ordinary principle: 1868, *Brown v. People*, 17 Mich. 429, 435 (to fix the date of an alibi, W. testified that it was Aug. 1; that he told another person on Aug. 2 that he had seen the defendant at the place the night before, excluded). Compare the principles of §§ 1129, 1131, *post*.

⁶ 1860, *Queener v. Morrow*, 1 Coldw. 123, 134 (for this would otherwise allow "every unprincipled witness to bolster up his credit"; moreover, here the statements were made under apparent hope of obtaining thereby a discharge from jail); 1891, *Graham v. McReynolds*, 90 Pa. 673, 697, 18 S. W. 272; 1836, *Ellicott v. Pearl*, 10 Pet. 412, 440, per Story, J., *semble*; 1850, *Conrad v. Griffey*, 11 How. 480, 491 (because "it is possible, if not probable, that the inducement to make them is for the very purpose of coun-

an unnecessary refinement. It has also been said that the permission, when granted, to corroborate by consistent statements does not apply to a *party*, even when he is a witness, against whom admissions have been used;⁷ but this is unsound.⁸

§ 1127. **Offered (4) after Impeachment by Contradiction.** A former consistent statement helps in no respect to remove such discredit as arises from a contradiction by other witnesses. When B is produced to swear to the contrary of what A has asserted on the stand, it cannot help us, in deciding between them, to know that A has asserted the same thing many times previously. If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible. Nevertheless, a few Courts see fit to receive the evidence, misled by the traditional notion that it has some force.¹

§ 1128. **Offered (5) after Impeachment by Bias, Interest, or Corruption; Statements of an Accomplice.** (1) A consistent statement, at a *time prior* to the existence of a fact said to indicate Bias, Interest, or Corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence. The former statements are therefore admissible:

1806, Mr. W. D. Evans, Notes to Pothier, II, 247: "If a witness speaks to facts negating the existence of a contract, and insinuations are thrown out that he has a near connection with the party on whose behalf he appears, that a change of market or any other alteration of circumstances has excited an inducement to recede from a deliberate engagement, the proof by unsuspecting testimony that a similar account was given when the contract alleged had every prospect of advantage removes the imputation resulting from the opposite circumstance, and the testimony is placed upon the same level which

teracting those first uttered"). *Contra*: 1876, Brookhauk v. State, 55 Ind. 169, 172.

⁷ 1898, Logansport & P. G. T. Co. v. Heil, 118 Ind. 135, 20 N. E. 703; Md. St. Co. v. Heil, and Pub. Gen. L. 1888, Art. 35, § 2 (quoted *ante*, § 488); 1890, Mallonee v. Duff, 72 Md. 283, 287, 19 Atl. 708.

⁸ Examples of such use (cited also *supra* and *infra*): 1860, Reed v. Spanking, 42 N. H. 114, 117, 123; 1866, Judd v. Brentwood, 46 Id. 430; 1868, Washington Fire Ins. Co. v. Davison, 30 Md. 92, 104; 1871, McAleer v. Horsey, 35 Id. 439, 464; 1881, McLeod v. Bullard, 84 N. C. 515, 529; 1894, Wallace v. Grizzard, 114 Id. 488, 19 S. E. 760.

But whether, *without the party being a witness*, his consistent claims can be used in general to rebut his admissions is a different question: *post*, § 1133.

¹ D. C.: 1880, U. S. v. Newsom, 1 Mackey 152, 169 (admitted); Ill.: 1873, Stolp v. Blair, 68 Ill. 541, 543 (excluded); Ind.: 1881, Carter v. Carter, 79 Ind. 466, 468 (excluded); 1885, Hodges v. Bales, 102 Id. 494, 500, 1 N. E. 692 (same); Ia.: 1868, State v. Vincent, 24 Ia. 570, 574, *semble* (excluded); Md.: 1823, Cooke v. Curtis, 6 H. & J. 93 (admitted, and in the following cases); 1868, Washington Fire Ins. Co. v. Davison, 30 Md. 92, 104; 1871, McAleer v.

Horsey, 35 Id. 439, 463 (Stewart, J., diss.); 1874, Maitland v. Bank, 40 Id. 540, 559; 1878, Bloomer v. State, 48 Id. 521, 537; 1890, Mallonee v. Duff, 72 Id. 283, 287, 19 Atl. 708; 1901, Gill v. Staylor, 93 Id. 453, 49 Atl. 630 (entries in a book, treated as made by the witness himself, admitted to corroborate him, after impeachment by contradiction on a material point); Mo.: 1846, Riney v. Vanlandingham, 9 Mo. 807, 812 (excluded); N. Y.: the evidence was at first received; 1834, People v. Vane, 12 Wend. 78, *semble*; but this case was later repudiated; 1840, Robb v. Hackley, 23 Wend. 50; Dudley v. Bolles, 24 Id. 465, 472; N. C.: 1854, March v. Harrell, 1 Jones L. 329 (admitted); 1874, Bullinger v. Marshall, 70 N. C. 520, 524 (same); 1879, State v. Blackburn, 80 Id. 474, 478 (dying declarant); 1881, McLeod v. Bullard, 84 Id. 515, 529; 1894, Wallace v. Grizzard, 114 Id. 488, 19 S. E. 760; Pa.: 1823, Henderson v. Jones, 10 S. & R. 322 (admitted); 1877, Hester v. Com., 85 Pa. 139, 158, *semble* (same); Tenn.: 1890, Glass v. Bennett, 89 Tenn. 478, 481, 14 S. W. 1085, *semble* (admitted where the impeachment merely offered contrary facts, not self-contradictions, but the Court treated them as the latter); U. S.: 1816, Wright v. DeKlyne, 1 Pet. C. C. 199, 203, *semble* (excluded); Vt.: 1839, Munson v. Hastings, 12 Vt. 346, 350 (excluded).

it would have if the motives for receding from a previous intention had never had existence."¹

(2) An *accomplice*, whether a co-indictee or not, is always under a suspicion of discredit, implied from his interest to screen himself and to secure the conviction of his companions (*ante*, § 967); and he is usually required to be corroborated by other witnesses (*post*, § 2056). Is it permissible to support him by the fact that he told a consistent story before taking the stand? It would seem not;² unless by some mode of impeachment some other principle (*supra*, par. 1; *post*, § 1129) becomes applicable.

§ 1129. Offered (6) after Impeachment as to Recent Contrivance. Impeachment on the ground of recent contrivance must be distinguished (as it is not always) from the preceding ground. It is more nearly connected with the case of impeachment by Self-Contradiction. The charge of Recent Contrivance is usually made, not so much by affirmative evidence, as by negative evidence that the witness did *not* speak of the matter before, at a time when it would have been natural to speak; his silence then is urged as inconsistent with his utterances now, *i. e.* as a Self-Contradiction (*ante*, § 1042). The effect of the evidence of consistent statements is that the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story. This use of former similar statements is universally conceded to be proper; though occasionally it is difficult to apply the principle to the facts.¹

¹ The evidence was held admissible, except as otherwise noted: *King*: 1803, *Clare's Trial*, 28 How. St. Tr. 899 (after insinuations that the witness had been motivated by a reward); *Ala.*: 1895, *Yarbrough v. State*, 105 Ala. 43, 16 So. 758; *Cal.*: 1874, *People v. Doyell*, 48 Cal. 85, 90, *semble*; 1887, *Barkly v. Copeland*, 74 id. 1, 3, 15 Pac. 307 (before the time of an alleged offer of a bribe); 1888, *Mason v. Vestal*, 88 id. 396, 398, 26 Pac. 213, *semble*; *Ga.*: 1889, *McCord v. State*, 83 Ga. 521, 530, 10 S. E. 437 (before the time of an alleged bribery); *Ill.*: 1853, *Gates v. People*, 14 Ill. 433, 438; 1873, *Stolp v. Blair*, 64 id. 541, 543; *Ia.*: 1868, *State v. Vincent*, 24 Ia. 570, 575; 1868, *Boyd v. Bank*, 25 id. 257; *La.*: 1894, *State v. Cady*, 46 La. An. 1346, 1349, 16 So. 195 (*semble*, the principle conceded, but held not applicable where the proponent of the witness had himself shown the fact indicating bias); *Mass.*: 1858, *Com. v. Jenkins*, 10 Gray 485, 488 (admissible, after evidence that "he is under a strong bias or in such a situation as to put him under a sort of mental duress to testify in a particular way"); 1890, *Hewitt v. Corey*, 150 Mass. 445, 23 N. E. 223 (same); *Mo.*: 1896, *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *N. H.*: 1860, *Reed v. Spaulding*, 42 N. H. 114, 123; 1866, *Judd v. Brentwood*, 46 id. 430; *N. Y.*: 1840, *Hobb v. Hackley*, 23 Wend. 50 (admissible, after evidence that the witness speaks "under the influence of some motive prompting him to make a false or colored statement"); *N. C.*: 1891, *State v. Brabham*,

108 N. C. 793, 13 S. E. 217 (deceased's son); *Tenn.*: 1855, *Dossett v. Miller*, 3 Sneed 72, 76; 1860, *Queener v. Morrow*, 1 Coldw. 123, 134; 1880, *Hayes v. Cheatham*, 6 Lea 1, 10, *semble*; 1890, *Glass v. Bennett*, 89 Tenn. 478, 481, 14 S. W. 1085, *semble*; 1900, *Nashville C. & St. L. R. Co. v. Lawson*, 105 id. 639, 58 S. W. 480; *Utah*: 1898, *Ewing v. Kelth*, 16 Utah 312, 52 Pac. 4 (the interest arising from being a party to the litigation, held not sufficient); *Vt.*: 1868, *State v. Flint*, 60 Vt. 304, 307, 316, 14 Atl. 178 (undue influence of an interested person). The statement in *Reed v. Spaulding*, 42 N. H. 123 (1860), that the sustaining statement "must have been, or at least appeared to be, directly against his interests," is not sound.

² 1895, *State v. Callahan*, 47 La. An. 444, 455, 17 So. 50 (by a majority); 1895, *State v. Doudon*, *ib.* 977, 17 So. 685; 1901, *State v. Williams*, 129 N. C. 581, 40 S. E. 84 (co-defendant, after verdict of not guilty entered by consent). *Contra*: 1834, *People v. Vane*, 12 Wend. 78, 79.

³ Compare with the following the cases in § 1126, *ante*, note 5: *Ga.*: 1902, *Atlanta K. & N. R. Co. v. Strickland*, 116 Ga. 439, 42 S. E. 864 (not admitted, where the opponent had impeached the witness' testimony as "manufactured"; the opinion ignores the principle involved); *Ia.*: 1865, *State v. Cruise*, 19 Ia. 312 (whether the defendant was at a place on the 14th was essential; the defendant admitted that he was there on the 7th; a statement of his made on the 9th, and speaking

§ 1130. **Same: Statements Identifying an Accused, or Fixing a Time or Place.** (1) Ordinarily, when a witness is asked to *identify* the assailant, or thief, or other person who is the subject of his testimony, the witness' act of pointing out the accused (or other person), then and there, is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in that person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him. The situation is practically the same as when Recent Contrivance is alleged. To corroborate the witness, therefore, it is entirely proper (on the principle of § 1129, *ante*) to prove that at a former time, when the suggestions of others could not have intervened to create a fancied recognition in the witness' mind, he recognized and declared the present accused to be the person. If, moreover (as sometimes is done) the person has been so placed among others that all probability of suggestion (by seeing him handcuffed, for example) is still further removed, the evidence becomes stronger. This is a simple dictate of common sense, and has never been denied, except when the bearings of the present principle have been lost sight of.¹

of having been there already, was admitted, as it was conceded that he had been there only once); 1868, *State v. Vincent*, 24 Ia. 570, 575; *Kan.*: 1900, *Board v. Vickers*, 62 Kan. 25, 61 Pac. 391; *La.*: 1895, *State v. Doudoussat*, 47 La. 977, 17 So. 685 (where the prosecuting witness' statements were charged to be fabricated); *Md.*: 1896, *Baltimore C. P. R. Co. v. Knee*, 83 Md. 77, 81, 34 Atl. 252 (but here the impeachment was by testimony that the witness was absent at the time of the event he testified to, and a former general statement made a few days after the event was rejected as not "supplying a test of witness' recollection as well as of his integrity"); *Mass.*: 1854, *Com. v. Wilson*, 1 Gray 338, 340 (similar statement at the time of the original event, admitted after a cross-examination directed to show concealment of his testimony until recently; said to be admissible where the opponent "has sought to impeach the witness on cross-examination"); 1858, *Com. v. Jenkins*, 10 Id. 485, 489 (after a showing that he "formerly withheld or concealed the facts," admissible); 1890, *Hewitt v. Corey*, 150 Mass. 445, 23 N. E. 223 (same); *N. H.*: 1833, *French v. Merrill*, 6 N. H. 465, 467; 1860, *Reed v. Spaulding*, 42 Id. 114, 123; *N. Y.*: 1848, *People v. Finnegan*, 1 Park. Cr. C. 147, 151; 1890, *Hesdra's Will*, 119 N. Y. 615, 618, 23 N. E. 555 (deceased attesting witness' declarations during H's lifetime that H. had made a will, received to rebut his declarations after H's death that he had forged a will for H.; unsound); *Pa.*: 1835, *Craig v. Craig*, 5 Rawle 91, 98; 1847, *McKee v. Jones*, 6 Pa. St. 425, 429; *S. D.*: 1901, *State v. Caddy*, 15 S. D. 167, 17 N. W. 927; *Tenn.*: 1860, *Queener v. Morrow*, 1 Coldw. 123, 134; 1880, *Hayes v. Cheatham*, 6 Lea 1, 10; 1890, *Glass v. Bennett*, 89 Tenn. 478, 481, 14 S. W. 1085, *semble*; *Tex.*: 1886, *Lewy v. Fischl*, 65 Tex. 312, 318 [partnership]; 1901, *Ætna Ins. Co. v. Eastman*, 95 Id. 34,

64 S. W. 863; *U. S.*: 1836, *Ellicott v. Pearl*, 10 Pet. 412, 439 ("where the testimony is assailed as a fabrication of a recent date or a complaint recently made"); *Utah*: 1894, *Silva v. Pickard*, 10 Utah 78, 89, 37 Pac. 86; 1897, *State v. Carrington*, 15 Id. 480, 50 Pac. 526, *semble*; *Vt.*: 1839, *Munson v. Hastings*, 12 Vt. 346, 350 ("cases where the silence of the witness would operate strongly to discredit the fact afterwards sworn to, as in the case of bastardy, rape, robbery, and the like"); 1888, *State v. Flint*, 60 Id. 304, 309, 317, 14 Atl. 178 (testimony of an accomplice as to tools in the defendant's trunk; the suggestion being that the police had told him of their discovery, evidence was admitted that he so stated before they told him); *Wash.*: 1902, *Callihan v. W. W. Power Co.*, 27 Wash. 154, 67 Pac. 697 (written report of car-conductor, made to his superior before knowledge of the injury to the plaintiff, admitted in corroboration). An analogous situation seems the following, where the evidence was thought admissible: 1878, *State v. Parish*, 79 N. C. 610, 613, per Reade, J. (where "from lapse of time his memory was impeached"); 1879, *Jones v. Jones*, 80 Id. 247, 250 (same).

In *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 189 (1876), the opinion of Hanneu, J., admitted certain prior statements of the principal witness, made when her mind was presumably impartial.

¹ 1743, *Annesley v. Anglesea*, 17 How. St. Tr. 1139, 1195 ff.; 1866, *R. v. Smith*, London, Montague Williams' Reminiscences, I, 138 (the Canon street murder; the police-inspector was allowed to prove the identification of the accused from among a number of other persons, by tests so devised as to avoid any suggestion). *Contra*: 1899, *Murphy v. State*, 41 Tex. Cr. 120, 51 S. W. 940. See other cases cited *ante*, § 744 (recollection), and *post*, § 1791 (verbal acts).

(2) Where the witness can verify his recollection of a time or place by the circumstance that *another person made a statement* to him, a different use of evidence is involved; the statement does not corroborate him by its similarity, for it may be otherwise irrelevant.²

§ 1131. Offered (7) after **Cross-Examination or Impeachment of Any Sort.** The broad rule obtains in a few Courts that consistent statements may be admitted *after impeachment* of any sort, — in particular after any impeachment by *cross-examination*.¹ But there is no reason for such a loose rule.

§ 1132. **Consistent Statements are not themselves Testimony; Impeached Witness himself may prove them.** (1) The consistent statements are not to be taken in themselves as additional testimony; as such they would be obnoxious to the Hearsay rule (*post*, § 1792); it is the fact of a consistent statement having been made that affords the corroboration:

1878, *Reade, J.*, in *State v. Parish*, 79 N. C. 614: "It must not be considered as substantive evidence of the truth of the facts any more than any other hearsay evidence. The fact that supporting a witness who testifies does indirectly support the facts to which he testifies does not alter the case; that is incidental. He is supported, not by putting a prop under him, but by removing a burden from him, if any has been put upon him."¹

(2) When, by any of the foregoing rules, the statements are admissible at all, there is no reason why the *impeached witness himself* may not testify to

¹ These cases are placed *ante*, § 416; the objection is based on the Hearsay rule (*post*, § 1791).

² Some of these cases rest on the ground that moral character (*ar'e*, § 1125) is involved; the ruling favors admission, except as otherwise noted: *Ill.*: 1873, *Stolp v. Blair*, 68 Ill. 541, 543 (cross-examination); *La.*: 1895, *State v. Johnson*, 47 La. An. 1225, 17 So. 789 (cross-examination to fraud); *Md.*: 1823, *Cooke v. Curris*, 6 H. & J. 93 ("where the credibility of a witness is attacked"); 1871, *McAleer v. Horsey*, 35 Md. 439, 467 (left undecided); *Mass.*: 1854, *Com. v. Wilson*, 1 Gray 338, 340 (cross-examination); *Mo.*: 1883, *State v. Grant*, 79 Mo. 113, 133 (if an "attack be made on the character of the witness"); 1890, *State v. Wheelon*, 102 id. 17, 21, 14 S. W. 730 (left undecided); 1896, *State v. Taylor*, 134 id. 109, 35 S. W. 92 (repudiating *State v. Grant* on this point, and denying this broad scope to the rule); *N. Y.*: 1834, *People v. Vane*, 12 Wend. 78 (an accomplice; evidence admitted); but later decisions entirely repudiate this principle, and sustain the foregoing case under the doctrine (*supra*, § 1128) of explaining away a supposed bias or interest: 1840, *Robb v. Hackley*, 23 Wend. 50, 53; *N. C.*: 1822, *State v. Twitty*, 2 Hawks 449; 1848, *State v. George*, 8 Ire. 324, 328, *semble*; 1854, *March v. Harrell*, 1 Jones L. 329 (from "the nature of his evidence, from his situation, from bad character," from prior self-contradictions, or by imputations on cross-examination); *State v. Thomason*, ib. 274; 1874, *Hullinger v. Marshall*, 70 N. C. 520, 523; 1878, *State v. Laxton*, 78 id. 564; 1878, *State v. Parish*, 79 id. 610, 613; 1879, *Jones v. Jones*, 80 id. 246, 249 (admissible "to repel any imputations upon the credit of the witness");

1880, *Roberts v. Roberts*, 82 id. 29, 31 (to sustain "assailed" testimony); 1885, *State v. Rowe*, 92 id. 629, 631; 1885, *State v. Whitfield*, ib. 831, 834; 1885, *Davis v. Council*, ib. 725, 730 (fraud); 1887, *State v. Brewer*, 98 id. 607, 3 S. E. 819 (impeachment on cross-examination); 1887, *Davenport v. McKec*, ib. 500, 506, 4 S. E. 545 ("when and however impeached"); 1888, *State v. Freeman*, 100 id. 429, 5 S. E. 921 ("whenever the witness is impeached and in whatever manner"); 1889, *State v. Ward*, 103 id. 419, 8 S. E. 814; 1890, *State v. Morton*, 107 id. 890, 12 S. E. 112; 1890, *State v. Jacobs*, ib. 873, 12 S. E. 248; 1891, *Hooks v. Houston*, 109 id. 623, 627, 14 S. E. 49; 1892, *Gregg v. Mallett*, 111 id. 74, 77, 15 S. E. 936; *State v. McKinney*, ib. 683, 16 S. E. 235; 1893, *Byrd v. Hudson*, 113 id. 203, 18 S. E. 209; 1894, *State v. Staton*, 114 id. 813, 19 S. E. 96; 1894, *Wallace v. Grizzard*, ib. 488, 19 S. E. 760; 1897, *Burnett v. Wilm. N. & N. R. Co.*, 120 id. 517, 26 S. E. 819; 1902, *State v. Maultsby*, 130 id. 664, 41 S. E. 97; *Pa.*: 1823, *Henderson v. Jones*, 10 S. & R. 322, *semble* (declaring in favor of "the generality of the rule"); 1877, *Hester v. Com.*, 85 Pa. 139, 158, *semble* (approving the preceding case); 1890, *Crooks v. Bunn*, 136 id. 368, 372, 30 Atl. 529 (apparently approving *Henderson v. Jones*; but also apparently favoring a limitation to impeachment by prior self-contradictions); *Tex.*: 1898, *Scott v. State*. — *Tex. Cr.* —, 47 S. W. 531 (admitting after impeachment by conviction of crime).

³ 1895, *Yarbrongh v. State*, 105 Ala. 43, 16 So. 758; 1850, *Conrad v. Griffey*, 11 How. 480, 492. Such evidence is said to be an exception to the Hearsay rule in *Maitland v. Ban*,⁴ 40 Md. 559 (1874); but this is erroneous.

them;² even though this will usually be of less value than the testimony of other persons.

§ 1133. **Statements of Claim by a Party, to rebut his Admissions.** If the consistent statements of a witness are (as a majority of Courts hold) not admissible to explain or rebut his inconsistent statements (*ante*, § 1126), then is there any less or greater reason for permitting the admissions of a party (when he has not become a witness) to be rebutted or explained by his statements of claim, made at other times, consistent with his present claims under the pleadings? His admissions are relevant against him in analogy to the self-contradictions of a witness (*ante*, § 1048), and it would seem therefore that his consistent claims should be treated after the same analogy; *i. e.* they should be received or excluded in whatever situations a witness' consistent statements would be received or excluded (*ante*, §§ 1126-1129). Most Courts, however, exclude such statements unconditionally.¹ Nevertheless, in property controversies, where usually the question arises, the same utterances are often receivable on some principle of Admissions (*ante*, §§ 1085-1087) or of Verbal Acts (*post*, § 1778), or, in other controversies, of Completeness of a conversation or correspondence (*post*, §§ 2115-2120).

¹ *Ind.*: 1892, *Hobbs v. State*, 133 Ind. 404, 408, 32 N. E. 1019; *N. C.*: 1848, *State v. George*, 8 Ire. 324, 329; 1881, *McLeod v. Bullard*, 84 N. C. 515, 529; 1885, *State v. Whitfield*, 92 Id. 831, 835; 1897, *Burnett v. R. Co.*, 120 Id. 517, 26 S. E. 818; *Tex.*: 1893, *Goode v. State*, 32 Tex. Cr. 505, 508, 24 S. W. 102.

² *Colo.*: 1882, *Nutter v. O'Donnell*, 6 Colo. 253, 260 ("he cannot annul or explain them away by counter-declarations"); *Ga.*: 1878, *Lewis v. Adams*, 61 Ga. 559 (title to land); *Ia.*: 1872, *Wilson v. Patrick*, 34 Ia. 362, 368, 371 (an ancestor's declarations that he owned the land absolutely, not received to counteract his admissions that he owned it as security only); 1887, *Wescott v. Wescott*, 75 Id. 628, 35 N. W. 649, *semble* (similar; here, the declarations of the plaintiff's mother that money handed by her to the defendant was a loan, not a gift); *Me.*: 1887, *Royal v. Chandler*, 79 Me. 265, 9 Atl. 615 (title to land); *Md.* (the statutes and cases are cited *ante*, § 1126, notes 4 and 8, and § 1127); *Mass.*: 1853, *Hunt v. Roylance*, 11 Cush. 117, 121 (excluded; "To show that a man denied being a member of a copartnership to A to-day does not prove or in any way tend to show that he did not admit that he was a member of the firm to B yesterday"); 1859, *Com. v. Goodwin*, 14 Gray 55 (arson); 1861, *Blake v. Everett*, 1 All 248, 249 (right of way); 1866, *Baxter v. Knowles*, 12 Id. 114, 119 (title to personalty); 1875, *Pickering v. Reynolds*, 119 Mass. 111, 113 (title to land); 1876, *Hayden v. Stone*, 121 Id. 413 (dedication); *Mo.*: 1846, *Turner v. Belden*, 9 Mo. 787, 790 (*Foster v. Nowlin* (1835), 4 Id. 18, 22, repudiated); 1855, *Criddle v. Criddle*, 21 Id. 522 (same rule); 1858, *Clark v. Huffaker*, 26 Id. 264, 267 (partnership); *N. H.*: 1860, *Hurlburt v. Wheeler*, 40 N. H. 73, 76 (title to property); *N. Y.*: 1806, *Waring v. Warren*, 1 John. 340, *semble*; *Pa.*: 1819, *McPeake v. Hutchinson*, 5

S. & R. 294, 296 (advancement to child); 1822, *Patton v. Goldborough*, 9 Id. 47, 55 ("A confession made at one time cannot be rebutted by a declaration at another time," because, "if that were permitted, a man might always destroy his confessions by subsequent declarations to the contrary"); 1824, *Galbraith v. Green*, 13 Id. 85, 92; 1890, *Crooks v. Bunn*, 136 Pa. 368, 371, 20 Atl. 529; *S. C.*: 1882, *Elleu v. Elleu*, 18 S. C. 489, 494 (adverse possession); *Tex.*: 1854, *Jones v. State*, 13 Tex. 168, 176. *Contra*: 1869, *Key v. Thomson*, 1 Han. N. Br. 295, 297, 301 (malpractice; defendant having assured the plaintiff that he would recover, his statement at the time to another person that the plaintiff would not recover, held admissible, as explaining that the first assurance was merely to keep up the plaintiff's spirits); 1811, *Brackenridge, J.*, in *Garwood v. Dennis*, 4 Binn. 314, 333, 339 ("It goes to the evidence of the fact that he did at any time disclaim. For though a declaration at one time is not inconsistent with a contrary declaration at another, yet it diminishes the probability that such a declaration was made"; here, oral declarations of a predecessor of the defendant in title disclaiming title had been received; his deeds containing recitals of other deeds giving him title were declared admissible, as tending to show the improbability of such conversations; *contra*, *Yeates, J.*; compare the theory of *Cooley, J.*, *ante*, § 1126); 1899, *Fidelity N. L. Ass'n v. Miller*, 34 C. C. A. 211, 92 Fed. 63 (fraudulent plan to commit suicide after obtaining insurance; after evidence of the deceased's utterances showing such a plan, other utterances showing the contrary were admitted in rebuttal). The principles of §§ 1725-1732, *post* (declarations of intent), will sometimes also suffice for such evidence. Distinguish the question whether the party when a witness may be corroborated as such (*ante*, § 1126).

2. Special Classes of Witnesses.

§ 1134. **Complaint of Rape; History.** This class of corroborative statements is unusually complicated in principles and confused in precedents, not because of any inherent complexity in the principles themselves, but because the evidence admits of the application of three distinct general principles for its admission, and the distinct bearings of these different principles have not always been borne in mind by the Courts.

Down to the beginning of the 1800s, evidence of this sort was received by the Courts as a matter of old tradition and practice, with little or no thought of any principles to support it. The tradition went back by a continuous thread to the primitive rule of hue-and-cry; and the precise nature of the survival is more fully explained in dealing with the Hearsay Exception of *Res Gestæ* (*post*, § 1760). But as more and more attention began to be given, in the early 1800s, to the principles underlying every sort of evidence, there came to be felt a need of explaining on principle this inherited and hitherto unquestioned practice; the various aspects of its significance began to be thought of. There are three possible principles, well enough established otherwise, upon which such evidence can be offered: 1, as an Explanation of a Self-Contradiction (*ante*, § 1042); 2, as a Corroboration by other Similar Statements, under the present principle; 3, as a *Res Gestæ* Declaration, excepted under the Hearsay Rule (*post*, § 1760). These may be noticed in order, with the precedents proceeding upon each theory.

§ 1135. **Same: (1) First Theory: Explanation of an Inconsistency; Fact of Complaint is admissible.** It has already been seen (*ante*, § 1042) that the fact of a failure to speak when it would have been natural to do so is in effect an Inconsistent Statement or Self-Contradiction,—as when on a former trial a witness said nothing about an important circumstance which he now asserts, or when he failed to testify at all, though present, when his testimony (if true) could have been highly valuable. This failure to speak, as also already seen (*ante*, § 1044), may perhaps be explained away in some fashion; but, unless so explained, it stands in effect as a Self-Contradiction. Now, when a woman charges a man with a rape, and testifies to the details, and the accused denies the act itself, its very commission thus coming into issue, the circumstance that at the time of the alleged rape the woman said nothing about it to anybody constitutes in effect a Self-Contradiction of the above sort. It was entirely natural, in this situation above all others, that she should have spoken out. That she did not, that she went about as if nothing had happened, was in effect an assertion that nothing violent had been done. Thus, the failure of the woman, at the time of the alleged rape, to make any complaint could be offered in evidence (as all concede) as a virtual self-contradiction discrediting her present testimony.¹

¹ But not on a charge of rape under age of consent, where the intercourse is voluntary: 1897, *People v. Lee*, 119 Cal. 84, 51 Pac. 22, *semble*; 1899, *State v. Birchard*, 35 Or. 484, 59 Pac. 468; nor of sodomy: 1897, *Honselman v. People*, 168

Ill. 172, 48 N. E. 304. That the woman's subsequent friendly conduct towards the accused, on a charge of rape, is admissible, stands upon another principle (*ante*, § 402).

Moreover, it is apparent that where nothing appears on the trial as to the making of such a complaint, the jury might naturally assume that none was made, and counsel for the accused might be entitled to argue upon that assumption. As a peculiarity, therefore, of this kind of evidence, it is only just that the prosecution should be allowed to forestall this natural assumption by showing that the woman was not silent, *i. e.* that a complaint was in fact made.² This apparently irregular process of negating evidence never formally introduced by the opponent is regular enough in reality, because the impression upon the tribunal would otherwise be there as if the opponent had really offered evidence of the woman's silence. Thus the essence of the process consists in the showing that the woman did not in fact behave with a silence inconsistent with her present story. The Courts have fully sanctioned this analysis of the situation:

1830, *Daggett, J.*, in *State v. De Wolf*, 8 Conn. 99: "If a female testifies that such an outrage has been committed on her person, an inquiry is at once suggested why it was not communicated to her female friends. To satisfy such inquiry it is reasonable that she should be heard in her declaration that she did so complain."

1869, *Woolruff, J.*, in *Baccio v. People*, 41 N. Y. 268: "It may be suggested, perhaps, that it is so natural as to be almost inevitable that a female upon whom the crime has been committed will make immediate complaint thereof to her mother or other confidential friend, and, inasmuch as her failure to do so would be strong evidence that her affirmation on the subject when examined as a witness was false, that the prosecution may anticipate such a claim by affirmative proof that complaint was made. . . . Like outeries made at the time charged, the appearance and manner of the female immediately after, her instant complaints of the fact are all such as are natural and according to the ordinary course of events."

1900, *Burch, C. J.*, in *State v. Neal*, 21 Utah 151, 69 Pac. 510: "The natural instinct of a female thus outraged and injured prompts her to disclose the occurrence, at the earliest opportunity, to the relative or friend who naturally has the deepest interest in her welfare; and the absence of such a disclosure tends to discredit her as a witness, and

² The English cases have always conceded that the fact of the complaint may be shown; they are collected *post*, § 1760 (under the Hearsay Exception), and need not be repeated here. The American cases here follow; but only the first ruling in each jurisdiction is given, except where later ones were needed to settle the doctrine; all the other cases, in the following sections, assume the doctrine as settled: 1871, *Lacy v. State*, 45 Ala. 80 ("the fact of making complaint immediately and before it is likely that anything should have been contrived and devised"); 1855, *Pleasant v. State*, 15 Ark. 624, 648; 1862, *People v. Graham*, 21 Cal. 261, 265, *semble*; 1901, *People v. Figueroa*, 134 id. 159, 66 Pac. 202; 1830, *State v. De Wolf*, 8 Conn. 93, 99; 1852, *Stephen v. State*, 11 Ga. 233, 233; 1869, *Weldon v. State*, 32 Ind. 81; 1871, *State v. Richards*, 28 Ia. 420; 1901, *State v. Washington*, 104 La. 57, 28 So. 904; 1871, *Strang v. People*, 24 Mich. 1, 5; 1874, *People v. Lynch*, 29 id. 273, 279; 1879, *Maillet v. People*, 42 id. 262, 264, 3 N. W. 854; 1872, *State v. Shettleworth*, 18 Minn. 208, 212; 1877, *Gardner v. Kellogg*, 23 id. 463; 1875, *State v. Jones*, 61 Mo. 232, 235, *semble*; 1881, *State v. Warner*, 74 Mo.

83, 86; 1881, *Oleson v. State*, 11 Nebr. 276, 9 N. W. 38, *semble*; 1900, *Welsh v. State*, 60 id. 101, 82 N. W. 368; 1863, *State v. Kunpp*, 45 N. H. 148, 155; 1869, *Baccio v. People*, 41 N. Y. 265; 1866, *State v. Marshall*, Phillips N. C. 49; 1848, *Johuson v. State*, 17 Oh. 593, 595; 1897, *Harmon v. Terr.*, 5 Okl. 368, 49 Pac. 55; 1897, *State v. Sargent*, 32 Or. 110, 49 Pac. 889; 1848, *Phillips v. State*, 9 Tennph. 246, 247; 1874, *Pfefferling v. State*, 40 Tex. 486, 492; 1853, *Brogys Case*, 10 Gratt. 722, 726; 1874, *State v. Niles*, 47 Vt. 82, 86; 1898, *Hannon v. State*, 70 Wis. 448, 450, 36 N. W. 1. The same rule ought to apply to other charges involving violent sexual assault: 1902, *People v. Swist*, 136 Cal. 520, 69 Pac. 223 (crime against nature, committed on a child); 1893, *People v. Hicks*, 98 Mich. 86, 89, 56 N. W. 1102 (indecent assault); 1900, *State v. Inlay*, 22 Utah 156, 61 Pac. 557 (assault with intent to rape); but not to charges involving intercourse by consent: 1895, *State v. Sibley*, — Mo. —, 31 S. W. 1033 (criminal seduction); compare the cases cited *supra*, note 1.

There is no reason why a second complaint should be excluded. *Contra*: 1896, *Lowe v. State*, 97 Ga. 792, 25 S. E. 676.

may raise an inference against the truth of the charge. To avoid such discredit and inference, it is competent for the prosecution to anticipate any claim as to effect, and show, by affirmative proof of the victim and of her relative or friend to whom she narrated the circumstances of the outrage, that complaint was made recently after its commission."

In the same way, and just as with ordinary Self-Contradictions (*ante*, § 1044), if the silence is conceded by the prosecution, the silence may nevertheless be *explained away* as due to fear, shame, or the like, so that it loses its significance as a suspicious inconsistency:

1863, *Bellows, J.*, in *State v. Knapp*, 45 N. H. 155: "It is equally well settled also that the delay to make complaint may be explained by showing that it was caused by threats or undue influence of the prisoner. . . . It would then be clearly proper to show the reasons of such delay, — whether caused by the threats of the prisoner, inability caused by the violence, want of opportunity, or the fear of injury by the communication to the only persons at hand. . . . Upon a disclosure of all the circumstances the jury might properly find that the delay was neither unreasonable nor inconsistent with the testimony of the prosecutrix." *

Under the early rule of hue-and-cry, it was necessary that there should have been fresh complaint; and this notion has been perpetuated in the statement, usual in enunciating the modern rule, that *the complaint must have been recent*, in order that the fact of it may be admitted. A few Courts have applied this notion practically in their rulings, by excluding complaints made after a certain length of time.⁴ But, if it be considered that the purpose of the evidence is merely to negative the supposed silence of the woman, it is perceived that the fact of complaint *at any time* should be received. After a long delay, to be sure, the fact is of trifling weight, but it negatives silence, nevertheless, and the accompanying circumstances must determine how far the delay has been successfully explained away.⁵

* 1864, *R. v. Rearden*, 4 F. & F. 78, 80; 1900, *State v. Petersen*, 110 Ia. 647, 82 N. W. 329; 1895, *People v. Ezzo*, 104 Mich. 341, 82 N. W. 407; 1872, *State v. Shettleworth*, 18 Minn. 208, 212; 1863, *State v. Knapp*, 45 N. H. 148, 155 ("how much delay in making the complaint ought to weigh against the prosecution must depend upon the circumstances of each particular case"); 1900, *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73 (explanations nearly nine months later, excluded); 1892, *State v. Wilkins*, 66 Vt. 1, 10, 28 Atl. 323.
⁴ 1896, *R. v. Lillyman*, 2 Q. B. 167, 170 ("provided it was made as speedily after the acts complained of as could reasonably be expected"); 1898, *People v. Lambert*, 120 Cal. 170, 52 Pac. 307 (delay held too long on the facts); 1902, *Lyles v. U. S.*, 20 D. C. App. 559, 563 (to a physician, four weeks later, when applying for an examination, excluded); 1887, *People v. O'Sullivan*, 104 N. Y. 481, 490, 10 N. E. 881 (excluding, where the complaint was not made for nearly eleven months); 1887, *Dunn v. State*, 45 Oh. St. 249, 252, 12 N. E. 826 (an unexplained delay of ten days excluded the evidence).

* 1903, *Trimble v. Terr.* — Ariz. —, 71 Pac. 932; 1903, *State v. Bebb*, — Ia. —, 96 N. W. 714 (made more than three months afterwards; admitted); 1897, *State v. Marcks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; 1903, *State v. Perea*, 27 Mont. 358, 71 Pac. 162; 1874, *Higgins v. People*, 58 N. Y. 378, *semble* ("there is and can be no particular time specified"); 1898, *State v. Snodden*, 52 S. C. 488, 30 S. E. 408; 1899, *Roberson v. State*, — Tex. Cr. —, 49 S. W. 398; 1874, *State v. Niles*, 47 Vt. 82, 88 (*Royce, J.*: "It has never been understood that mere lapse of time could be made the test upon which the admissibility of such evidence depended; the time that intervenes . . . is a subject for the jury to consider"). The following cases lay down no rule: 1902, *State v. Snider*, 119 Ia. 15, 91 N. W. 762; 1898, *Legare v. State*, 87 Md. 735, 41 Atl. 80 (complaint not too late on the facts); 1898, *Com. v. Cleary*, 172 Mass. 178, 51 N. E. 746 (trial judge's discretion controls as to time; whether lapse of time may ever exclude as a matter of law, undecided).

§ 1136. Same: Consequences of this Theory | Details not admitted | Complainant must be a Witness. When the complaint is admitted on this theory, certain limitations upon its use follow logically and necessarily.

(1) *Only the fact of the complaint, not the details.* The purpose is to negative the supposed inconsistency of silence by showing that there was not silence. Thus the gist of the evidential circumstances is merely not-silence, i. e. the fact of a complaint, but the fact only. That she complained of a rape, or an attempt at rape, is all that principle permits; the further terms of her utterance (except so far as to identify the time and place with that of the one charged) are not only immaterial for the purpose, but practically turn the statement into a hearsay assertion, and as such it is inadmissible (except on the third theory).¹

(2) *The woman must be a witness.* Since the only object of the evidence is to repel the supposed inconsistency between the woman's present testimony and her former silence, it is obvious that if she has not testified at all, there is no inconsistency to repel, and therefore the evidence is irrelevant.²

¹ The English cases on this point are collected *post*, § 1760 (under the Hearsay Exception), and need not be repeated here; in the American following it is to be noted that many of these Courts do allow the details of the statement to be used under the second theory, as seen in the next section: *Ala.*: 1871, *Lacy v. State*, 45 *Ala.* 80; 1872, *Scott v. State*, 48 *id.* 420; 1884, *Griffin v. State*, 78 *id.* 29, 31; *Ark.*: 1855, *Pleasant v. State*, 15 *Ark.* 624, 649; 1897, *Davis v. State*, 63 *id.* 470, 39 *S. W.* 356 (description given by a raped woman when shown the defendant); *Cal.*: 1862, *People v. Graham*, 21 *Cal.* 261, 265; 1893, *People v. Stewart*, 97 *id.* 238, 241, 32 *Pac.* 8; 1898, *People v. Lambert*, 120 *id.* 170, 52 *Pac.* 307; 1903, *People v. Wilnot*, 139 *id.* 103, 72 *Pac.* 838; *Ga.*: 1852, *Stephen v. State*, 11 *Ga.* 225, 233; *Ind.*: 1869, *Weldon v. State*, 32 *Ind.* 81; 1871, *Thompson v. State*, 38 *id.* 39; 1893, *Polson v. State*, 137 *id.* 519, 523, 35 *N. E.* 907; *Ia.*: 1871, *State v. Richards*, 28 *Ia.* 420; 1886, *State v. Clark*, 69 *id.* 295, 28 *N. W.* 606; 1886, *State v. Mitchell*, 63 *id.* 118, 26 *N. W.* 44 (but this does not exclude the fact that the complaint spoke of a rape); 1890, *McMurrin v. Rigby*, 80 *id.* 322, 325, 45 *N. W.* 877 (same); 1900, *State v. Petersen*, 110 *id.* 647, 82 *N. W.* 329 ("exact particulars" inadmissible); 1902, *State v. Wheeler*, 116 *id.* 212, 89 *N. W.* 978 (admissible only "in confirmation of the witness or to repel the presumption that her statement is a fabrication"; but the name of the ravisher as stated may be included in proof of the fact of complaint); *La.*: 1903, *State v. McCoy*, 109 *La.* 682, 33 *So.* 730 (not clear); *Me.*: 1892, *State v. Mulken*, 85 *Me.* 106, 107, 26 *Atl.* 1017; *Mich.*: 1877, *Brown v. People*, 36 *Mich.* 203 (admitted exceptionally; no principle laid down); 1879, *Maillet v. People*, 42 *id.* 262, 264, 3 *N. W.* 854 (left undecided); 1896, *People v. Gage*, 62 *id.* 271, 28 *N. W.* 835 (treated as properly excluded by the present principle, but nevertheless admitted exceptionally by the *res gestae* principle, *post*,

§ 1760); 1893, *People v. Hicks*, 98 *id.* 86, 89, 56 *N. W.* 1102 (excluding the details, and not applying the *res gestae* exception); 1896, *People v. Duncan*, 104 *id.* 460, 62 *N. W.* 556 (same); 1898, *People v. Bernor*, 115 *id.* 692, 74 *N. W.* 184, *semble*; 1900, *People v. Marra*, 125 *id.* 376, 84 *N. W.* 284 (details excluded, unless they are made at the time as *res gestae* or unless the complainant is a child); *Minn.*: 1872, *State v. Shettleworth*, 18 *Minn.* 208, 212; *Mo.*: *State v. Jones*, 61 *Mo.* 232, 235; *Nebr.*: 1881, *Oleason v. State*, 11 *Nebr.* 276, 279, 9 *N. W.* 38; 1886, *Mathews v. State*, 19 *id.* 330, 337, 27 *N. W.* 234; *N. H.*: 1863, *State v. Knapp*, 45 *N. H.* 148, 155; *N. Y.*: 1869, *Baccio v. People*, 41 *N. Y.* 265, 271; *Okl.*: 1897, *Harmon v. Terr.*, 5 *Okl.* 368, 49 *Pac.* 55; *Tex.*: 1874, *Pefferling v. State*, 40 *Tex.* 486, 492; *Utah*: 1898, *State v. Halford*, 18 *Utah* 3, 54 *Pac.* 819 (obscure); 1900, *State v. Neel*, 21 *id.* 151, 60 *Pac.* 510 (not admissible, except when so fresh as to be of the *res gestae*); *Vt.*: 1874, *State v. Niles*, 47 *Vt.* 82, 86; 1892, *State v. Bedard*, 65 *id.* 278, 284, 26 *Atl.* 719, *semble*; *Va.*: 1853, *Brogy's Case*, 10 *Grant.* 722, 726; *Wash.*: 1898, *State v. Hunter*, 18 *Wash.* 670, 52 *Pac.* 247; *Wis.*: 1888, *Harmon v. State*, 70 *Wis.* 448, 452, 36 *N. W.* 1 ("except . . . where the person ravished is very young," referring to the cases of § 1760, *post*); 1902, *Bannan v. State*, 115 *id.* 317, 91 *N. W.* 107 (same). A few Courts have erroneously allowed the detailed statement to be used even when proceeding upon the present theory; but these rulings are probably due to a confusion of the first and the second theory; 1830, *State v. DeWolf*, 8 *Conn.* 93, 100; 1848, *Johnson v. State*, 17 *Oh.* 593, 595; 1872, *Burt v. State*, 23 *Oh. St.* 394, 401.

² The English Courts have not been clear upon this point: 1839, *R. v. Walker*, 2 *Moo. & Rob.* 212, *Parke, B.* (obscure); 1840, *R. v. Megson*, 9 *C. & P.* 420, *Rolle, B.*, *semble, contra*; 1840, *R. v. Guttridge*, *ib.* 471, *Parke, B.*, *semble, accord*; 1841, *R. v. Alexander*, 2 *Cr. & D.* 126,

In a rape, for instance, charged to have been committed on a frequented way, and testified to by several bystanders, without calling the woman herself to the stand, it is entirely immaterial whether she made complaint or not; there is no story of hers before the court, and there is therefore no suspicion about such a story and nothing to repel. On the other hand, if the woman has taken the stand, it is immaterial whether she has been impeached or cross-examined (a matter of importance under the next theory); the fact of complaint may be introduced immediately, even by her own testimony in chief.

§ 1137. **Same: (2) Second Theory: Rehabilitation by Consistent Statement.** It has been seen (*ante*, § 1122) that, under some circumstances, and with limitations differently accepted in different jurisdictions, a witness whose testimony has been impeached may be corroborated or rehabilitated by evidence of his similar statements made at other times. This principle has been resorted to for admitting the present sort of evidence. The story of the woman is corroborated by showing that she told the same story at the time of making complaint. Where a Court allows this form of corroboration for other witnesses, it is a legitimate application of the principle to admit such evidence here. Courts sometimes permit the evidence to be used "to test" or "to verify" the woman's recollection; but this is merely another way of saying that her telling a similar story at the first occasion corroborates her testimony on the stand. But in certain respects the conditions of use under the present theory differ radically from those under the preceding one.

§ 1138. **Same: Consequences of this Theory; Details are admissible; Complainant must be a Witness, and Impeached.** (1) *The details of the statement are admissible.* Since the purpose is to show that she tells the same story as on the stand, the whole of the complaint as made by her, with its terms and details, is to be received, and not the mere fact of the complaint.¹ (2) But it is obviously necessary, here as in the preceding theory, that *the woman must have testified.* This requirement is common to both theories; for both assume that the purpose is to rehabilitate a witness, and if the woman has not testified, there is no one in that position.²

Pennefather, B., *semble, contra*; 1896, R. v. Lillyman, 2 Q. B. 167, 177, *semble, accord.* Most American Courts fail to make the requirement; but its logical necessity has occasionally been perceived: 1902, *State v. Wolf*, 118 Ia. 564, 92 N. W. 673; 1898, *Com. v. Cleary*, 172 Mass. 175, 51 N. E. 746; 1887, *People v. O'Sullivan*, 104 N. Y. 481, 486, 10 N. E. 880; 1853, *Brogy's Case*, 10 Gratt. 722, 727 (left undecided); and cases cited *post*, § 1138, par. 2.

Compare the doctrines of §§ 284 and 1076, *ante*. Note also that in Michigan and Wisconsin (*supra*, par. 1), the rule is partly contrary, i. e. only when the female is too young to testify are details admitted.

¹ This is the doctrine accepted by all the cases in the next two notes.

² *Eng.*: 1839, R. v. Walker, 2 Moo. & Rob. 212, Parke, B., *semble*; 1840, R. v. Megson, 9

C. & P. 426, Rolfe, B. ("to show her credit and the accuracy of her recollection": here the woman had died); 1840, R. v. Guttridge, *ib.* 471, Parke, B., *semble*; U. S.: 1862, *People v. Graham*, 21 Cal. 261, 265 (the child had been called to the stand, but could not testify for weeping); 1869, *Weldon v. State*, 32 Ind. 81 (the child alleged to have been raped being incompetent through youth); 1871, *Thompson v. State*, 38 *id.* 39 (the woman not having testified); 1895, *State v. Meyers*, 46 Nebr. 152, 64 N. W. 697 (incapacity as witness); 1845, *People v. McGee*, 1 Denio 19, 23 (excluded wherever the woman is incompetent or for other reasons has not testified); 1848, *Johnson v. State*, 17 Oh. 593, 595; and cases *infra* in note 3, especially *Hornbeck v. State*, Oh., *Phillips v. State*, Tenn. Compare the cases cited *ante*, § 1136 par. 2.

(3) *The witness must have been impeached.* According to the general theory of Corroboration by Similar Statements (*ante*, § 1124), there must be some kind of impeachment before the other statement can be offered. In different jurisdictions different views are taken (*ante*, §§ 1125-1131) of what this impeachment must amount to, — whether it may be by general bad character, by bias, by prior self-contradiction, or the like. The kind of impeachment, therefore, which will be sufficient to admit the rape-complaint will depend on the view taken of the general principle in the particular jurisdiction.³

§ 1139. *Same: (3) Third Theory: Spontaneous or Res Gestæ Declarations, as Exception to Hearsay Rule.* One of the exceptions to the Hearsay Rule permits the spontaneous declarations of a person suddenly excited by an extrinsic occurrence to be admitted as hearsay testimony (*post*, § 1747). The declarations of a woman under the fright of a sudden assault have been

³ The English rulings are obscure as to whether impeachment is necessary: 1839, *R. v. Walker*, 2 Mo. & Rob. 212, Parke, B., *semble* (after cross-examination as to her story); 1840, *R. v. Megson*, 9 C. & P. 420, Rolfe, B., *semble, contra*; 1860, *R. v. Eyre*, 2 F. & F. 579, Byles, J., *semble, contra*; 1877, *R. v. Wood*, 14 Cox Cr. 47, Bramwell, J., *semble, contra*; 1896, *R. v. Lillyman*, 2 Q. B. 187, 177, *contra* (admissible in chief, as hearing on the consistency of the prosecutrix' conduct with her testimony). The American rulings requiring impeachment are as follows; where no special note is added, the Court simply requires impeachment of some sort without defining what kind, and this impeachment may even cover mere cross-examination: *Ala.*: 1872, *Scott v. State*, 48 Ala. 420 ("in corroboration . . . if she is assailed in the matter of her complaint"); 1884, *Griffin v. State*, 78 id. 29, 32 (after either cross-examination as to the particulars of the complaint or evidence introduced "to impeach the prosecutrix"); 1901, *Bray v. State*, 131 id. 46, 31 So. 107; 1902, *Oakley v. State*, 135 id. 15, 33 So. 23; *Ark.*: 1855, *Pleasant v. State*, 15 Ark. 824, 819 (after a general impeachment of credit); 1899, *Lee v. State*, 66 id. 298, 50 S. W. 517 (details admissible after impeachment as to the complaint); *Ind.*: 1889, *Weldon v. State*, 32 Ind. 81, *semble*; 1871, *Thompson v. State*, 38 id. 39 (obscure as to the complaint itself; but requiring "impeachment" to admit other similar statements in general, following the usual rule for such evidence); *Ia.*: 1886, *State v. Clark*, 69 Ia. 294, 28 N. W. 606, *semble*; 1890, *McMurrin v. Rigny*, 80 id. 322, 323, 45 N. W. 877, *semble*; *La.*: 1893, *State v. Langford*, 45 La. An. 1177, 14 So. 181 (admissible only after impeachment); *Mich.*: 1893, *People v. Hicks*, 28 Mich. 88, 56 N. W. 1102 (details admissible after impeachment; here excluded, rape not being charged; but only indecent assault); *Mo.*: 1875, *State v. Jones*, 81 Mo. 232, 235; *Nebr.*: 1881, *Olson v. State*, 11 Nebr. 278, 279, 9 N. W. 38; *N. M.*: 1892, *Terr. v. Maldonado*, 9 N. M. 629, 58 Pac. 350 (on direct testimony, details cannot be stated); *N. Y.*: 1889, *Baccio v. People*, 41

N. Y. 265, 269, *semble*; *N. C.*: 1888, *State v. Marshall*, Phillips 49, 51 (after a self-contradiction); 1899, *State v. Brown*, 125 N. C. 606, 84 S. E. 103 (declaration admitted after impeachment of prosecutrix on cross-examination); *Or.*: 1897, *State v. Sargent*, 32 Or. 110, 49 Pac. 889 (not admissible in chief); *Tenn.*: 1848, *Phillips v. State*, 9 Hlmph. 246, *semble*; *Tex.*: 1874, *Pfefferling v. State*, 40 Tex. 486, 492; 1894, *Thompson v. State*, 33 Tex. Cr. 472, 473, 28 S. W. 987 (not admissible in chief). The American cases not requiring impeachment are as follows; they allow the complaint-details to be offered in chief: *Conn.*: 1830, *State v. DeWolf*, 3 Conn. 93, 100 (but here there had been cross-examination on the facts of the charge); 1876, *State v. Kinney*, 44 id. 153, 155 (same); 1880, *State v. Byrne*, 47 id. 485; *Mass.*: 1898, *Conn. v. Cleary*, 172 Mass. 175, 51 N. E. 746, *semble*; *N. Y.*: 1845, *People v. McGee*, 1 Donio 19, 22; *Oh.*: 1848, *Johnson v. State*, 17 n. 593, 593 (the declarations must be made "immediately" after the alleged offence); 1849, *Laughlin v. State*, 18 id. 99, 101 (same); 1858, *McCombs v. State*, 8 Oh. St. 643, 648 (same); 1872, *Burt v. State*, 23 id. 394, 401 ("immediately or soon after"; the particularity of the details being left to the trial Court's discretion); 1879, *Hornbeck v. State*, 35 id. 277, 279; 1887, *Dunn v. State*, 45 id. 249, 251, 12 N. E. 828 ("immediately"; yet they are admissible after a delay, if it is accounted for, the Court applying here the rule as to admitting the fact of complaint, *supra*); *U. S.*: 1834, *Ellicott v. Pearl*, 1 McLean 206, 211; *Utah*: 1900, *State v. Imlay*, 22 Utah 136, 61 Pac. 557 (details admissible, in corroboration of the complainant's testimony, if made immediately after the act). It will be noted that most of the rulings prescribe something as to the time of the complaint. But this is really unnecessary, under the present theory of Corroboration by Similar Statements: the time of the statements is immaterial (*ante*, § 1126). This requirement as to time comes simply from a confusion of the first theory above (admitting the fact of the complaint) with the second theory (admitting the details).

regarded by some Courts as receivable under this exception. The proper limitations are better considered in connection with the Hearsay Rule (*post*, § 1760). But the differences and similarities may be here pointed out between the rules of this theory and of the preceding ones.

(1) *The details of the statement are admissible*, because the rule is admitting a hearsay assertion, *i. e.* in effect, testimony.

(2) *The woman need not be a witness*, because the hearsay is admitted for its own sake, and not as corroborating her testimony or as in any way dependent upon it.

(3) *If a witness, she need not have been impeached*, because this requirement is wholly peculiar to the preceding theory.

§ 1140. **Summary.** (1) The fact of the complaint is always and legitimately admissible under the first theory above. (2) The details are legitimately receivable under either the second or the third theory; but the third has little vogue, while the second is widely adopted. Each has its own logical requirements, different from the other. (3) Both the first and the second theories may be accepted, without conflict. In most jurisdictions, the first theory is used to admit the fact of complaint, and then the second theory is invoked to admit the details; and this is proper, if the conditions of the second theory are observed.

§ 1141. **Complaint in Travail by a Bastard's Mother.** (1) At a time when parties and interested persons were disqualified, an exception was made by statute (resting probably on old traditional practice¹), in several of the colonial communities, and the mother permitted to be a witness in a prosecution for bastardy or suit for filiation; this was indeed probably the first statutory exception to the general disqualification (*ante*, § 575). But it was conditioned on the fact that the mother had in her travail named and accused as the father the very person now on trial as defendant. This was the law in Massachusetts and New Hampshire;² while in Maine and Connecticut the requirement was more rigid, and formed a condition precedent (as sometimes construed) to the maintenance of the action.³ The theory on

¹ 1637, Bishop of Lincoln's Trial, 3 How. St. Tr. 769, 773 (witnesses to P. as the father of a bastard testified "some by confession of herself being the mother of the child who were present at the time of her delivery").

² *Mass.*: 1807, *Drowne v. Stimpson*, 2 Mass. 441 (under St. 1785, c. 66, Mar. 16, the accusation during travail and the subsequent constancy is a condition precedent to her competency, and the facts must be evidenced by other witnesses); 1809, *Com. v. Cole*, 5 Bl. 517 (time of travail, determined); 1827, *Harou v. Harrington*, 5 Pick. 63 (time of travail determined); 1829, *Maxwell v. Harly*, 8 id. 560 (variance of accusation before travail does not disqualify); 1838, *M'Managil v. Ross*, 20 id. 99 (travail-accusation required even for complaints filed after birth of child); 1852, *Briley v. Chesley*, 10 Cush. 284 (form of accusation, determined); 1868, *Stiles v. Eastman*, 21 Bl. 132 (the travail-accusation is a condition precedent

to the maintenance of the action, not merely to her competency); 1874, *Ray v. Coffin*, 123 Mass. 65, *semble* (the old requirement is abolished, through the repeal of the statute by Gen. St. c. 72, § 8); 1888, *Leonard v. Holton*, 148 Bl. 66, 18 N. E. 879 (same); *N. H.*: 1825, *Hallford v. J. M.*, 3 N. H. 135, 140 (the requirement of travail-accusation is not a condition precedent to the right of maintenance but only to the mother being a witness; here proceeding upon the construction of St. Feb. 11, 1791); 1845, *Long v. Dow*, 17 id. 470 (statute applied to admit the mother as witness; time of "travail," defined); 1846, *Rodimon v. Reding*, 18 id. 431, 435 (same; form of declaration, defined).

³ *Me.*: 1830, *Dennett v. Kueceland*, 6 Me. 460 (travail-accusation, held a condition precedent to the mother's competency, under the statute); 1831, *Tillson v. Bowley*, 8 id. 163 (accusation held sufficient); 1844, *Burgess v. Bosworth*, 10 Shepl. 573 (the required constancy

which these travail-accusations were thus given force was a composite one. Partly it was the present theory of corroborating by consistent statements, — in particular, by statements calculated to rebut the suspicion of recent contrivance (*ante*, § 1129). Partly the theory of the Hearsay exception for spontaneous utterances (*res gestæ*) lent its aid (*post*, § 1747); for the painful circumstances of the occasion (as the judges repeatedly pointed out) gave some guarantee of sincerity. Partly, too, the Hearsay exception for dying declarations furnished a close analogy (*post*, § 1438), for the apprehension of death was present. These various considerations united to give a just evidential force to such utterances.

(2) Since disqualification by interest has been abolished, and the mother's competency no longer depends on this requirement, the use of such declarations involves solely a question of admissibility for their own sake. The result in the different jurisdictions has been diverse. (a) In the States in which the requirement originally obtained, the use of the travail-accusation still survives as admissible evidence by express new statute, or by the preservation of former practice.⁴ (b) In a few other States similar statutes have introduced a sanction, based more directly on the theory of dying declarations.⁵ (c) Rarely, a Court is found recognizing on common-law principles

dates from the time of first accusation of the defendant, not from the time of first accusation of any one; 1867, *Wilson v. Woodside*, 57 Me. 489 (voluntary accusation, without questioning, sufficient); 1868, *Totman v. Forsaith*, 55 Id. 360 (form of accusation, determined); 1898, *Palmer v. McDonald*, 92 Id. 125, 42 Atl. 315 (under Pub. St. 1893, c. 97, § 6, accusation at travail and constancy in the accusation are both essential to the action; but the constancy does not relate to accusations between time of travail and time of charge before magistrate); *Conn.*: 1788, *Hitchcock v. Grant*, 1 Root 107 (plea in bar allowed; applying a statute of 1702); 1796, *Warner v. Willey*, 3 Id. 490; 1804, *Davis v. Salisbury*, 1 Day 278, 282 (but otherwise in a suit for maintenance by the selectmen, not the woman); 1823, *Judson v. Blanchard*, 4 Conn. 557, 565; 1825, *Chaplin v. Hartshorne*, 6 Id. 41, 44 (same); 1876, *Booth v. Hart*, 43 Id. 480, 485 (holding that the original statute required the travail-accusation and the subsequent constancy, merely a condition precedent to the mother's testifying at the trial by way of exception to the general rule of disqualification for parties, and that therefore the statute of 1848, making all parties competent, removed the necessity of prior accusation as a condition precedent to competency).

⁴ *Conn.*: Gen. St. 1887, § 1207 (after the woman's complaint on oath, constancy of accusation when "put to her discovery in the time of her travail and also examined on the trial of the cause" is *prima facie* evidence); 1879, *Robbins v. Smith*, 47 Conn. 182, 189 (even since proof of constancy ceased to be a requirement, it still remained admissible; here also admitting declarations before the child's birth; *Carpenter, J.*, diss. on the last point); 1869, *Bouton v. Starr*, 58 Id. 285, 20 Atl. 450 (the

woman's constant accusations received, including details of time and place); 1896, *Harty v. Malloy*, 67 Id. 339, 36 Atl. 259; *Me.*: 1874, *Sideling v. Buekin*, 64 Me. 371 (repetition of the accusation, before and after the time of examination, excluded, as governed by the ordinary rule for witnesses); 1891, *Mann v. Maxwell*, 83 Id. 146, 21 Atl. 844 (accusations during travail, admitted); *Mass.*: Pub. St. 1882, c. 85, § 16 (if, upon examination in writing under oath at time of making formal accusation, she accuses a certain man, and "being put upon the discovery of the truth respecting such accusation in the time of her travail she accuses the same man . . . and has continued constant in such accusation, the fact of such accusation in time of travail may be put in evidence upon the trial to corroborate her testimony"); Rev. L. 1902, c. 82, § 16 (statute rewritten, without material change of rule); 1862, *Eddy v. Gray*, 4 All. 435, 438 (statute applied); 1874, *Reed v. Haskins*, 116 Mass. 198 (by express statute, the mother may testify to her travail-accusation, even since interested parties are made competent); 1874, *Rav v. Coffin*, 123 Id. 365 (if there was no travail accusation, subsequent constancy, or the failure to accuse any other person, is inadmissible); 1887, *Tacey v. Noyes*, 143 Id. 449, 9 N. E. 830 (time of travail determined); 1888, *Leonard v. Bolton*, 148 Id. 66, 18 N. E. 879 (travail-accusation inadmissible, even where complaint is not filed till after birth); 1891, *Scott v. Donovan*, 153 Id. 375, 26 N. E. 871 (time of travail determined).

⁵ *Del. Rev. St.* 1893, c. 77, § 15 (if the mother be dead at time of trial of bastardy charge, "her declaration made in time of travail and persevered in as her dying declaration shall be evidence"); *Miss. Annot. Code* 1892, § 237 ("declarations in her travail, proved to be her

the traditional admission of travail-accusations. There is no reason why this should not be the general rule.⁶ (d) Commonly, in the jurisdictions having no statutes, admissibility is not conceded.⁷

§ 1142. **Owner's Complaint after Robbery or Larceny.** Statements made by the owner or possessor of goods after an alleged robbery or larceny of them may be affected by several principles. (1) The failure of the person to make complaint would be conduct indicating a non-belief in the genuine occurrence of the injury charged, and would seem to be clearly admissible against him (under the principle of § 284, *ante*). Accordingly, to repel in advance this inference, it would be proper to show for the prosecution, as in a charge of rape (*ante*, § 1135), that the person was not silent but did in fact complain with reasonable promptness.¹ Upon this principle, however, as in the case of rape (*ante*, § 1136), only the *fact of the complaint*, and not the details of the statement, would be admissible. Such seems to be the English practice.² (2) But on the theory of rehabilitating a witness, by showing his *prior consistent statements*, the details of the statement would become admissible; the ordinary conditions, however, would on this theory be (*ante*, §§ 1124-1131) that the injured person became a witness and that he was impeached as having recently fabricated the story. It is on this theory that some Courts act with reference to rape-complaints (*ante*, § 1138); but it does not appear to be definitely applied by any Court for the present sort of evidence.³ (3) On the theory (*post*, § 1749) of the Exception to the Hearsay Rule for Spontaneous Exclamations (or *res gestæ* statements), it would seem that, after some evidence of the robbery or larceny had been offered, the details of *complaints* or outcries made *shortly after the robbery* (or, if a larceny, shortly after the discovery of it) should be receivable. This is the attitude of some Courts towards rape-complaints (*post*, § 1761); and a number of Courts seem also to apply it to the present class of evidence. Such rulings might have founded themselves upon the ancient doctrine of *hue-and-cry* (*post*, § 1760), but no connection between the two seems to be assumed in the opinions; they proceed mainly upon a ruling in the Supreme Court of Michigan. The Courts admitting such statements seem not to go

dying declarations," of deceased mother in bastardy proceedings, admissible).

⁶ 1887, *Easley v. Com.*, — Pa. —, 11 Atl. 220 (declarations "in that extremity of labor," believing herself to be in peril of death, admitted).

⁷ 1858, *State v. Husey*, 7 Ia. 409 (declarations of the mother "while in *extremo travali*," held not admissible); 1898, *State v. Spencer*, 73 Minn. 101, 75 N. W. 893; 1894, *State v. Tipton*, 15 Mont. 74, 38 Pac. 222 (mother's declarations of paternity in travail, excluded); 1895, *Stoppert v. Nierle*, 45 Nebr. 105, 65 N. W. 382 (excluded at common law; here the statute admits the examination only, but by either party); 1899, *Poyner v. State*, 40 Tex. Cr. 640, 51 S. W. 377 (incest; the woman's accusation of the defendant, just after a child's birth, as the father,

held inadmissible, except to explain away other inconsistent statements); 1865, *Richmond v. State*, 19 Wis. 307, 309.

Distinguish the use of the mother's examination before the magistrate (*post*, § 1417).

¹ Or, if in fact no complaint was made, the reason for silence may be shown: 1846, *R. v. Gandfield*, 2 Cox Cr. 43 (to explain why a witness had not told of a burglary, her husband's directions to her not to tell of it because he was afraid of revengeful injuries were received).

² 1834, *R. v. Wink*, 6 C. & P. 397 (the prosecutor was allowed to state that he made complaint to a constable the next morning early, but not to state what person he named as the robber). But see *R. v. Lundy*, 6 Cox Cr. 477 (1834).

³ See the cases in the next note.

definitely upon either this or the preceding theory.⁴ (4) Some Courts, not accepting either of the two preceding theories as valid, reject altogether the details of such complaints.⁵

Where the defendant is a *bailee charged with the loss of goods*, and he pleads robbery as an excuse, it would seem that he is in the same position evidentially as the owner or possessor in a prosecution for robbery. The fact of his speedy complaint should therefore be received (under (1) *supra*), as also the details of it (under (2) or (3) *supra*).⁶

§ 1143. **Statements by Possessor of Stolen Goods.** When, on a charge of larceny or robbery, the defendant's being found in possession of the stolen goods is relied upon in evidence against him, it would seem that his prior assertions, explaining his source of acquisition, should be admitted upon the principle (*ante*, § 1129) which admits consistent statements indicating that his explanation on the trial was not of recent contrivance. This presupposes, in strictness, that he has himself become a witness, and is thus open to rehabilitation in this manner. But since at common law the accused could not be a witness for himself, this application of the principle seems not to have been explicitly recognized. Its only limitation would be that the statements should have been made before the motive for deliberate contrivance could have arisen; and this would fairly represent the rule laid down in most of the cases. But, though such statements are by most Courts received, their admission is placed on a theory apparently that of the Verbal Act doctrine; and accordingly the precedents are examined under that head (*post*, § 1781).

⁴ 1896, *Goon Bow v. People*, 160 Ill. 438, 43 N. E. 593 (statements made in pursuit of the robber, admitted); 1887, *State v. Driscoll*, 72 Ia. 583, 585, 34 N. W. 428 (entry and declarations "in the effort to arrest the robbers," admitted; *Rothrock, J., diss.*); 1874, *People v. Morrigan*, 29 Mich. 5 (the complainant, in a trial for larceny, was allowed to state that he had before described to a detective one of the stolen notes found on the defendant; *Campbell, J.*: "The conduct of a party complaining of a crime is often of considerable importance in determining his honesty," and is to be considered as *res gestæ* rather than as hearsay); 1874, *Lambert v. People*, *ib.* 71 (similar); 1882, *Driscoll v. People*, 47 *id.* 416, 11 N. W. 221 (complaints of robbery, made immediately, were admitted as a part of the whole affair); 1882, *People v. Simpson*, 48 *id.* 479, 12 N. W. 662 (similar declarations admitted as "illustrative"); 1893, *People v. Hicks*, 98 *id.* 86, 89, 56 N. W. 1102 (restricting the rule of *Lambert's case* narrowly); 1901, *State v. Smith*, 26 Wash. 354, 67 Pac. 70 (complaint of the robbed person, "almost immediately after the time of the alleged offence," admitted").

⁵ 1892, *Bolling v. State*, 98 Ala. 80, 82, 12 So. 782 (larceny); 1867, *People v. McCrea*, 32 Cal. 98; 1895, *Brooks v. State*, 96 Ga. 353, 23 S. E. 413 (the claim made by the owner of goods stolen, when certain goods were shown him, excluded); 1893, *Shoecraft v. State*, 137

Ind. 433, 36 N. E. 1113 (excluded; to be treated apparently only on the ordinary principle of § 1749, *post*); 1890, *Jones v. Com.*, 86 Va. 743, 10 S. E. 1004.

⁶ 1826, *Tompkins v. Saltmarsh*, 14 S. & R. 275, 279 (action against a bailee for careless losing; plea, robbery; "evidence ought to have been received of the hue and cry immediately after the discovery, his assiduous and indefatigable pursuit and strict search, both at the inn and the steamboat. If he had made no complaint or no inquiry, remained with his arms folded and his mouth shut, . . . the jury would have drawn the most unfavorable conclusions from it. . . . All this, however, is to be understood of acts immediately preceding and directly following, concurrent acts and declarations, not acts and declarations not known or commenced until after a lapse of time and suspicion afloat"); 1852, *Lampley v. Scott*, 24 Misc. 528, 534 (assumpsit for money delivered to defendant to be carried for plaintiff; defendant pleaded that he had been robbed; his declarations while in the swamp, where the alleged robbery occurred, to passers-by, his appeals for assistance, and his letter written to plaintiff immediately afterward, were admitted, following *Tompkins v. Saltmarsh*). *Contra*: 1867, *Tucker v. Hood*, 2 Bush 85 (action for money collected; plea, robbery; defendant's declarations and conduct a few hours afterwards, excluded; no precedent cited).

§ 1144. **Accused's Consistent Exculpatory Statements.** It would seem that, in a liberal view of the principle of § 1129, *ante*, the statements of an accused person, made before or upon accusation made (*i. e.* before motive for deliberate contrivance could have operated), should be receivable, whether or not he becomes a witness. Probatively, an accused person's protestations of innocence, made in such circumstances, seem to have, for any one inquiring without prepossessions as to the rules of evidence, a value similar to the class of statements dealt with in § 1129. Moreover, they serve to repel (as in the cases of the preceding sections) the inference from silence (*ante*, § 284). Most Courts dismiss them as ordinary hearsay assertions;¹ this result seems harsh and unreflecting. But a few Courts indicate a willingness to accept them.² An accused's statements may of course be admissible under other principles, — for example, as exculpatory parts of a confession (*post*, § 2115), as statements of a mental condition (*post*, § 1732), or as spontaneous exclamations (*post*, § 1749); his conduct indicating consciousness of innocence (*ante*, § 293) may also be admissible. What has been said elsewhere (*post*, § 1732, par. 3), as to the judicial treatment of similar questions, may be urged again here.

¹ 1873, *Ray v. State*, 50 Ala. 104, 107 (defendant's denials on another occasion, excluded); 1891, *U. S. v. Cross*, 20 D. C. 365, 376 (denials, when arrested for murder, excluded); 1878, *Turner v. Com.*, 86 Pa. 54, 71 (murder; declarations of innocence, excluded); 1897, *State v. Carrington*, 15 Utah 480, 50 Pac. 526 (made after knowing of the charge); and compare the cases cited *ante*, § 1133. But the following case is sound: 1897, *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049 (declarations under hypnotic influence after arrest, excluded). So also the following: 1871, *State v. Vandergraff*, 23 La. An. 96 (R. S. § 1010, authorizing the accused's examination by a magistrate to be "evidence," does not admit it for the defendant); 1879, *State v. Toby*, 31 id. 756 (same; DeBlanc, J., diss.); 1879, *State v. Dufour*, lb. 804 (same).

² 1870, Pearson, C. J., in *State v. Worthington*, 64 N. C. 594, 595 (" [Evidence was offered] of what was said by the defendant when he showed the cotton to Wilson, who claimed it as his cotton and charged that it had been stolen out of his gin the night before. . . . When a man who is at liberty to speak is charged with a crime and is silent, his silence is a circumstance tending to show guilt. It follows that if he denies the charge, or says anything in explanation, these declarations may be given in evidence in his favor, to pass before the jury for what they are worth"); 1894, *Boston v. State*, 84 Ga. 590, 21 S. E. 603 (statements made within half an hour, when voluntarily surrendering himself, admitted).

TITLE III: AUTOPTIC PREFERENCE

(REAL EVIDENCE).

CHAPTER XXXVII

1. General Principle.

§ 1150. Definition of the Process.

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§ 1152. Sundry Instances of Production and Inspection in Court.

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3. Limitations germane to the Process itself of Autoptic Preference.

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§ 1160. Incapacity of the Jury to appreciate by Observation (Experiments in Court; Insane Person's Conduct).

§ 1161. Physical or Mechanical Inconvenience of Production; Patent Infringements.

§ 1162. Production Impossible; View by Jury; (1) General Principle.

§ 1163. Same: (2) View allowable upon any Issue, Civil or Criminal; Statutes.

§ 1164. Same: (3) View allowable in Trial Court's Discretion.

§ 1165. Same: (4) View by Part of Jury.

§ 1166. Same: (5) Unauthorized View.

§ 1167. Same: Principles to be distinguished (Juror's Private Knowledge; Official Showers; Accused's Presence; Fence and Road Viewers).

§ 1168. Non-transmissibility of Evidence on Appeal; Jury's View as "Evidence."

1. General Principle.

§ 1150. **Definition of the Process.** The three modes by which a tribunal may properly acquire knowledge for making its decisions have been already defined and distinguished (*ante*, § 24). They are circumstantial evidence, testimonial evidence, and "real" evidence. In arriving now at the principles regulating the use of the third mode, it is necessary to recall briefly the nature of this mode as distinguished from the other two.

If, for example, it is desired to ascertain whether the accused has lost his right hand and wears an iron hook in place of it, one source of belief on the subject would be the testimony of a witness who had seen the arm; in believing this testimonial evidence, there is an inference from the human assertion to the fact asserted. A second source of belief would be the mark left on some substance grasped or carried by the accused; in believing this circumstantial evidence, there is an inference from the circumstance to the thing producing it. A third source of belief remains, namely, the *inspection by the tribunal* of the accused's arm. This source differs from the other two in omitting any step of conscious inference or reasoning, and in proceeding by direct self-perception or autopsy. It is unnecessary, for present purposes, to ask whether this is not, after all, merely a third source of inference, *i. e.* an inference from the impressions or perceptions of the tribunal to the objective existence of the thing perceived. The law does not need and does not

attempt 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 judicial investigation, a thing perceived by the tribunal as existing does exist. There are indeed genuine cases of inference by the tribunal from things perceived to other things unperceived — as, for example, from a person's size, complexion, and features, to his age; these cases of a real use of inference can be later more fully distinguished (*post*, § 1154). But we are here concerned with nothing more than matters directly perceived, — for example, that a person is of small height or is of dark complexion; as to such matters, the perception by the tribunal that the person is small or large, or that he has a dark or a light complexion, is a mode of acquiring belief which is independent of inference from either testimonial or circumstantial evidence. It is the tribunal's self-perception, or autopsy, of the thing itself. From the point of view of the litigant party furnishing this source of belief, it may be termed *Autoptic Proference*.¹

The nature of this source of belief, as distinguished from that of inference from evidence, has more than once been noted in judicial utterances:

Ante 1726, Chief Baron Gilbert, Evidence, 2: "All certainty is a clear and distinct perception; and all clear and distinct perceptions depend upon a man's own proper senses; . . . and when perceptions are thus distinguished on the first view, it is called Self-evidence, or intuitive knowledge. . . . Now most of the business of civil life subsists on the actions of men, that are transient things, and therefore oftentimes are not capable of strict demonstration (which, as I said, is founded on the view of our senses), and therefore the rights of men must be determined by probability. 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 indistinct views, or upon report from the sight of others; . . . and this is the original of trials, and all manner of evidence."

1888, *Garrison, J.*, in *Gaunt v. State*, 50 N. J. L. 490, 495, 14 Atl. 600: "Inspection is like [an] Admission, in that, while not testimony, it is an instrument for dispensing with testimony."²

¹ The word "autoptic" has a precedent in the language of C. J. Robertson, quoted in the next section. 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.

The term "real evidence" has sometimes been applied to this source of belief; but not happily; 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, in the strict sense; 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 corporeal 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. As to the novelty of the term "autoptic proference,"

compare the "self evidence" of Gilbert, C. B., and the "autopsy" of Robertson, C. J., quoted *post*.

² Compare also the traditional phrase about a record "tried by inspection," i. e. its contents determined by direct perception; and also the language in the quotations in the next section. The following passage, though dealing with a judge's peculiar province, rests upon the same thought: 1768, Blackstone, *Commentaries*, III, 331: "Trial by inspection, or examination, is when for the greater expedition of a cause, in some point or issue being either the principal question or arising collaterally out of it, but being evidently the object of senses, the judges of the Court, upon the testimony of their own sense, shall decide the point in dispute; . . . and therefore when the fact, from its nature, must be evident to the Court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the Court alone."

It follows, on the one hand, that autoptic preference, or the tribunal's self-inspection, is to be distinguished from the use of testimonial and circumstantial evidence as the basis of an inference. Autoptic preference calls for no inference from the thing perceived to some other thing; and in this sense, but in this sense only, autoptic preference is not evidence, *i. e.* not evidence in so far as evidence implies a process of inference. On the other hand, it is clear that autoptic preference is one of the three sources of belief, and that it may be employed in litigation in order to convince the tribunal of desired facts. It is thus evidence, in the sense that evidence includes all modes, other than argument, by which a party may lay before the tribunal that which will produce persuasion. It is something more than and different from testimonial or circumstantial evidence, and it is to be included among the kinds of evidence in the broader sense of that term. The due appreciation of this is of considerable practical consequence in solving one of the problems connected with a jury's view (*post*, § 1168).

§ 1151. **General Principle: Autoptic Preference always Proper, unless Specific Reasons of Policy apply.** It is obvious that, from the point of view of logic or probative value, none of the limitations have here to be examined which always affect the use of testimonial and circumstantial evidence. If we offer to prove that a man was of negro complexion by the circumstance that his grandchild is of negro complexion, it may be a question whether this fact is of enough probative value to be admissible. Or, if we offer to prove it by the assertion of a witness on the stand, the witness must first appear to be so qualified that his assertion is worth receiving. But when we offer to produce in Court the man himself, no inference is necessary, and the restrictions and preliminary inquiries that are due to the use of circumstantial or testimonial inferences are entirely dispensed with. There may be objections based on privilege or on auxiliary policy (*post*, §§ 1157-1168), but there can be none based on relevancy or probative value. There is always a question as to the relevancy of a circumstance, or the qualifications of a witness; there can never be a question as to the relevancy of the thing itself, autoptically produced. Add to this that, 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 efficient process of proof. If the question is whether a shoe is fastened by laces or by buttons, the testimony of one who has seen the shoe or the circumstance that a button has fallen from the shoe, can at least be no more satisfactory than the inspection of the shoe in Court. Accordingly, it might be asserted, *à priori*, that where the existence or the external quality or condition of a material object are in issue or are relevant to the issue, *the inspection of the thing itself, produced before the tribunal, is always proper*, provided no specific reason of policy or privilege bears decidedly to the contrary. Such ought to be, and such apparently is, the principle accepted by the Courts:

1811, *Coolter, J.*, in *Hook v. Page*, 2 Munf. 379, 384 (allowing the inspection of an alleged slave): "There can be no objection to the other finding, to wit, 'that the plaintiff Nanny is a white woman.' The jury find this fact upon their own knowledge,—in other words, by inspection. Was this improper? . . . If the plaintiff Nanny had not been before the jury, they must have found their verdict upon the testimony of others, which would have amounted only to a probability. But here they have the highest evidence, the evidence of their own senses. . . . The jury believe their own senses, in preference to the opinions of the witnesses."

1835, *Robertson, C. J.*, in *Gentry v. McSinnis*, 8 Dana Ky. 332, 336 (the jury had been allowed to inspect the defendant, to see if she was a white woman): "The counsel denies that personal inspection by the jurors on the trial is proper or allowable evidence. . . . To a rational man of perfect organization the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is therefore the first principle in the philosophy of evidence. . . . Hence, *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. . . . [Jurors,] when they decide altogether on the testimony of others, do so only because the fact to be tried is unascertainable by any better proof. Their own personal knowledge of the fact would always be much more satisfactory to themselves, and afford much more certainty of truth and justice. . . . Hence the policy of having a jury of the vicinage; and hence, too, jurors have not only been permitted but required to decide on autoptical examination wherever it was practical and convenient."

1876, *Beck, J.*, in *Stockwell v. R. Co.*, 43 Ia. 474 (admitting evidence of a trial in the jury's presence of the practicability of a train running a certain distance without steam): "The question involved is a physical fact. Its solution by the experiment would leave no chance for error in judgment or opinion. Why not employ the experiment to reach the truth,—the end and aim of all trials at law? . . . Suppose experts should differ as to the effect of the union of two chemical bodies; what objection could exist to an experiment before the jury to determine the true result? Suppose a question arose in a case as to the weight of a gold coin, the witnesses of the parties giving conflicting evidence on the subject; why not weigh it in the presence of the jury? Or suppose an alteration in a deed can only be determined by the use of artificial assistance, to the eye? Why should not jurors be permitted to use such aids to enable them to decide the case in accordance with the very truth? But the questions here presented we do not determine; we suggest these thoughts to show that there are arguments based upon the high considerations of justice and truth in support of the propriety of the alleged experiment," if fairly conducted.

1877, *Rodman, J.*, in *Warlick v. White*, 76 N. C. 175, 179: "On general principles it would seem that, when the question is whether a certain object is black or white, the best evidence of the color would be the exhibition of the object to the jury. . . . Why should a jury be confined to hearing what other men think they have seen, and not be allowed to see for themselves?"

"Ant agitur res in scenis, ant acta referunt.
Sognius irritant animos demissa per anrem,
Quam qua sunt oculis subjecta fidelibus, et que
Ipsa sibi sibi tradit spectator" (Horatius ad Pisones)."

§ 1152. **Sundry Instances of Production and Inspection in Court.** This source of persuasion has been resorted to in a great variety of instances. Among the earliest examples of its recognition are the view of realty;¹ the proceeding *de ventre inspiciendo* in cases of a widow professing to be with child entitled to inherit and of a convicted woman asking respite from

¹ See the authorities *post*, § 1162.

execution on account of pregnancy;³ the coroner's inquest over a deceased person; the inspection of a maimed person on a trial for mayhem;⁴ the inspection of one pleading non-age or infancy;⁴ and the Chancellor's examination of one protesting against being kept under restraint as an idiot or lunatic.⁴ Proof is often made by the production of a person whose color is in issue;⁵ of a person alleged to be intoxicated,⁵ or incompetent,⁶ or to be identical with another person,⁵ or to resemble another person.⁵ Tools, weapons, and other objects connected with a crime may be proved by production,⁷ as well as the clothing or mutilated members of the deceased,⁷ or the injured members of a plaintiff suing for compensation.⁸ The nature of goods may be made to appear by the inspection of a sample,⁹ or the operation of a force whose qualities are in issue by material instances of the effect of that operation.¹⁰ In short, it does not appear that there is, in the nature of the process, any distinction to be taken as regards the *kind of fact* presented for inspection. Anything cognizable by the senses of the tribunal may thus be offered.

Nor is any distinction to be taken as regards the *mode of presentation* by the party. An object may be merely set forth for inspection, or some experimental process may be conducted in the tribunal's presence;¹¹ whether the mode involves a showing or a doing, neither is in itself objectionable. Nor is any distinction to be taken as to the *mode of inspection* by the tribunal. It may merely employ its senses directly; or it may use some suitable mechanical aid, such as a microscope;¹² and it may merely look on, or it may take an active share in the process of experimentation.¹³ Nor is there any distinction as to the *place of inspection*; the thing may be brought into the court, or the tribunal may go to the place where the thing is.¹⁴

The discriminations that may serve to forbid this process of inspection by the tribunal are of two sorts: (1) Independent principles, connected with other subjects, may apply equally to the process of autoptic proference; (2) Limitations germane to the process itself may forbid its use. These may now be considered in order.

³ The question in this case is rather one of a compulsory examination, and is therefore treated *post*, § 1158.

⁴ 1592, *Abbot of Strata Mercella's Case*, 9 Co. Rep. 31 a; 1642, *Austin v. Hilliers*, *Hardres* 408; 1768, *Blackstone, Commentaries*, III. 392.

⁵ See the authorities *post*, § 1154.

⁶ *Post*, § 1154.

⁷ *Post*, § 1160.

⁸ *Post*, § 1157.

⁹ *Post*, § 1158.

¹⁰ *Ante*, § 439; *post*, § 1159.

¹¹ *Ante*, §§ 445, 451.

¹² *Post*, §§ 1154, 1160, 1163; *ante*, § 445.

¹³ 1878, *Short v. State*, 63 Ind. 376, 380 (to

discover a ring's erased inscription, the jury were allowed to examine it through a "magnifying or jeweller's eye-glass"; "if the eye-glass in question augmented the natural power of the eye to discover the inscription, it did that which in the light of science it was made for: and if it did not, no harm was done"); 1898, *Morse v. Blanchard*, 117 Mich. 37, 75 N. W. 93 (judge or jury may examine a writing with microscope to detect alteration); 1897, *People v. Constantino*, 153 N. Y. 24, 47 N. E. 37 (the judge allowed to illustrate the length of a minute by taking his watch and marking the period for the jury). Compare the cases cited *ante*, §§ 789, 790.

¹⁴ See the preceding instance, and *post*, § 1160.

¹⁵ *Post*, §§ 1161, 1162.

2. Independent Principles incidentally affecting Autoptic Preference.

§ 1154. Irrelevant Facts are not to be proved (Color, Resemblance, Appearance, etc., to show Race, Paternity, Age, etc.; Changed Conditions of Premises, etc.). If, by some principle of relevancy, a fact offered to be shown by autoptic preference is not admissible, because irrelevant, it cannot be shown, either in this or in any other way. For example, whether a person's color is black or white is best ascertained by inspecting the person; but if his color when ascertained would be irrelevant for the purpose concerned, an inspection to learn his color would obviously be unnecessary, and therefore improper. Thus, his color might be relevant to show his race-ancestry, but not to show his state of health; in the former case inspection would be allowed, in the latter case not, the ruling in each instance depending on the admissibility of the fact shown by inspection. In a large number of instances this is the real question.

(1) A person's color has always been regarded as some evidence of race-ancestry;¹ accordingly, the production of a person to ascertain his color as relevant for this purpose is proper;² so, also, to ascertain his foot-formation as evidence of race.³

(2) Resemblance of features, as evidence of paternity, in cases of bastardy, inheritance, or seduction, has been a matter of some controversy;⁴ but, where the fact of resemblance has been 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

¹ *Ante*, § 167.

² 1835, *Gentry v. McGinnis*, 3 Dana Ky. 362, 366 (inspection of an alleged slave to determine her color); 1839, *Chancellor v. Milly*, 9 id. 24 (same); 1876, *Garvin v. State*, 52 Miss. 207, 209 (exhibition of a defendant to determine his color); Mo. Rev. St. 1899, § 2174 (the jury may determine negro-blood from appearance, on an issue as to a mixed marriage); 1877, *Warlick v. White*, 76 N. C. 175, 179 (exhibition of a child to determine its parentage by its color); 1806, *Hudgins v. Wrights*, 1 Hen. & M. 134, 141 (Roane, J.: "In the case of a propositus of mixed blood, I do not see but that the fact may be as well ascertained by the jury or the judge upon view as by the testimony of witnesses"; otherwise, additional evidence may be needed); 1811, *Hook v. Pagan*, 2 Manf. 379, 384, 386 (inspection of an alleged slave's complexion, allowed).

³ 1861, *Daniel v. Gny*, 23 Ark. 50, 51 (the foot-formation being evidential of race, the plaintiff in a suit for freedom was allowed to exhibit her bare feet to the jury).

⁴ *Ante*, § 166.

⁵ The exhibition was allowed, except as otherwise noted: 1875, *Pank v. State*, 52 Ala. 427, 429; 1902, *Kelly v. State*, 133 id. 195, 32 So. 56 (bastardy: child about a year old, allowed to be shown); 1889, *Re Jessup*, 81 Cal. 408, 418, 21 Pac. 976, 22 Pac. 742; 1862, *Risk v. State*, 19 Ind. 152 (doubted because of the irrelevancy of

resemblance); 1870, *Reitz v. State*, 33 id. 187 (same); 1878, *State v. Danforth*, 48 Ia. 43, 47 (seduction; exhibition of infant, held improper, because of irrelevancy of resemblance); 1840, *State v. Smith*, 54 id. 104, 6 N. W. 153 (child exhibited, to show resemblance); 1900, *State v. Harvey*, 112 id. 416, 84 N. W. 535 (doubted, on authority of *Closs v. Samm*, cited *post*, § 1168); 1888, *Clark v. Bradstreet*, 80 Me. 454, 15 Atl. 56 (held improper for reasons of irrelevancy); 1876, *Jones v. Jones*, 45 Md. 144, 151, *semble*; 1867, *Finnegan v. Dugan*, 14 All. 197; 1869, *Yonng v. Makepeace*, 103 Mass. 50, 54; 1891, *Scott v. Donovan*, 153 id. 378, 26 N. E. 871 (bastardy: child allowed to be exhibited, with no "distinction according to age"); 1859, *Gilmanton v. Ham*, 38 N. H. 108, 112; 1900, *State v. Saidell*, 70 id. 174, 46 Atl. 1083 (bastardy, defendant being a Jew; child allowed to be inspected); 1888, *Gaunt v. State*, 50 N. J. J. 490, 495, 14 Atl. 600; 1872, *State v. Woodruff*, 67 N. C. 89, *semble*; 1892, *Crow v. Jordan*, 9 Oh. St. 655, 32 N. E. 750. The consideration of this resemblance was forbidden in *Hanawalt v. State*, 64 Wis. 84, 24 N. W. 489, on other grounds (*post*, § 1168).

Distinguish the following ruling, on the principle of § 1158, *post*: 1903, *Hopkins v. Hopkins*, 132 N. C. 25, 43 S. E. 506 (exhibition of defendant's child, in a divorce case, merely to excite sympathy, held improper).

(3) A person's *appearance*, as evidence of *age* (for example, of infancy, or of being under the age of consent to intercourse), is usually regarded as relevant;⁶ and, if so, the tribunal may properly observe the person brought before it.⁷

(4) A person's *appearance and behavior* is relevant as indicating his intoxication,⁸ or his lunacy,⁹ or even his competency as a workman;¹⁰ and may therefore be learned by the tribunal's direct observation of the person.

(5) Where the *identity* of one person or thing with another is in issue, the features as observable by the tribunal are relevant.¹¹

(6) The *present condition* of an object offered may not be the same as at the time in issue, nor so nearly the same as to be proper evidence of its former condition¹²; accordingly, autoptic preference is allowable only on the assumption that the condition is the same or sufficiently similar.¹³

(7) *Experiments* to show the quality or operation of a substance, a machine, etc., are often excluded because of the dissimilarity of circumstances or because of probable confusion of issues;¹⁴ and for this reason the exhibition of such experiments before the tribunal may of course be forbidden.¹⁵

⁶ *Ante*, § 222.

⁷ *Eng.*: 1558, *Langley v. Mark*, Cary 83 (person adjudged "by inspection not above the age of 15 years"); 1566, *Wood v. Wageman*, Toth. 72 ("view of the body" had by Chancellor, to determine infancy); 1592, *Abbot of Strata Mercella's Case*, 9 Co. Rep. 31a (plea of non-age; the writ was a *venire facias* "ut per aspectum corporis sui constare poterit præfatis justiciis nostris si prædictus A. sit plene ætatis"); *U. S.*: 1899, *Jones v. State*, 106 Ga. 365, 34 S. E. 174 (rape of girl of 15 years; the jury allowed, in determining whether she had capacity to consent, "to take into consideration facts discovered by their own observation of the girl herself" in court); 1898, *Com. v. Hollis*, 170 Mass. 433, 49 N. E. 632 (appearance of a girl said to be under 16, allowed); 1900, *State v. Thompson*, — Mo. —, 55 S. W. 1013; *N. Y. Laws* 1882, c. 340 (on a dispute as to a child's age, the child "may be produced and exhibited"); *Laws* 1883, c. 375, § 2 (similar, on a charge of selling fire-arms to a minor); 1851, *State v. Arnold*, 13 Fed. 184, 192 (whether a defendant was under 14; inspection allowed); 1888, *Hermann v. State*, 73 Wis. 248, 250, 41 N. W. 171 (whether a girl's appearance was under 21; inspection allowed).

In *Indiana* and *Texas* the consideration of appearance as evidence of age has been forbidden on the ground of § 1146, *post*, where the authorities are collected.

⁸ 1794, *Walker's Trial*, 23 How. St. Tr. 1154 (Mr. Justice Heath: "He has made himself so exceedingly drunk, it is impossible to examine him"); and cases cited *ante*, § 235.

⁹ The authorities are collected *post*, § 1160, where the subject is considered from another point of view.

¹⁰ 1885, *Keith v. N. H. & N. Co.*, 140 Mass. 175, 180, 3 N. E. 28 (appearance of employee on the stand, allowed to be considered as affecting his competency for his duties).

¹¹ 1669, *R. v. Backworth*, 1 Sid. 377 (perjury in a cause involving the birth of a posthumous child, said to have been falsely procured by the mother from another woman; the delivery of the child "was proved by the circumstances usual in such cases, and also by marks, and the child being in court was stripped and shown"); 1592, *Abbot of Strata Mercella's Case*, 9 Co. Rep. 30 (a person said to be dead); 3 Bl. Com. 332; 1743, *Annesley v. Anglessea*, 17 How. St. Tr. 1139, 1182; 1873, *R. v. Castro* (Tichborne Trial), charge of C. J. Cockburn, *passim*; *La. C. Pr.* 1894, § 139 (Court may order movable property brought into court to determine its identity). Compare the principles affecting identification, *ante*, § 413.

For the identity of animals, see *infra*, this section, and *post*, § 1161.

¹² The principles are explained *ante*, § 437.

¹³ 1892, *French v. Wilkinson*, 93 Mich. 323, 53 N. W. 530 (limb bitten by dog; exhibition three years afterwards, forbidden, the sameness of condition not being shown); 1898, *State v. Goddard*, 146 Mo. 177, 48 S. W. 82 (door of room of homicide, not changed in condition, admitted); 1878, *King v. R. Co.*, 72 N. Y. 607 (broken hook with cross-cracks, shown, the iron being in the same condition); 1903, *Walker v. Ontario*, — Wis. —, 95 N. W. 1086 (pieces of a broken bridge, two years after the break, allowed to be shown, after testimony to the sameness of condition); and cases cited *post*, § 1164 (jury's view). The following ruling is unsound: 1870, *Jacobs v. Davis*, 34 Md. 204, 208, 216 (whether rails and shingles had been injured; the rails and shingles not allowed to be shown, because they could not be "received as testimony to prove or disprove the fact of injury done to them"; a singular abuse of language).

¹⁴ *Ante*, § 445.

¹⁵ See *post*, § 1160, for an additional reason for exclusion; and cases cited *post*, § 1163.

The following classical example illustrates the propriety of experimentation when the fact ascertainable from it is a relevant one:

1800 (?), Lord Eldon, in *Twiss' Life*, I, 354: "When I was Chief Justice of the Common Pleas (I did like that court!) a cause was brought before me for the recovery of a dog, which the defendant had stolen in that ground [lying in the field beyond his house] and detained from the plaintiff its owner. We had a great deal of evidence, and the dog was brought into court and placed on the table between the judge and witnesses. It was a very fine dog, very large, and very fierce, so much so that I ordered a muzzle to be put on it. Well, we could come to no decision; when a woman, all in rags, came forward and said, if I would allow her to get into the witness-box, she thought she could say something that would decide the cause. Well, she was sworn just as she was, all in rags, and leant forward towards the animal, and said, 'Come, Billy, come and kiss me!' The savage-looking dog instantly raised itself on its hind legs, put its immense paws around her neck, and saluted her. She had brought it up from a puppy. Those words, 'Come, Billy, come and kiss me,' decided the cause."¹⁶

§ 1155. *Privilege, as a ground for Prohibition (Self-Crimination, Plaintiff suing for Corporal Injury)*. Another independent principle that may prohibit autoptic preference is the principle of privilege, protecting one who is unwilling to furnish evidence. Whether the privilege of an *accused person* not to criminate himself is violated by compelling the exhibition of his body or its members in court depends wholly on the theory of this privilege.¹ So also the question whether a *plaintiff* suing for *corporal injury* may be compelled to exhibit it to the jury or to medical witnesses is peculiarly one of privilege;² as also the propriety of granting a writ *de ventre inspiciendo*² or of ordering an inspection in a suit for divorce on the ground of impotency.²

§ 1156. *Sundry Independent Principles sometimes involved (Handwriting, Hearsay, Photographs, etc.)*. Certain other independent principles sometimes resulting in the prohibition of autoptic preference, or prescribing conditions for its use, need to be discriminated. (1) Specimens of *handwriting*, as evidence of a person's style of writing, are in some jurisdictions not to be submitted to the jury.¹ (2) Where an object has been obtained by *illegal means*, it has sometimes been made a question whether it should be allowed to be used in evidence.² (3) The *Hearsay rule* forbids a jury at a view to hear testimony;³ moreover, some things said or done in court by way of test or experiment may virtually involve a breach of this rule by calling for unsworn testimony.⁴ Whether the accused in a criminal case must be present at a view involves also the scope of the Hearsay rule.⁵ (4) The use of *photographs, models, maps*, and the like, by a witness, is merely one way of giving testimony, and does not concern the present principle.⁶ (5) Whether the *Court* may decide by inspection, instead of the jury, is a question of the respective

¹⁶ For the relevancy of animal conduct of this kind, see *ante*, § 177.

¹ *Post*, § 2265.

² *Post*, § 2220.

³ *Post*, § 2001.

⁴ *Post*, § 2183.

⁵ *Post*, § 1802.

⁶ 1877, *Com. v. Scott*, 123 Mass. 222, 224.

²³⁴ (cross-examination of one identifying defendant by his voice; Court's refusal to allow defendant to speak to test the witness, held proper, the defendant not being on oath; *post*, § 1824; 1886, *Osborn v. Detroit*, 36 Fed. 36 (*post*, § 1158)).

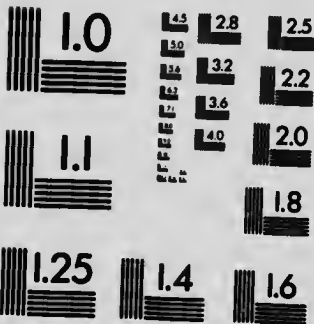
¹ *Post*, § 1803.

² *Ante*, § 790.



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functions of judge and jury.⁷ (6) 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, involves a different question;⁸ 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.⁹

3. Limitations germane to the Process itself of Autoptic Preference.

§ 1157. **Unfair Prejudice to an Accused Person (Exhibition of Weapons, Clothes, Wounds, etc.).** The autoptic preference to the jury of the weapons or tools of a crime, or of the clothing or the mutilated members of the victim of the crime, has often been objected to on grounds of Undue Prejudice (*post*, § 1863). The nature of this supposed prejudice is illustrated in the following passages:

1806, *Picton's Trial*, 30 How. St. Tr. 457, 480; the defendant was charged with inflicting torture, as governor of Trinidad, upon Luisa Calderon, by first tying the left foot and right hand together behind, and then suspending the body from the ceiling by a pulley-rope tied to the left wrist, so that the weight of the body rested, through the right foot, on a sharp wooden spike in the floor; Mr. *Garrow* (to the witness Luisa): "Is that a faithful description of it?" [showing the witness a coloured drawing]. Ans. "Yes, very good indeed"; L. C. J. *Ellenborough*: "I do not approve of exhibiting drawings of this nature before a jury; and I shall not permit it till the counsel for the defendant has seen it. I have no objection to your showing a description to the jury, but the colouring may produce an improper effect. [The opposing counsel consented to its use.] The jury will consider it merely as a description of the situation in which she was placed; whether she was justifiably so placed is the question between you." Mr. *Garrow*: "I have one to which there can be no objection; it is a mere pen-and-ink sketch." L. C. J. *Ellenborough*: "Gentlemen, you will consider that as a description of the position, which we can easily understand from the words of the witness. Nobody wishes that any improper impression should be made by that drawing; it is only to show the nature of the process." When the counsel for the defence afterwards complained of the prejudice thus created, Lord *Ellenborough* said: "That you must attribute to me, or perhaps to yourself; for I distinctly asked you whether you would consent to their exhibition, and on your concurring, I cautioned the jury not to suffer their minds to be inflamed, but simply to look at the representation of the position of the prosecutrix in order to understand the testimony of the witness."

1820, *Ings' Trial*, 33 How. St. Tr. 1051, 1088; the "Cato-street conspiracy"; high treason; the defendant claimed that he was ignorantly drawn into the movement and did not know of the specific murderous designs of the leaders. A constable produced the conspirators' weapons. "Are there now placed upon the table the things which were taken in Cato-street?" "Yes." — "You gave us an enumeration yesterday of thirty-eight hall-cartridges, firelock and bayonet, one powder-flask, three pistols, and one sword, with six bayonet spikes, and cloth belt, one blunderbuss, pistol, fourteen bayonet spikes, and three pointed files, one bayonet, one bayonet spike, and one sword scabbard, one carbine and bayonet, two swords, one hullet, ten hand-grenades; [two fire-halls, nine hundred and sixty-five ball cartridges, eleven hags of gunpowder of a pound each;] I do not see them?" "Here they are," producing a hag. — "We must have them on the table." They were emptied out, and the jury inspected the various articles, the hand-grenades being broken open, and other weapons displayed. No objection was made to this proceeding, which was taken as a matter of course; but the counsel for the defence, Mr.

⁷ *Post*, § 2550.

⁸ *Post*, § 1179.

⁹ Except for the considerations referred to in notes 1 and 2, *supra*.

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

1856, Mr. *David Paul Brown*, in "The Forum," II, 448 (this famous Philadelphia advocate is recounting the story of a *cause célèbre* of 1834, the homicide, by a disappointed lover, of the woman he loved): "During the course of the trial there was an occurrence which is entitled to notice. When I first called upon the prisoner, after he had furnished me with some of the prominent details, I asked him how the deceased was dressed at the time of the blow. He said, 'in black.' I observed, 'that was better than if the dress had been white.' Upon which the prisoner turned hastily round, and asked what difference that could make. The reply was, 'No difference in regard to your offence, but a considerable difference in respect to the effect produced upon the jury by the exhibition of the garments, which, no doubt, will be resorted to.' And so upon the trial it turned out. The black dress was presented to the jury, — the eleven punctures through the bosom pointed out; but no stain was observable, no excitement was produced. At last, however, they went further, and produced some of the white undergarments — corsets, etc., all besmeared with human blood. Upon this exhibition there was not a dry eye in the courtroom. And the current of opinion continued to run against the defendant from that moment until the close of the case, and finally bore him into eternity."

1882, *Andrews, C. J.*, in *Walsh v. People*, 88 N. Y. 467: "The exhibition of the photograph of a young girl alleged to have been cruelly murdered was, as is claimed, calculated to excite the pity of the jurors for the unfortunate victim of the homicide, and correspondingly to excite their prejudice, against the accused. . . . [After conceding that the condition of the corpse was irrelevant to the disputes of fact in the case,] The extent to which counsel may go, in opening a case to a jury, cannot in the nature of things be regulated by precise rule. The Court may doubtless interfere in the interest of justice to restrain undue license on the part of counsel in addressing the jury. . . . But if the prosecuting officer, instead of exhibiting the picture, had described the deceased in terms calculated to excite the sympathy or pity of the jury, it would scarcely be claimed that an exception would lie to a refusal of the Court to interfere. It is neither a logical nor a reasonable inference that a jury dealing with the grave issue of life or death, in a case where the sole controverted question is as to the insanity of the prisoner when he committed the act, would be influenced by a description in words or by a representation in a picture of the personal appearance of the person alleged to have been murdered."

1878, Mr. *Pitt Taylor*, *Evidence*, 7th ed., I, § 557: "Though evidence addressed to the senses, if judiciously employed, is obviously entitled to the greatest weight, care must be taken not to push it beyond its legitimate extent. The minds of jurymen, especially in the remote provinces, are grievously open to prejudices, and the production of a bloody knife, a bludgeon, or a burnt piece of rag, may sometimes, by exciting the passions or enlisting the sympathies of the jury, lead them to overlook the necessity of proving in what

manner these articles are connected with the criminal or the crime; and they consequently run no slight risk of arriving at conclusions which, for want of some link in the evidence, are by no means warranted by the facts proved. The abuse of this kind of evidence has been a fruitful theme for the satirists, and many amusing illustrations of its effect might be cited from our best authors. Shakspeare makes Jack Cade's nobility rest on this foundation; for Jack Cade having asserted that the eldest son of Edmund Mortimer, Earl of March, 'was by a beggar woman stolen away,' 'became a bricklayer when he came to age,' and was his father, one of the rioters confirms the story by saying, 'Sir, he made a chimney in my father's house, and the bricks are alive to this day to testify to it; therefore deny it not.' Archbishop Whately — who makes use of the above anecdote in his 'Historic Doubts relative to Napoleon Buonaparte,' — adds, 'Truly, this evidence is such as country people give one for a story of apparitions; if you discover any signs of incredulity, they triumphantly show the very house which the ghost haunted, the identical dark corner where it used to vanish, and perhaps even the tombstone of the person whose death it foretold.'

1877, *Scintille Juris*, 58: "What is called 'real evidence' — mostly bullets, bad florins, and old boots — is of much value for securing attention. This is true even when these exhibits prove nothing, — as is generally the case. They look so solid and important that they give stability to the rest of the story. The mind in doubt ever turns to tangible objects. They who first carved for themselves a Jupiter from a log of wood knew very well that the idol could do nothing for them; but it enabled them easily to realize a power who could. A rusty knife is now to an English jurymen just what a *scarabæus* was to an Egyptian of old. I have seen a crooked nail and a broken charity-box treated with all the reverence due to relics of the holiest martyrs."¹

The objection thus indicated seems to be twofold. First, there is a natural tendency to infer from the mere production of any material object, and without further evidence, the truth of all that is predicated of it. Secondly, the sight of deadly weapons or of cruel injuries tends to overwhelm reason and to associate the accused with the atrocity without sufficient evidence. The objection in its first phase may be at least partly overcome by requiring the object to be properly authenticated, before or after production; and this requirement is constantly enforced by the Courts.² The objection in its second phase cannot be entirely overcome, even by express instructions from the Court; but it is to be doubted whether the necessity of thus demonstrating the method and results of the crime should give way to this possibility of undue prejudice. No doubt such an effect may occasionally and in an extreme case be produced; and no doubt the trial Court has a discretion to prevent the abuse of the process. But, in the vast majority of instances where such objection is made, it is frivolous, and there is no ground for apprehension. Accordingly, such objections have almost invariably been repudiated by the Courts.³

¹ The great dramatist's example will occur to every one: "See, what a rent the envious Casca made! . . . Here is himself, marred, as you see, with traitors." For the extent to which the Roman advocates developed this method of tempting emotion to overwhelm reason, see Forsyth's *Hortensius the Advocate*, 3d ed., 92, 96.

² This necessity is further discussed in connection with the rules for Authentication (*post*, § 2130). The following examples will here

suffice: 1898, *Parrott v. Com.*, — Ky. — , 47 S. W. 452 (club used in killing, required to be authenticated); 1852, *People v. Larned*, 7 N. Y. 445, 451, 452 (tools, offered with connecting evidence).

³ To the cases following, add those quoted above, and also certain of the photograph cases cited *ante*, § 792: *Eng.*: 1722, *R. v. Reason*, 16 How. St. Tr. 42 (murder by shooting: "the clothes [of the deceased] were produced, and by the hole in the waistcoat it appeared that

§ 1158. **Unfair Prejudice to a Civil Defendant in Personal Injury Cases.**

In civil actions, an objection has often been made, on analogous grounds, to

the wound given by the pistol under the right pap could no way happen by my position of the pistols in the bosom of the deceased, by the pistol going off of itself"); *Ala.*: 1860, *Mose v. State*, 36 Ala. 211, 219, 229 (a chip from a tree containing a buckshot said to have been fired, shown); 1895, *Dorsey v. State*, 107 id. 157, 18 So. 199 (murder; coat with shot-hole, worn by deceased); *Hurbon v. State*, 108, 18 So. 283 (hat of the deceased); 1896, *Crawford v. State*, 112 id. 1, 21 So. 214 (pistol-balls taken from the body of the deceased, admitted); 1897, *Mitchell v. State*, 114 id. 1, 22 So. 71 (showing a purse said to have contained the stolen money); *Ark.*: 1896, *Starchman v. State*, 62 Ark. 538, 540, 36 S. W. 940 (burglar's tools exhibited); *Cal.*: 1882, *People v. Hope*, 62 Cal. 291, 295 (burglar's tools exhibited); 1886, *People v. McCurdy*, 68 id. 576, 580, 10 Pac. 207 (hats of the deceased, the defendant, and F. D., shown to the jury at their request); 1893, *People v. Hawes*, 98 id. 548, 652, 33 Pac. 791 (murder; vest worn by deceased, exhibited); 1897, *People v. Winthrop*, 118 id. 85, 50 Pac. 390 (articles taken in a robbery, admitted); 1900, *People v. Sullivan*, 129 id. 557, 62 Pac. 101 (gun used in a murder, admitted); 1901, *People v. Westlake*, 134 id. 505, 66 Pac. 731 (clothing of the deceased, admitted); *Ga.*: 1876, *Wynne v. State*, 56 Ga. 113, 118 (murder; the pistol and cartridges allowed to be placed before the jury for their inspection, with explaining testimony); 1893, *Adams v. State*, 93 id. 166, 18 S. E. 553 (perjury as to pantaloons; the pantaloons exhibited); 1899, *Dill v. State*, 106 id. 683, 32 S. E. 660 (rock used in an assault, admitted); 1903, *Patton v. State*, 117 id. 230, 43 S. E. 533 (causing the weeping mother of the murdered boy to show to the jury his bloody shirt and point out the bullet-holes, held improper); *Ill.*: 1887, *Spies v. People*, 122 Ill. 236, 12 N. E. 856, 17 N. E. 898 (Anarchist murders at Haymarket Square; bombs and cans of dynamite, etc., exhibited); 1893, *Piniter v. People*, 147 id. 444, 466, 35 N. E. 64 (bel-thing of the murdered man, etc., allowed to be displayed; "the time and manner in which objects of this character shall be displayed in the presence of the jury is a matter wholly within the sound discretion of the Court"); 1896, *Keating v. People*, 160 id. 340, 43 N. E. 724 (a wad of paper substituted for stolen bills, exhibited); 1902, *Henry v. People*, 198 id. 162, 65 N. E. 120 (huggy and deceased's clothes, exhibited); 1903, *Cleveland C. C. & St. Louis R. Co. v. Patton*, 203 id. 376, 67 N. E. 804 (injured person's clothing, exhibited); *Ind.*: 1883, *McDonel v. State*, 90 Ind. 320, 327 (hat/hat inspected by the jury); 1884, *Stors v. State*, 99 id. 413, 416 (inspection of deceased's pantaloons allowed); 1893, *Davidson v. State*, 135 id. 254, 258, 34 N. E. 972 (murder; clothing worn by the deceased, exhibited); 1897, *Anderson v. State*, 147 id. 445, 46 N. E. 901 (revolver used in resisting arrest, exhibited); 1899, *Thrawley v. State*, 153 id. 375, 55 N. E. 95 (murder; skull of deceased exhibited); *Ia.*: 1868, *State v. Vincent*, 24 Ia. 570, 576 (the severed head of the deceased, preserved in alcohol and exhibited to the Court and jury at the trial, then identified by witnesses); 1885, *Barker v. Perry*, 67 id. 146, 147, 25 N. W. 100 (cited *post*, § 1158); 1893, *State v. Jones*, 89 id. 182, 188, 56 N. W. 427 (murder; razor used, exhibited; defendant's admission of the fact of killing, immaterial); 1900, *State v. Petersen*, 110 id. 647, 82 N. W. 329 (rape; underclothing exhibited); *Mass.*: 1866, *Cour. v. Burke*, 12 All. 182 (inspection of a stolen wallet, etc., to find whether "they were of some value," allowed); *Minn.*: 1894, *State v. Smith*, 56 Minn. 78, 84, 57 N. W. 325 (shooting a trespasser; signs on premises, warning trespassers, admitted); 1900, *State v. Minot*, 79 id. 118, 81 N. W. 753 (burglars' tools and arms, exhibited); *Miss.*: 1883, *Powell v. State*, 61 Miss. 319 (portion of stolen hog, shown for identification); *Mo.*: 1897, *State v. Wiewers*, 66 Mo. 13, 29 (murder; deceased's boxes exhibited; "a party cannot, upon the ground that it may harrow up feelings of indignation against him in the breasts of the jury, have competent evidence excluded"); 1885, *State v. Stair*, 87 id. 268, 272 (blood-stained clothing of the deceased shown; "it was as competent for the jurors to get this information by their own sight as it was to get it through the medium of witnesses"); 1890, *State v. Moxley*, 102 id. 387, 14 S. W. 969; 15 S. W. 556 (spinal vertebrae of the deceased, allowed to be exhibited, if identified); 1893, *State v. Murphy*, 118 id. 7, 14, 25 S. W. 95 (rape; bloody underclothing exhibited); 1894, *State v. Duffy*, 124 id. 1, 10, 27 S. W. 358 (rape; defeculant's clothing exhibited); *Nebr.*: 1901, *Savary v. State*, 62 Nebr. 166, 87 N. W. 34 (skull of deceased exhibited); *N. J.*: 1897, *Johnson v. State*, 59 N. J. L. 535, 37 Atl. 949 (exhibition of defendant's boots and the tracks made by them, allowed); *N. Y.*: 1866, *Gardiner v. People*, 6 Park. Cr. C. 155, 201 (murder; weapons used, and the deceased's clothing, exhibited); 1852, *People v. Larned*, 7 N. Y. 445, 452 (burglary; tools exhibited); 1866, *People v. Gonzalez*, 35 id. 49, 64 (murder; deceased's clothing exhibited); 1875, *Foster v. People*, 63 id. 619 (burglar's tools shown); *N. C.*: 1873, *State v. Mordecai*, 68 N. C. 207, 210 (burglary; accomplice's stick, exhibited); *N. C.*: 1893, *State v. Symmes*, 40 S. C. 383, 387, 19 S. E. 16 (clothes exhibited, to show lack of powder-burns); *S. D.*: 1900, *State v. Shields*, 13 S. D. 464, 83 N. W. 559 (watch and chain of assaulted person, exhibited); *Tenn.*: 1890, *Turver v. State*, 89 Tenn. 547, 564, 15 S. W. 838 (murder; deceased's ribs and vertebra, exhibited); *Tex.*: 1882, *King v. State*, 13 Tex. App. 277, 280 (clothes of deceased, exhibited); 1883, *Hart v. State*, 15 id. 202, 228 (same; admissible, "no matter how the jury might be affected by them"); 1899, *Roberson v. State*, — Tex. Cr. —, 49 S. W. 398 (rape; complaining witness brought in to testify, in such a bruised and emaciated condition that she could testify only

the exhibition of his corporal injuries by one suing for compensation.¹ This objection, like the preceding one, assumes that there is a double risk; the jury may heedlessly conclude, it is thought, first, that because the injury is perfectly patent therefore the defendant is to blame for it, and, secondly, that since the plaintiff is truly in a pitiable plight, some one at least should be found to compensate him, and the defendant rather than any one else; both of these risks being particularly great in actions against a corporation or a moneyed individual. No doubt there is in such cases a constant tendency to render verdicts against defendants regardless of proved culpability; no doubt the danger is of greater frequency here than in the preceding class of cases; and no doubt the trial Court has a discretion, which it should firmly exercise, to prevent the abuse of such a mode of proof. But it seems too rigorous to forbid a party to prove his case by the clearest evidence; and a jury which through violent prejudice would not be restrained by the Court's instructions would probably give way to its prejudice even without this evidence. The Courts impose no prohibition, except so far as the discretion of the trial Court may prevent abuses.²

by moving the head or by writing; held allowable); 1899, *Harkman v. State*, 41 id. 105, 52 S. W. 73 (clothing of deceased, exhibited); *Vt.*: 1884, *State v. Burham*, 56 Vt. 445 (breach of the peace by boxing-match; inspection of the gloves by the jury, apparently left to trial Court's discretion); *Wash.*: 1896, *State v. Cushing*, 14 Wash. 527, 45 Pac. 145, 17 Wash. 544, 50 id. 512 (clothing of the deceased and gun with which he was shot, exhibited).

¹ 1892, *Coleman, J.*, in *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 219, 12 So. 176 ("Human feelings are easily excited by the description of great bodily injuries or ghastly wounds or the exhibition of objects which appeal to the senses. Sympathy or indignation, once aroused in the average juror, readily become enlisted, to the prejudice of the person accused as the author of the injury").

² *Can.*: 1897, *Sornberger v. R. Co.*, 24 Ont. App. 263 (railroad injury; plaintiff allowed to exhibit her injured limb, for the purpose of having a medical witness explain the injury); 1897, *Laughlin v. Harvey*, ib. 438 (malpractice; plaintiff not allowed to exhibit his injured part to the jury, where no explanation by medical testimony was purposed; preceding case distinguished); *Cal.*: 1892, *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 219, 12 So. 176 (shoe of brakeman killed on train, excluded on this ground); *Ill.*: 1889, *Tndor Iron Works v. Weber*, 129 Ill. 535, 539, 21 N. E. 1078 (plaintiff's torn clothing exhibited); 1891, *Springer v. Chicago*, 135 id. 552, 561, 26 N. E. 514 (general principle approved); 1894, *Lamar v. Dougherty*, 153 id. 163, 165, 38 N. E. 892 (injured limb examined by physician in jury's presence); 1899, *Swift v. Rutkowski*, 182 id. 18, 54 N. E. 1038 (injured limb may be exhibited, in trial Court's discretion); *Ind.*: 1884, *Indiana C. Co. v. Parker*, 100 Ind. 181, 199 (injured hand exhibited); 1887, *Louisville N. A. & C. R. Co. v. Wood*, 113 id. 544, 548, 14 N. E. 572, 16 N. E. 197 (plain-

tiff's injured limbs exhibited); 1893, *Citizen's S. R. Co. v. Willoby*, 134 id. 563, 570, 33 N. E. 627 (physician allowed to exhibit the plaintiff's hip-joint injury and illustrate it by placing him in various poses); *Ia.*: 1885, *Barker v. Perry*, 67 Ia. 146, 147, 25 N. W. 100 ("In all actions for injuries to the person," and "in the trial of criminal assaults," the injury may be exhibited to the jury); 1902, *Faivre v. Mauderscheid*, 117 id. 724, 90 N. W. 76 (plaintiff's husband's crippled limbs, allowed to be exhibited); *Ky.*: 1895, *Newport News & M. V. R. Co. v. Carroll*, — Ky. —, 31 S. W. 132 (bones of injured arm, exhibited); 1898, *Williams v. Nally*, — id. —, 45 S. W. 874 (bones of fractured leg, shown to expert witnesses); *Me.*: 1899, *Jarvis v. Weld*, 93 Me. 345, 45 Atl. 299 (injured arm, allowed in discretion to be shown); *Mich.*: 1886, *Carstens v. Hanselman*, 61 Mich. 426, 430, 28 N. W. 158 (medical assistance to the defendant, a woman; trial Court's refusal to allow her to exhibit her injured limb to the jury, approved, the appearance not being a satisfactory source of inference); 1893, *Langworthy v. Green*, 95 id. 91, 96, 54 N. W. 697 (plaintiff's shrivelled limb allowed to be exhibited; argument of undue prejudice apparently repudiated); 1893, *Graves v. Battle Creek*, ib. 266, 268, 54 N. W. 757, ("the injured party may exhibit his wounds to the jury"); 1893, *Edwards v. Three Rivers*, 96 id. 625, 628, 55 N. W. 1033 (injured limb, exhibition allowed); 1895, *People v. Sutherland*, 104 id. 468, 62 N. W. 566 (wounds exhibited); *Minn.*: 1885, *Hatfield v. R. Co.*, 33 Minn. 130, 22 N. W. 176 (principle approved); 1901, *Adams v. Thief River Falls*, 84 id. 30, 86 N. W. 767 (plaintiff allowed in trial Court's discretion to make arm movements to illustrate her injury); *Nebr.*: 1898, *Omaha S. R. Co. v. Emminger*, 57 Nebr. 240, 77 N. W. 675 (injured woman's limb, exhibited); 1902, *Crete v. Hendricks*, — Nebr. —, 90 N. W. 215 (injured foot, exhibited); *N. H.*: 1895, *Neboue v. R. Co.*, 68 N. H. 296,

§ 1159. *Indecency, or other Impropriety; Liquor Sampled by Jurors.* When justice and the discovery of truth are at stake, the ordinary canons of modesty and delicacy of feeling cannot be allowed to impose a prohibition upon necessary measures. If such matters were not unshrinkingly discussed and probed, many kinds of crime would remain unpunished. Nevertheless, needless offence to feelings of delicacy, especially by public exhibitions before idle spectators having no responsibility for the course of justice, may well be avoided. The limitations that may be applied are suggested in a passage from Chief Baron Hale:

Ante 1680, Sir Matthew Hale, Pleas of the Crown, I, 635: "I shall never forget a trial before myself of a rape in the county of Sussex. . . . There was an antient wealthy man of about sixty-three years old indicted for rape, which was fully sworn against him by a young girl of fourteen years old. . . . [The antient man alledged that he neither was nor could be guilty, since] he had for above seven years last past been afflicted with a rupture so hideous and great that it was impossible he could carnally know any woman, . . . and offered to show the same openly in court; which for the indecency of it I declined, but appointed the jury to withdraw into some room to inspect this unusual evidence; and they accordingly did so, and came back and gave an account of it to the Court, that it was impossible he should have to do with any woman in that kind; . . . whereupon he was acquitted."

Where it is a question of what would otherwise be an *indecency*, two limitations seem appropriate;¹ (a) there should be a fair necessity for the jury's inspection, the trial Court to determine; (b) the inspection should take place apart from the public court-room, in the sole presence of the tribunal and the parties. Such seems to be the tendency of the Courts.²

There may also be an unnecessary impropriety in other ways. The exhibition of *repulsive* objects should not be allowed unless it is fairly necessary.³

44 Atl. 521 (exhibition of amputated toes, allowed); N. Y.: 1864, *Mulhady v. R. Co.*, 30 N. Y. 370 (plaintiff's injured arm, exhibited); S. D.: 1898, *Sherwood v. Sioux Falls*, 10 S. D. 405, 73 N. W. 913 (bringing the plaintiff into Court on a cot, in action for personal injury; not improper, where not shown unnecessary); Tenn.: 1900, *Arkansas River P. Co. v. Hobbs*, 105 Tenn. 29, 58 S. W. 278 (injured limb, allowed to be exhibited and moved); U. S.: 1886, *Osborne v. Detroit*, 36 Fed. 36, 38 (allowing the plaintiff to indicate to the jury the extent of a paralysis by submitting to the insertion of a pin into her body; "she was at liberty to exhibit her wounds if she chose to do so, as is frequently the case where an ankle has been sprained or brot on, a wrist fractured, or any maiming has occurred"); 1901, *Baggs v. Martin*, 47 C. C. A. 175, 108 Fed. 33 (clothing of deceased, exhibited); W. Va.: 1894, *Carrico v. R. Co.*, 39 W. Va. 86, 89, 19 S. E. 571 (stump of amputated arm; exhibition allowed; "danger of inspiring sympathy" not to exclude); Wis.: 1901, *Viellesse v. Green Bay*, 110 Wis. 160, 85 N. W. 665 (injury at a defective sidewalk; pieces of rotten plank allowed to be exhibited).

On the same principle, objection has been made to the plaintiff's testifying, as a witness.

in a manner calculated to prejudice the defendant (*ante*, § 789). Whether the plaintiff in such suits is *compellable to exhibit* his injuries, for inspection by the jury and the defendant's witnesses, is a question of privilege, elsewhere considered (*post*, § 2220).

¹ Compare also the general principle as to *Indecent Evidence* (*post*, § 2180).

² 1889, *McGuff v. State*, 88 Ala. 147, 7 So. 35 (rape; inspection of complaining witness allowed); 1898, *Chicago & A. R. Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680 (rupture shown by injured person; allowable in discretion); 1891, *Union P. R. Co. v. Botsford*, 141 U. S. 250, 255, 11 Sup. 1000 (exposure of person allowable, "with a due regard to decency, and with the permission of the Court"); 1878, *Brown v. Swineford*, 44 Wis. 282, 284 (assault and battery; defendant's exhibition of his organs of generation to the jury, held improper; if material, a private examination by experts out of court should be made); 1901, *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. 142 (personal injury; photograph of plaintiff's nude body, held improperly received).

³ 1856, *R. v. Palmer*, *Annual Register*, 1856, pp. 422, 473, 475 (while allowing experiments as to the effect of strychnia upon dogs and

The consumption by the jury of *samples of liquor*, for the purpose of determining its intoxicating qualities, will also ordinarily be prohibited.⁴

§ 1160. **Incapacity of the Jury to Appreciate by Observation (Experiments in Court; Insane Person's Conduct.** The significance of the production of a thing or a person or the performance of an experiment before the jury may sometimes not be properly apprehensible by unskilled laymen through mere observation. Nevertheless, an accompanying explanation by an expert will generally obviate any danger that the jury may be misled; and Courts have rarely recognized any force in this objection. Experiments and samples have frequently been shown for the personal observation of the jury.¹

On an issue of *illioy* or *insanity*, it was from an early period regarded proper that the person should appear before the Chancellor for inspection.² Since the Chancellor is upon the subject of insanity no less a layman than is a jurymen, it seems equally proper, and has been perhaps equally long established,³ that inspection by the jury should be an allowable mode of acquiring knowledge on an issue of insanity. It is almost universally agreed that a lay-witness is qualified to testify to insanity;⁴ and it seems to be universally accepted that, in whatever form the issue of insanity may be presented, the

rabbits to be described, the Court refused to allow dogs to be brought into the court-yard and killed by strychnia before the jury); 1837, Knowles v. Crampton, 55 Conn. 336, 341, 11 Atl. 593 (section of a human body, cut from a woman about the plaintiff's size and age, offered to show the character of rib and breast-bone formation, excluded, "the exhibit being of doubtful utility and offensive in its nature"; the trial Court's discretion to control).

¹ 1898, Wadsworth v. Dunnam, 117 Ala. 661, 23 So. 699 (that jurors should test the intoxicating qualities of a liquor by taking bottles to their room, not allowed, because evidence must be publicly presented in Court); 1900, State v. Coggins, 10 Knn. App. 455, 62 Pac. 247 (liquor offence; held improper to allow the jury to examine and smell bottles of whiskey); 1894, Com. v. Brelsford, 161 Mass. 61, 63, 36 N. E. 677 (offer to have jurors taste liquor, excluded); 1900, People v. Kinney, 124 Mich. 496, 83 N. W. 147 (whether a liquor was hard or sweet cider; jurors allowed to taste it).

² Besides the following, compare the cases cited *ante*, §§ 445, 451, 457, 460, and 1154: 1887, People v. Hope, 62 Cal. 291, 295 (experiments before the jury with burglar's tools to show their working, allowed); 1895, Thomas Fruit Co. v. Start, 107 id. 206, 40 Pac. 336 (a sample of prunes whose quality was in issue); 1859, Junpertz v. People, 21 Ill. 375, 396, 408 (experiments with door-hooks, etc., to show the impossibility of the deceased's suicide as alleged; such an experiment before the jury, "to say the least, is very uncommon, and should be permitted by the Court with great caution"); 1876, Stockwell v. R. Co., 43 Ia. 470, 473 (fire attributed to a locomotive; whether the engineer had not shut off the steam in running over a certain stretch was in issue, the practicability of doing

so being denied; to show the practicability, a view having been ordered, a train was run over the stretch in question without steam; held proper); 1873, Brown v. Foster, 113 Mass. 136 (contract to make a suit of clothes; to show that they did fit the defendant, the plaintiff was allowed to produce them and with the defendant's assent to try them on him); 1879, Eilt v. Cutter, 127 Id. 522 (whether the gases from the defendant's copperas works had discolored the paint on the plaintiff's house; boards, etc., used in experiments made out of Court, were shown to the jury); 1880, Dillard v. State, 58 Miss. 368, 386 (horse ridden by deceased, produced, and experiments by the jury as to the height of a rider, allowed); 1893, Taylor v. Com., 9 Va. 109, 117, 17 S. E. 812 (jury allowed to examine rifle and cartridge to determine manner of explosion); 1886, Osborne v. Detroit, 36 Fed. 36, 38 (allowing the plaintiff to test the extent of her paralysis by submitting to the insertion of a pin into her body in the jury's presence during the trial); 1898, Taylor v. U. S., 32 C. C. A. 449, 89 Fed. 954 (counterfeiting; plating-machine allowed to be operated before the jury).

³ 1592, Abbot of Strata Mercella's Case, 9 Co. Rep. 31 a; 1768, Blackstone, Commentaries, III. 332.

⁴ *Ante* 1680, Hale, Pleas of the Crown, I, 29, 33 ("'Illioy or not' is a question of fact triable by jury, and sometimes by inspection. . . . Touching the trial of this incapacity [of dementia], . . . the law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge").

⁵ *Ante*, § 568, *post*, § 1932.

jury may take into consideration the behavior of the person as observed by them.⁶

§ 1161. **Physical or Mechanical Inconvenience of Production; Patent Infringements.** It may cause inconvenience, by obstruction of the court-room or by too great expense of time, to bring the desired object before the tribunal; and on this ground its production may be forbidden in the trial Court's discretion; though such a course has rarely been taken.¹ In Chancery, a Master may be ordered to examine and report.² In suits for *infringement of patents of invention*, the judge usually inspects the articles produced in court and may even allow machines to be produced and there operated.³

§ 1162. **Production Impossible; View by Jury; (1) General Principle.** Where the object in question cannot be produced in Court because it is immovable or inconvenient to remove, the natural proceeding is for the tribunal to go to the object in its place and there observe it. This process, traditionally known as a "view," has been recognized, since the beginnings of jury-trial, as an appropriate one:

⁶ *Eng.*: 1787, *R. v. Steel*, 1 Leach Cr. C., 3d ed., 451 (larceny; the accused not pleading on arraignment, a jury was sworn *instantly*, and found that she stood "mute by the visitation of God"); 1836, *R. v. Pritchard*, 7 C. & P. 303 (same); 1818, *Ex parte Smith*, 1 Swanst. 4, 7 (Lord Eldon, L. C.: "It is a practice by no means uncommon in cases of lunacy [in equity] (analogous to a practice very common in civil cases) that, when the lunatic cannot be removed to the jury, and it is inconvenient for the jury to examine the innatic, one or two of the jury examine the lunatic and report their observations to the rest"); 1837, *R. v. Goode*, 7 A. & E. 535 (inquest of insanity; the defendant continued to show in Court "violent symptoms of mental derangement;" after evidence of his former condition, it was proposed to call a medical man as to his present condition; Denman, L. C. J.: "I think it is quite unnecessary: we can judge of that by what has passed in Court just now"); *Can.*: *Newf. St.* 1897, c. 15, § 49 (in inquiries of lunacy, the alleged lunatic "shall be produced," and shall be examined unless the judge dispenses); *U. S.*: 1873, *State v. West*, 1 Honst. Cr. 371, 385 (allowing production of a collection of articles—bottled snakes, an old shoe, a broken mirror, etc.—forming the "museum" of the defendant, and indicating his insanity); 1804, *Com. v. Braley*, 1 Mass. 103 (murder; the accused appearing at arraignment to be insane, "a jury was immediately empanelled" and found him insane); 1864, *Beaubien v. Cicotte*, 12 Mich. 459, 492 (jury's inspection said to be proper; "in all of these proceedings, while testimony is generally necessary, and in many cases scientific testimony is of the utmost value, yet the law has always regarded the subject as usually open to the common understanding and capable of being judged by personal appearance"); 1845, *Re Russell*, 1 Barb. Ch. 38,

39 (inquisition of insanity; Walworth, Ch.: "The jury also have the right to inspect and examine the innatic; and they should do so in every case of doubt, where such an examination can be had"); 1881-2, *Guiteau's Trial*, Washington, D. C., *passim* (murder of the President; defence, insanity; the accused's annoying, insulting, and unruly behavior at the trial was allowed for the sake of the basis of inference thus placed before the jury as to his sanity; no express ruling on the subject seems to have been made).

¹ 1862, *Line v. Taylor*, 3 F. & F. 731 (bide of a dog; the dog allowed to be produced and inspected by the jury to determine whether he was ferocious; perhaps under C. L. Pr. Act 1854, § 58); 1879, *Thurman v. Bertram*, Exch. D., Pollock, B., London Mail, July 18, 1879, cited in 20 Alb. J. 150 (horse frightened by the "unusual and unsightly appearance" of an elephant; the elephant brought into the court-room for inspection); 1902, *Moran Bros. Co. v. Smoqualmie F. P. Co.*, 29 Wash. 292, 69 Pac. 759 (contract concerning a regulator-box for a power-plant; the box weighing several thousand pounds, held not necessary to be produced); 1886, *Hood v. Bloch*, 29 W. Va. 244, 255, 11 S. E. 910 (cheese inferior to agreed quality; trial Court's refusal to allow production of the cheese, held not improper in view of the large bulk of goods involved); and other instances *ante*, § 1160, note 1, and *post*, § 1163, note.

² As is customary in actions for infringement of copyright, where the material is voluminous: 1799, — *v. Leadbetter*, 4 Ves. Jr. 681; 1826, *Mnwmn v. Tegg*, 2 Russ. 385, 398.

³ With the following cases compare those cited *post*, § 2221, concerning the opponent's privilege to refuse inspection; 1870, *Seymour v. Osborne*, 11 Wall. 516, 559; 1878, *Bates v. Coe*, 98 U. S. 31, 45, 49.

Circa 1258, *II. de Praetor*, fol. 315 (of a woman charged with waste of dower-property): "Since *dama*, . . . has thus been done in a corporeal thing which is manifest to the sight of the eyes, she cannot by her law [*i. e.* by oaths] deny that it is not so, for so the view would be contrary to the oath of the jurors. It is better, therefore, when the woman denies waste, that a view be taken of the thing wasted against this prohibition both in the quality of the act and in the quantity."

1801, *Craig, J.*, in *Springer v. Chicago*, 135 Ill. 533, 561, 26 N. E. 514: "If the parties had the right upon the trial to prove by oral testimony the condition of the property at the time of the trial, . . . upon what principle can it be said the Court could not allow the jury in person to view the premises and thus ascertain the condition thereof for themselves? . . . If a plat or a photograph of the premises would be proper evidence, why not allow the jury to look at the property itself, instead of a picture of the same? There may be cases where a trial Court should not grant a view of premises where it would be expensive, or cause delay, or where a view would serve no useful purpose: but this affords no reason for a ruling that the power to order a view does not exist or should not be exercised in any case. . . . If at common law, independent of any English statute, the Court had the power to order a view by jury (as we think it plain the Court had such power), as we have adopted the common law in this State, our Courts have the same power."

§ 1163. **Same:** (2) **View allowable upon any Issue, Civil or Criminal; Statutes.** That the Court is empowered to order such a view, in consequence of its ordinary common-law function, and *irrespective of statutes* conferring express power, is not only naturally to be inferred, but is clearly recognized in the precedents.¹

Nor can any distinction here properly be taken as to *criminal cases*. It is true that here, by some singular scruple, a doubt has more than once been judicially expressed.² But it is impossible to see why the Court's power to aid the investigation of truth in this manner should be restricted in criminal cases, and the better precedents accept this doctrine.³

Nor need there be any distinction to the disadvantage of any kind of *civil case*: for, although traditionally the chief and perhaps exclusive use of the view occurred in cases involving waste, trespass, and nuisance,⁴ it is clear

¹ See Glauvil, b. XIII, c. 14; Bracton, f. 69, and f. 315, quoted in the foregoing section; Fitzherbert, *Natura Brevium*, 123 C, 128 B, 184 F; Lord Mansfield, in 1 Burr. 252, quoted in the next section; 1624, *Dalton v. All Souls' College*, Palmer 363.

² 1756, *R. v. Redman*, 1 Keenon 384 ("Per Curiam: There can be no view in a criminal prosecution without consent; and the practice was so before the act [4 Ann. c. 16]"); 1830, *Com. v. Knapp*, 9 Pick. 496, 515 (view allowed, with consent of accused, but "with hesitation," because the Court "had doubts whether they could hold the prisoner to his consent"); 1855, *Eastwood v. People*, 3 Park. Cr. 25, 53, *semble* (Court may not authorize a view in criminal cases); 1899, *State v. Hancock*, 148 Mo. 488, 50 S. W. 112 (denied, even on defendant's application); 1899, *Price v. U. S.*, 14 D. C. App. 391, 405 (not decided).

³ 1897, *State v. Perry*, 121 N. C. 533, 27 S. E. 997. Under some of the statutes *infra* it is expressly allowable; see the cases cited in the next section, and also the following: 1847, *R. v. Whalley*, 2 Cox Cr. 231 (objected to as not

proper in a criminal case except where indictment is removed by *certiorari* to civil side; overruled); 1872, *R. v. Martin*, 12 Cox Cr. 204, 41 L. J. M. C. 113, L. R. 1 C. C. R. 378, 380 (view allowed after summing up; trial Court's discretion); 1850, *Com. v. Webster*, 5 Cush. 295, 298 ("the Court said that they had no doubt of their authority to grant a view, if they deemed one expedient, R. S. c. 137, § 10; and that views had been granted of late in several capital cases in this county"); 1858, *Fleming v. State*, 11 Ind. 234 (jury's view of building burned, allowed under statute); 1872, *Chute v. State*, 19 Minn. 271, 278 (view allowable in discretion); 1903, *Litton v. Com.*, — Va. —, 44 S. E. 923 (Code, § 3167, held to authorize a view in criminal cases; Buchanan, J., resting the result on St. 1887-8, c. 15, § 4048).

Whether the accused must have an opportunity to be present at the view is an entirely different question (*post*, § 1803).

⁴ 1814, *Attorney-General v. Green*, 1 Price 130 (allowable under the statute "in case of land," and perhaps in "Informations of intrusion" . . . on the principle of analogy); but not

that no strict line of definition was made, nor can any reason for it be seen in principle. A view should be allowable in whatever sort of issue it may appear to be desirable.⁶

Moreover, the process of view need not be applicable merely where *land* is to be observed; it is applicable to any kind of object, real or personal in nature, which must be visited in order to be properly understood.

Thus at common law there need be no limitations of the above sorts upon the judicial power to order a view. The regulation of the subject by statute, which began in England some two centuries ago,⁷ was concerned

on an information against a glass factory for taxes, "where a model may answer every purpose"; 1824, *Redfern v. Smith*, 9 Moore 497 (waste; view held necessary); 1846, *Stones v. Menhem*, 2 Exch. 382 (Parke, B., refusing an order for a view of work done as carpenter, bricklayer, etc., on a house; "The language of the acts of Parliament, coupled with the practice, appears to me to show that this is not a case in which a view ought to be granted; the necessity of a view seems to me to apply chiefly to actions of a local nature, such as trespass *q. c. f.*, nuisance, and the like").

See instances in the cases cited in the next section and *ante*, § 1160; and compare the similar controversy as to inspection (*post*, § 1862) and privilege (*post*, §§ 2194, 2221).

See instances in the citations to the next section and § 1160, *ante*, and also the following: 1876, *Campbell v. State*, 55 Ala. 80 (tracks of the murderer were found in sandy soil; the defendant was allowed on the trial to make tracks in the sawdust on the court-house floor; but the trial Court refused to allow him to be taken by the sheriff out of the court to a place of sandy soil and there make tracks in the jury's presence, or to allow sandy soil to be brought into the court-room for the same purpose; held, that the trial Court had discretion to allow whichever mode it thought best); 1891, *Mayor v. Brown*, 87 Ga. 596, 599, 13 S. E. 638 (injury at a street-crossing; jury's personal inspection of the place, held proper); 1858, *Nutter v. Ricketts*, 6 Ia. 92, 96 (jury allowed to go out into the court-house yard and inspect the horse in controversy); 1899, *Schweinfurth v. R. Co.*, 60 Oh. St. 215, 54 M. E. 89 (jury allowed to go out and view experiments made with horse and buggy, engine and train, reproducing the conditions of the injury); 1901, *Olsen v. N. P. Lumber Co.*, 40 C. C. A. 427, 100 Fed. 388, 106 Id. 298, 302 (view of the scene of an injury may include machinery in operation); 1899, *Bias v. R. Co.*, 46 W. Va. 349, 33 S. E. 240 (jury allowed to view the railroad track and observe experiments as to distance of distinct vision). *Contra*: 1901, *Brady v. Shirley*, 14 S. D. 447, 85 N. W. 1002 (view of horses, held improper, in the absence of statutory authority). The cases where the rights of inspection by the opponent before trial (*post*, § 1862) and of privilege (*post*, §§ 2194, 2221) are involved are sometimes not distinguished by the Courts.

⁷ See Lord Mansfield's explanation, quoted in the next section. The English and Canadian statutes are as follows: ENGLAND: 1705, St. 4

Anne, c. 16, § 8 ("in any action" at Westminster, where it shall appear to the Court that it will be "proper and necessary" the jurors who are to try the issues should have the view of the lands or place in question, "in order to their better understanding the evidence" to be given at the trial, the Court may order special writs of *distingas* or *habeas corpora*, commanding the selection of six out of the first twelve of the jurors therein named, or a greater number, to whom the matters controverted shall be shown by two persons appointed by the Court); 1730, St. 3 G. II, c. 25, § 14 (where a view shall be allowed, six of the jurors, or more, who shall be consented to on both sides, or if they cannot agree, appointed by the proper officer of the Court or a judge, "shall have the view, and shall be first sworn, or such of them as appear upon the jury" before any drawing; and so many only shall be drawn, to be added to the viewers, as shall make up the number of twelve); 1825, St. 6 G. IV, c. 50, §§ 23, 24 (in any case, civil or criminal, wherever "it shall appear . . . that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial," an order may appoint six or more, to be named by consent or, upon disagreement, by the sheriff, and the place in question shown them by two persons appointed by the Court; and "those men who shall have had the view, or such of them as shall appear upon the jury to try the issue, shall be first sworn," and only so many added as are needed to make up twelve); 1852, St. 15 & 16 Vict. c. 76, § 14 (writ of view not necessary; order of Court or judge sufficient); 1853, Second Report of Commissioners on Practice and Pleading, 37 (recommends the allowance of orders for inspection, by the jury or by the party or his witnesses, "of any premises or chattels the inspection of which may be material to determine the question in dispute"); 1854, St. 17 & 18 Vict. c. 125, § 58 ("Either party shall be at liberty to apply to a Court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property the inspection of which may be material to the proper determination of the question in dispute"; the judge to make the order on such terms as he sees fit; and the rules for views under preceding acts to apply as nearly as may be); 1883, Rules of Court, Ord. 50, R. 3 ("It shall be lawful for the Court or a judge, upon

rather with the details of the process, than with the limits of the power. Statutes now regulate the process in almost every jurisdiction;⁸ but it may

the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection, of any property or thing, being the subject of such cause or matter or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorize any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence"; R. 4 ("It shall be lawful for any judge . . . to inspect any property or thing concerning which any question may arise therein"); R. 5 ("The provisions of Rule 3 of this order shall apply to inspection by a jury," which may be ordered as the Court "may think fit"); *Canada: Dom. Crim. Code 1892, § 722* (in criminal trials the Court may order a view of "any place, thing, or person," and prescribe the manner of showing); *Man. Rev. St. 1902, c. 40, Rules 581, 582* (like Ont. Rules 570, 571); *Rule 894* (like *ib. 1096*); *N. Br. Cons. St. 1877, c. 45, § 22* ("when a view shall be considered necessary by the Court, the jury sworn to try the cause shall make the view"; showers if necessary to be appointed by the Court; *N. Sc. Rules of Court 1900, Ord. 34, R. 36* (referee may "have any inspection or view" which he deems expedient); *Ord. 50, R. 3* (like *Ont. R. 1096*); *lh. R. 4* (any judge on appeal may inspect "any property or thing" concerned); *lh. R. 5* (Rule 3 above shall apply to "inspection by a jury"); *Ont. Rev. St. 1897, c. 61, § 131* (in a civil case or a case on a penal statute before the High Court, the judge may order a view if it appears "proper and necessary that the jurors or some of them, who are to try the issues in the case should have a view of the place in question in order to their better understanding the evidence that may be given upon the trial"); § 132 (six or more are to have the view); § 133 (showers are to be appointed by the judge); § 135 (mode of selecting the jury after the view); *Rules of Court 1897, § 570* (the judge "may inspect any property or thing concerning which any question arises"); § 571 (view may be ordered of "any real or personal property the inspection of which may be material to the proper determination of the question in dispute"); § 1096 (similar; and for this purpose the judge may authorize entry upon land or buildings in the party's possession); *P. E. I. St. 1873, c. 22, § 107* ("It shall be sufficient to obtain a rule of the Court or judge's order directing a view to be had"); § 252 (view of "any real or personal property the inspection of which may be material to the proper determination" may be ordered).

⁸ The statutes in the United States are as follows (but these should be compared with the statutes cited *post*, §§ 1862, 2194, 2221, dealing with the *privilege* of a party to refuse to allow

inspection of premises or chattels; the one kind of statute has chiefly in mind the judicial power to permit the jury to use this mode of proof, the other has in mind the compulsory submission of the opponent to an entry upon his premises, before trial, by the first party and his witnesses, the contrast is shown in Rules 3 and 5, *supra*, of the English Court); *Alaska: C. C. P. 1900, § 188* (like *Or. Annot. C. 1892, § 197*); *Ariz. P. C. 1887, § 1669* (like *Cal. P. C. § 1119*); *Ark. Stats. 1894, § 2225* (criminal cases; like *Cal. P. C. § 1119*); § 5821 (like *Cal. C. C. P. § 610* substituting "real property" for "property"); *Cal.: C. C. P. 1872, § 1954* ("Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make it a item in the sum of evidence, such object may be exhibited to the jury . . . [or testified to]. The admission of such evidence must be regulated by the sound discretion of the Court"); § 610 ("When in the opinion of the Court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred," the Court may order a view, the place to be shown by the Court's appointee); *P. C. § 1119* ("When in the opinion of the Court it is proper that the jury should view the place in which the offence is charged to have been committed, or in which any other material fact occurred," it may order a view, the place to be "shown to them by a person appointed by the Court for that purpose"); *Colo.: Annot. St. 1891, C. C. P. § 188* (like *Cal. C. C. P. § 610*); *St. 1893, p. 78, § 1* (in all proceedings involving mining rights, it shall be the Court's duty, on application of either party, to order a view; each party to nominate a guide approved by the Court, and such guide or guides to point out "such features in the premises as it is desirable that the jury should see, and answer all questions propounded by the jury," with specified restrictions); *Ida.: Rev. St. 1893, c. 109, § 20* (jury may view "the premises or place in question, or to which the controversy relates, when it shall appear to the Court that such view is necessary to a just decision"); *Fla.: Rev. St. 1892, § 2918* (in criminal cases, "the Court may order a view by the jury"); § 1087 (in civil proceedings, "the jury may in any case, upon motion of either party, be taken to view the premises or place in question, or any property, matter, or thing relating to the controversy between the parties, when it shall appear to the Court that such view is necessary to a just decision"); *Ida.: Rev. St. 1887, § 7878* (like *Cal. P. C. § 1119*); § 4386 (like *Cal. C. C. P. § 610*); *Ill.: Rev. St. 1874, c. 47, § 9* (jury in eminent domain proceedings "shall, at the request of either party, go upon the land sought to be taken or damaged, in person, and examine the same"); *Ind.: Rev. St. 1897, § 552* ("Whenever in the opinion of the Court it is proper for the jury to have a view of real or personal property which is the subject of litigation, or of the place where any material

be assumed that the judicial power to order a view exists independently of any statutory phrases of limitation.

fact occurred," the Court may order a view, the place to be shown by "some person appointed by the Court"; § 1918 (in criminal cases, "whenever, in the opinion of the Court and with the consent of all the parties, it is proper for the jury to have a view of the place in which any material fact occurred," a view may be ordered, the place to be shown by "some person appointed by the Court for the purpose"); *Id.*: Code 1897, § 3710 ("When in the opinion of the Court it is proper for the jury to have a view of the real property which is the subject of controversy, or the place where any material fact occurred," it may be ordered, the place to be shown by the Court's appointee); § 5380 (in criminal cases, "when the Court is of the opinion that it is proper the jury should view the place in which the offence is charged to have been committed, or in which any other material fact occurred," it may order a view, the place to be shown by Court's appointee); *Kan.*: G. St. 1897, c. 102, § 235 ("Whenever in the opinion of the Court it is proper for the jury to have a view of the place in which any material fact occurred, it may order a view of the place, which shall be shown to them by some person appointed by the Court for that purpose"); *Ar.*: C. C. P. 1895, § 318 (view allowable, when Court deems proper, "of real property which is the subject of litigation or of the place in which any material fact occurred"; some person appointed by the Court is to show it to them); C. Cr. P. § 236 (view allowable in discretion when "necessary" for the jury to see the place of the alleged offence "or in which any other material fact occurred"; judge, prisoner, and counsel to accompany; the judge, or a shover appointed by the Court, to show the place); *La.*: C. Pr. 1894, § 139 (Court may order production of "the object in dispute, of which he is in possession, if it be such movable property as can be produced, in order that it may be shown by testimony that it is in reality the object claimed"); *Me.*: P. S. 1883, c. 18, § 80 (in actions for highway injuries, view may be ordered, when it would "materially aid in a clear understanding of the case"); c. 82, § 82 ("in any jury trial" a view may be ordered); c. 95, § 2 (view may be ordered in action for waste); c. 104, § 41 (view may be ordered in real actions, if in Court's opinion "it is necessary to a just decision"); c. 134, § 23 (view may be ordered in a criminal case); *Mass.*: Pub. St. 1882, c. 214, § 11 (view may be ordered in criminal cases); c. 170, § 43 (view may be had at the request of either party of "the premises or place in question, or any property, matter, or thing relating to the controversy, when it appears to the Court that such view is necessary to a just decision," on tender of expenses, etc.); c. 51, § 6 (view in betterment cases to be had at the request of either party); c. 190, § 13 (same for flowage cases); c. 49, § 48 (view in highway cases when the jury think proper or at either party's request); c. 49, § 86 (special rule for Suffolk Co.); c. 180, § 2 (view may be ordered in waste cases); *Mich.*:

Comp. L. 1897, § 10256 (when a court "shall deem it necessary that the jury view the place or premises in question, or any property or thing relating to the issues between the parties," the Court may order a view on either party's application, "and direct the manner of effecting the same"); § 11952 (view may be ordered in criminal cases "whenever such Court shall deem such view necessary"); *Minn.*: Gen. St. 1894, § 5372 ("Whenever, in the opinion of the Court, it is proper that the jury should have a view of real property which is the subject of the litigation, or of the place in which any material fact occurred," a view may be ordered, the place to be shown by the judge or the Court's appointee); § 5330 (Court "may order a view" in criminal case); *Miss.*: Annot. Code 1892, § 2391 ("When, in the opinion of the Court, on the trial of any cause, civil or criminal, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which the offence is charged to have been committed or in which any material fact occurred," a view may be ordered, the place to be shown by the Court's appointee); amended by St. 1894, c. 62 (substituting a new provision as follows: beginning the same as before, down to "committed," then continuing: "or the place or places in which any material fact occurred, or any material object or thing in any way connected with the evidence in the case, the Court may at its discretion enter an order providing for such view or inspection"; the "whole organized court" is to go, and the thing "shall be pointed out and explained to the Court and jury by the witnesses in the case, who may at the discretion of the Court be questioned by him and by the representatives of each side, at the time and place of such view or inspection, in reference to any material fact brought out by such view or inspection"; the Court is to be regarded as still in session with full powers; and in criminal trials the view "must be had before the whole court and in the presence of the accused and the production of all evidence from all witnesses or objects animate or inanimate must be in his presence"); *Mont.*: C. C. P. 1895, § 1081 (like Cal. C. C. P. § 610), § 3250 (like Cal. C. C. P. § 1954); P. C. § 2097 (like Cal. P. C. § 1119); *Neb.*: Comp. St. 1899, § 7205 (criminal cases; like *Kan.* Gen. St. c. 102); § 3856 (in civil cases "whenever, in the opinion of the Court, it is proper for the jury to have a view of property which is the subject of litigation, or of the place where," etc., as in criminal cases); *Nev.*: Gen. St. 1885, § 4257 (like Cal. P. C. § 1119); *N. H.*: Pub. St. 1891, c. 227, § 19 (in actions involving right to real estate, or where "the examination of places or objects may aid the jury in understanding the testimony," the Court may in discretion direct a view); *N. J.*: Gen. St. 1896, Evidence, § 24 (where inspection of "any premises or chattels in the possession or under the control of either party" would aid in ascertaining the truth of any matter in dispute," Court may order pos-

§ 1164. **Same: (3) View allowable in Trial Court's Discretion.** The inconvenience of adjourning court until a view can be had, or of postponing the trial for the purpose, may suffice to overcome the advantages of a view, particularly when the nature of the issue or of the object to be viewed renders the view of small consequence. Accordingly, it is proper that the trial Court should have the right to grant or to refuse a view according to the requirements of the case in hand. In the earlier practice, the granting of a view seems to have become almost demandable as of course; but a sounder doctrine was introduced by the statute of Anne (which apparently only re-stated the correct common-law principle); so that the trial Court's discretion was given its proper control:

1757, *Mansfield*, L. C. J. Rules for Views, 1 Burr. 252: "Before the 4 & 5 Anne, c. 16, § 8, there could be no view till after the cause had been brought on to trial. If the Court saw the question involved in obscurity which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the Court or judge,

essor to permit inspection by jury, under proper regulations); St. 1900, c. 150, § 30 (re-enacts Gen. St. Evid. § 24, inserting after "chattels" the words "or other property"); Gen. St. 1896, Juries § 31 (jury of view; special venire of view may be issued, for six or more to view; trial to proceed notwithstanding defect of members viewing, etc.); § 32 (a struck jury of twelve may view); § 35 (in any cause criminal or civil, before or after trial begun, a view may be ordered of "any lands or place" if the Court deems it "necessary to enable the jury better to understand the evidence"); St. 1898, c. 237, § 77 (upon trials of indictments, the Court may order a view of "any lands or place, if in the judgment of the Court such view is necessary to enable the jury better to understand the evidence given in the cause"; the Court to direct the manner of the view); N. Y.: C. Cr. P. 1881, § 411 (view in criminal cases allowable when "in the opinion of the Court it is proper"); C. C. P. 1877, § 1659 (in action for waste, view may be ordered in discretion); N. D.: Rev. C. 1895, § 8209 (like Cal. P. C. § 1119); § 5434 (civil cases; like Cal. C. C. P. § 610); Ok.: Rev. St. 1898, § 7283 ("Whenever in the opinion of the Court it is proper for the jurors to have a view of the place at which any material fact occurred," the Court may order a view, an appointee of the Court to show the place); § 6428 (view allowable in eminent domain proceedings); Rev. St. 1900, § 5191 (like R. S. 1898, § 7283, *supra*, inserting after "view," the words "of the property which is the subject of litigation, or"); Okl.: Stats. 1893, § 5222 (criminal cases; like Cal. P. C. § 1119); § 4167 (civil cases; like Cal. C. C. P. § 610); Or.: Codes & G. L. 1892, C. C. P. § 197 (like Cal. C. C. P. § 610, substituting "real property" for "property"); C. C. P. § 769 (like Cal. C. C. P. § 1954, substituting "the exhibition of such object to the jury" for "the admission, etc."); Pa.: St. 1834, Puh. L. 333, §§ 158, 159, P. & L. Dig. Juries, §§ 83, 84 (when a view is allowed, "six of the first twelve jurors named in the panel, or

more of them, shall be taken" to the place; "those of the viewers who shall appear [at the trial] shall first be sworn," and enough added to make up the twelve); R. I.: Gen. L. 1896, c. 244, § 1 ("In all cases in which it shall seem advisable to the Court, on request of either party, a view by the jury may be allowed," and the Court shall regulate the proceedings); S. C.: Rev. St. 1893, § 2410 ("the jury in any case may at the request of either party be taken to view the place or premises in question, or any property, matter, or thing relating to the controversy between the parties, when it appears to the Court that such view is necessary to a just decision"); S. D.: Stats. 1899, § 8666 (like Cal. P. C. § 1119); § 6257 (civil cases; like Cal. C. C. P. § 610); Tenn.: Code 1896, § 1856 (jury of Inquest of damages by eminent domain may examine ground, etc.); § 3689 (jury for processional boundaries of land may examine it); Utah: Rev. St. 1898, § 4870 (criminal cases; like Cal. P. C. § 1119); § 3152 (civil cases; like Cal. C. C. P. § 610); Va.: Stats. 1891, § 1234 (in actions for damages to real estate or concerning title to land, where a view is "necessary," it may be granted on motion of either party); Va.: Code 1887, § 3167 (in civil cases, at either party's request, the jury may be "taken to view the premises or place in question or any property, matter, or thing, relating to the controversy," when it appears to the Court "that such view is necessary to a just decision"; the requester to advance expenses); Wash.: C. & Stats. 1897, § 4998 (like Cal. C. C. P. § 610, substituting "real property" for "property," and providing alternatively that the judge may act as shower); § 6948 (Court may order a view in a criminal trial); W. Va.: Code 1891, c. 116, § 30 (like Va. Code, § 3167); Wis.: Stats. 1898, § 4694 (the Court may order a view in a criminal case); § 2852 (civil cases; like Va. Code, § 3167); Wyo.: Rev. St. 1887, § 3303 (like Oh. Rev. St. § 7283, inserting "disinterested" before "person"); § 2554 (like lb. § 5191).

at the trial, 'that the nature of the question made a view not only proper but necessary'; for the judges at the assizes were not to give way to the delay and expense of a view unless they saw that a case could not be understood without one. However, it often happened in fact that upon the desire of either party causes were put off for want of a view upon specious allegations from the nature of the question that a view was proper, — without going into the proof so as to be able to judge whether the evidence might not be understood without it. This circuitry occasioned delay and expense; to prevent which the 4 & 5 Anne, c. 10, § 8, empowered the Courts at Westminster to grant a view in the first instance previous to the trial. . . . [He then refers to the other statute of 3 G. II, and to the supposed rule as to the number of viewers necessary, treated *infra*.] Upon a strict construction of these two acts in practice, the abuse which is now grown into an intolerable grievance has arisen. Nothing can be plainer than the 4 & 5 Anne, c. 10, § 8. . . . The Courts are not bound to grant a view of course; the Act only says 'they may order it, where it shall appear to them that it will be proper and necessary.' . . . [He then refers to the abuse of repeated postponement of trial to obtain a view.] We are all clearly of opinion that the Act of Parliament meant a view should not be granted unless the Court was satisfied that it was proper and necessary. The abuse to which they are now perverted makes this caution our indispensable duty; and, therefore, upon every motion for a view, we will hear both parties, and examine, upon all the circumstances which shall be laid before us on both sides, into the propriety and necessity of the motion; unless the party who applies will consent to and move it upon terms which shall prevent an unfair use being made of it, to the prejudice of the other side and the obstruction of justice."

Accordingly, this provision, leaving the granting of the view to the trial Court's discretion, is found in almost every statute on the subject; and this doctrine is constantly exemplified in judicial decision.¹ It may be noted,

¹ Compare the statutes *ante*, § 1163; in the following cases, except where otherwise noted, the doctrine of the trial Court's discretion is enforced; most of the rulings apply one of the statutes already mentioned: *Eng.*: 1815, *Avon*, 2 Chitty 422 (whether there was a hole on certain premises; view refused, because "in this case it might mislead"); 1742, *Davis v. Lees*, Willes 344, 348; *Can.*: 1880, *Auderson v. Mowatt*, 20 N. Br. 255, *semble* (view after charge given, allowable); *Ark.*: 1875, *Benton v. State*, 30 Ark. 328, 345, 350 (discretion of trial Court controls as to necessity, under statute); 1880, *Curtis v. State*, 36 id. 284, 289 (same, as to time of view); *Cal.*: 1897, *People v. White*, 116 Cal. 17, 47 Pac. 771 (premises of a burglary); 1897, *Niosi v. Laundry*, 117 id. 257, 49 Pac. 185 (place of a street accident); *Fla.*: 1878, *Coker v. Merritt*, 16 Fla. 416, 421 (statute applied); *Ga.*: 1896, *Broyles v. Priscock*, 97 Ga. 643, 25 S. E. 389 (whether both parties must consent, left undecided); 1899, *Johnson v. Winship M. Co.*, 108 id. 554, 33 S. E. 1013 (defective machinery; order to view it, within judicial powers in absence of parties' consent, depends on trial Court's discretion); *Ill.*: 1891, *Springer v. Chicago*, 135 Ill. 553, 561, 26 N. E. 514 (view allowable in any case in discretion; here, of property damaged by a viaduct; practically overruling *Dond v. Guthrie*, 13 Ill. App. 653, 658); 1894, *Vane v. Evanston*, 150 id. 616, 621, 37 N. E. 901 (same principle approved; here allowed for a special assessment on land); 1894, *Good v. Chicago*, 154 id. 194, 41 N. E. 40

(eminent domain); 1895, *Pike v. Chicago*, 155 id. 656, 40 N. E. 567 (same); *Ia.*: 1872, *King v. R. Co.*, 34 Ia. 458, 462; 1892, *Morrison v. R. Co.*, 84 id. 663, 51 N. W. 75; *Kan.*: 1883, *State v. Furbeck*, 29 Kan. 380 (view of wheat said to have been stolen); *Ky.*: 1893, *Roberts v. Com.*, 94 Ky. 499, 22 S. W. 845; 1892, *Kentucky C. R. Co. v. Smith*, 93 Ky. 449, 460, 20 S. W. 392, *semble* (discretion as to time of view); 1900, *Valley T. & G. R. Co. v. Lyons*, — Ky. —, 58 S. W. 502 (discretion); 1900, *Memphis & C. P. Co. v. Buckner*, 108 id. 701, 57 S. W. 442 (discretion); *Mass.*: 1899, *Com. v. Chance*, 174 Mass. 245, 54 N. E. 551 (discretion of trial Court controls); *Mich.*: 1893, *Leitlein v. Meyer*, 95 Mich. 586, 55 N. W. 367 (injury to land by flowage; view by jury in discretion of Court); 1896, *Mulliken v. Corauna*, 110 id. 212, 68 N. W. 141 (injury by falling on a defective sidewalk); *Minn.*: 1872, *Chute v. State*, 19 Minn. 271, 278 (in discretion, under statute); 1895, *Brown v. Kohout*, 61 id. 113, 63 N. W. 248; 1901, *Northwestern M. L. L. Co. v. Sun Ins. Office*, — id. —, 88 N. W. 272; *N. C.*: 1892, *Jenkins v. R. Co.*, 110 N. C. 439, 441, 15 S. E. 193 (discretion of trial Court); *Oh.*: 1894, *Jones v. State*, 51 Oh. St. 331, 38 N. E. 79 (the view may be had in another county in the State); *Pa.*: 1891, *Com. v. Miller*, 139 Pa. 77, 95, 21 Atl. 138 (discretion of trial Court); 1898, *Rudolph v. R. Co.*, 186 id. 541, 40 Atl. 1083 (land-damages; view in discretion); 1899, *Mutzner v. Hogg*, 192 id. 137, 43 Atl. 465 (street-injury); *Va.*: 1858, *Baltimore & O. R. Co. v. Polly*, 14 Gratt. 447,

as one circumstance affecting the exercise of that discretion, that, since the present condition of an object is not always a good index of its prior condition at the time in issue (*ante*, § 437), a view may well be refused where such a change of condition is likely to have occurred that a view of the object in its present condition would probably be misleading.²

§ 1165. **Same: (4) View by Part of Jury.** According to the earlier practice, a view was obtained before the trial and before the final selection of the jurors; and it was not regarded as necessary that all of the jurors finally selected should have participated in the view:

1757, *Mansfield*, L. C. J., in 1 Burr. 252: the reporter states that after the 4 & 5 Anne, c. 16, § 8, views were granted upon motion, as of course; and under this act and 3 G. II, c. 25, § 14, a notion prevailed "that six of the first twelve upon the panel must view and appear at the trial; if they did not, there could be no trial, and the cause must go off." Where either party wished delay or vexation, he moved for a view. A thousand accidents might prevent a view, or six of the twelve from attending the view, or their attending the trial. He who wished them not to attend might by various ways bring it about. . . . Though twelve viewers should appear at the trial, yet according to the notion which prevailed if six of the first twelve upon the panel were not among them, the cause could not be tried. The tendency of this abuse to delay, vexatious expense, and the obstruction of justice, was so manifest that the Court thought it their duty to consider of a remedy; and Lord Mansfield for the Court announced the following rule: "The 3 G. II, c. 25, § 14, provides 'that where a view shall be allowed, the jurors who have had the view shall be first sworn, or such of them as shall appear, before any drawing,' which means, in opposition to such other jurors as are to be drawn by ballot, and *not* to establish that six at least of the first twelve shall be sworn. . . . It is infinitely better that a cause should be tried upon a view had by any twelve, than by six of the first twelve; or by any six, or by fewer than six, or even without any view at all, than that the trial should be delayed from year to year, perhaps forever"; and the Court accordingly announced that the view would thereafter be granted only upon consent to such terms as would be just [as quoted *ante*, § 1164]; and the reporter continues: "No party has ever since moved for a view without consenting to the terms: . . . as the non-attendance of viewers can now gratify neither party, both concur in wishing the duty performed"; he then gives the customary terms consented to for a special jury: "Consenting that in case no view shall be had, or if a view shall be had by any of the said jurors, whether they shall happen to be any of the twelve jurors who shall be

470 (excavation-contract; trial Court's refusal to order a view, held not improper); *Wash.*: 1892, *Klepsch v. Donald*, 4 Wash. 436, 445, 30 Pac. 991 (injury received from a blast of rock); 1894, *State v. Coella*, 8 id. 512, 36 Pac. 474; 1898, *State v. Hunter*, 18 id. 670, 52 Pac. 247; *W. Va.*: 1892, *Gunn v. R. Co.*, 36 W. Va. 165, 178, 14 S. E. 465 (death on a railroad track; trial Court's refusal to order view, held not improper); 1897, *State v. Musgrave*, 43 id. 672, 28 S. E. 813 (view of locality of death; trial Court's discretion controls); 1903, *Davis v. American T. & T. Co.*, — id. —, 45 S. E. 926; *Wis.*: 1871, *Pick v. Rubicon H. Co.*, 27 Wis. 433, 446 (floodage; trial Court's discretion); 1882, *Boardman v. Ins. Co.*, 54 id. 364, 366, 11 N. W. 417 (trial Court's discretion; here, a fire loss); 1892, *Andrews v. Yonmans*, 82 id. 81, 82, 1901, *Koepke v. Milwaukee*, 112 id. 475, 88 N. W. 238 (defective sidewalk).

Distinguish the rulings as to a party's inspec-

tion before trial (*post*, § 1862) and a privilege to refuse such inspection (*post*, §§ 2194, 2221).

² Compare also the cases cited *ante*, § 1154, par. (6): 1899, *Seward v. Wilmington*, 2 Marv. Del. Sup. 189, 42 Atl. 451 (street injury; view not ordered, because the injury had been received three years before and the place was not in the same condition); 1896, *Broyles v. Priscock*, 97 Ga. 643, 25 S. E. 389 (the trial Court has a discretion to refuse, where a material alteration in the premises has occurred); 1893, *Banning v. R. Co.*, 89 Ia. 74, 80, 56 N. W. 277 (locality of railroad injury; view allowed in discretion, the condition of the place not being shown to have changed); 1863, *State v. Knapp*, 45 N. H. 148, 157 (rape; at a view of the place, the lack of a board in a fence, making an aperture by which witnesses said they had seen certain facts, had been replaced; notice not having been given by the State, the burden was upon it to show that no harm was done to the defendant's case).

first named in the said writ or not, yet the said trial shall proceed"; and also for common juries: "Consenting that in case no view shall be had, or if a view shall be had by any of the jurors, whether they shall happen to be six or any particular number of jurors who shall be so mutually consented to as aforesaid [referring to the consent to the statutory selection from the panel], yet the trial shall proceed."¹

Under modern practice the view is commonly had after the complete impaneling of the jury; so that the reasons for being satisfied with a view by a part only of the jurors no longer exist. It may well be regarded as within the power of the trial Court to sanction no view in which the whole jury has not participated. Nevertheless, it should be noted that a participation by the entire number is no essential part of the orthodox and traditional notion of a view; and that the absence of one or more jurors need not be regarded as in itself fatal to the sufficiency of the view.²

§ 1166. **Same: (5) Unauthorized View.** That a view unauthorized by order of Court is improper, and that the information so obtained should be rejected, may easily be conceded. But it is important to distinguish the reasons for the impropriety. Assume that the whole number of the jury have attended, so as to obviate possible objection on that score; as one further that no witness or other person converses with the jury or attends them while viewing, so as to eliminate objections based on the Hearsay rule;¹ yet it would still be an improper proceeding. A view not had under the direction of the Court is improper because of the danger that the jury would view the wrong objects, and because of the difficulty for the party of ascertaining whether they have viewed the right objects. Under the instructions of the Court, and with the official assistance furnished by the Court's order, these objections disappear; otherwise, they are serious and sufficient:

1893, *Mitchell, J.*, in *Aldrich v. Wetmore*, 52 Minn. 161, 172, 53 N. W. 1072: "The theory of jury trials is that all information about the case must be furnished to the jury in open court, where the judge can separate the legal from the illegal evidence, and where the parties can explain or rebut; but if jurors were permitted to investigate out of court, there would be great danger of their getting an erroneous or one-sided view of the case, which the party prejudiced thereby would have no opportunity to correct or explain."

Such unauthorized investigations by way of view have invariably been regarded as improper; the only question has been whether the irregularity was dangerous enough to require a new trial.²

¹ The error above-mentioned as to the earlier practice was founded apparently upon the following precedents: Brooke's Abridgment, "View," 89, 95; 1614, *Gage v. Smith*, Godb. 209 ("if six of the jury are examined upon a *coyer dire* if they have seen the place wasted, that is sufficient"); 1628, *Coke* upon Littleton, 158 b. But the error had already been corrected judicially before Lord Mansfield's time: 1699, *Anon.*, 2 Salk. 665, *semble* (where the practice of leaving out "so many of the principal panel who were not at the view" was disapproved). In the following cases, apparent irregularities have been thought harmless: 1578, *Anon.*, 1 Leon. 267, pl. 359 ("In an action of wast, of wast assigned in a wood, the jury viewed the

wood only, without entering into it; and it was holden that the same was sufficient, for otherwise it would be tedious for the jury to have had the view of every stub of a tree which had been felled"); 1863, *R. v. Coroner*, 9 Cox Cr. 373 (not viewing all at the same time).

² Possibly some of the cases cited in the next section may have proceeded upon a doctrine contrary to that above set forth; but such a doctrine is without orthodox support.

¹ This question is dealt with *post*, § 1802.

² This question being one peculiar to the law of new trials, no attempt has here been made to collect all the precedents; compare the cases cited *post*, § 1802: 1875, *Stampowski v. Steffens*, 79 Ill. 303, 306 (private inspection

§ 1167. **Same: Principles to be Distinguished (Juror's Private Knowledge; Official Showers; Accused's Presence; Fence and Road Viewers).** The propriety of a view, as resting merely upon considerations inherent in the process of inspection, must be distinguished from other questions that sometimes arise in connection with a view.

(1) (a) A juror must proceed upon what he learns as a member of the jury and not upon his own *private belief* otherwise acquired (*post*, § 1800). Accordingly, the private and unauthorized investigation by a juror of some object connected with the trial may be regarded, not only as a violation of the foregoing principle (§ 1166), but also as an improper use of his private knowledge. (b) The acquisition of information from *other persons present* at a view is a violation of the Hearsay rule (*post*, § 1802). (c) The presence of *official "showers"* at a view is on principle not a violation of the Hearsay rule; the reasons are examined elsewhere (*post*, § 1802). (d) Whether the *accused* in a criminal case is constitutionally *entitled to be present* at a view is a question involving the Hearsay rule (*post*, § 1803). (e) Whether the jury, after considering the information obtained at a view, may disregard the testimony of witnesses is a question of the jury's duty, and is not within the scope of the present subject; a principle bearing upon it is discussed in the next section.

(2) (a) The process by which, under statutes in many jurisdictions, *fence or road viewers* are appointed is entirely different from the process here dealt with as a "view." Such viewers form in effect a special and anomalous tribunal, and take in their own way all the evidence that they need. Their procedure has nothing to do with the view by an ordinary jury. (b) The ancient learning about the right which was possessed by a *tenant in formdon* to have a view of lands in which he was interested was an entirely different thing from a jury's view;¹ it was a right of inspection given him to protect his interests, and is in any case to-day of no importance.²

by one juror, held improper); 1884, *Luck v. State*, 96 Ind. 16, 19 (taking the jury to the place by way of exercise, not sufficient in itself to authorize new trial); 1885, *Epps v. State*, 102 id. 537, 555, 1 N. E. 491 (taking them among other people for exercise; same ruling); 1897, *Tudor v. Com.*, — Ky. —, 43 S. W. 187 (conduct of the jury while taking exercise, held not a view); 1878, *Winslow v. Morrill*, 68 Me. 362 (juror visited the location privately; held improper); 1893, *Harrington v. R. Co.*, 157 Mass. 579, 32 N. E. 955; 1893, *Aldrich v. Wetmore*, 52 Minn. 164, 172, 53 N. W. 1072 (new trial granted for private inspection by three jurors); 1893, *Woodbury v. Anoka*, ih. 329, 54 N. W. 187 (similar); 1897, *Rush v. R. Co.*, 70 id. 5, 72 N. W. 733 (view without order of Court or knowledge of parties, improper, because "the parties have no opportunity of meeting, explaining, or rebutting evidence so obtained"); 1901, *Pierce v. Brennan*, 83 id. 422, 86 N. W. 417 (improper visit by jurors); 1878, *State v. Sanders*, 68 Mo. 202 (experiments made by some of the jury out of court to see whether worn-out boots, like some

described, would make tracks as described, held improper, because done without leave of Court and after the case had been submitted; but here the *defendant's counsel himself* had suggested and urged the experiment; "this looks like allowing a party to take advantage of his own wrong, and therefore has caused some hesitation on our part"; there ought to have been no hesitation over so impudent an objection); 1849, *Deacon v. Shreve*, 22 N. J. L. 176 (private view by three jurors, where persons talked to them for the plaintiff, held improper); 1855, *Eastwood v. People*, 3 Park. Cr. 25, 52 (unauthorized view by six jurors, held improper); 1885, *People v. Court*, 101 N. Y. 245, 4 N. E. 259 (one of the jurymen went alone to the scene of affray to observe it; *semble*, improper); 1888, *People v. Johnson*, 110 id. 134, 144, 17 N. E. 684 (view allowable under C. Cr. P. § 411; failure to administer oath to officers, held to be waived); 1894, *Peppercorn v. Black River Falls*, 89 Wis. 38, 61 N. W. 79.

¹ See its features discussed in *William v. Gwyn*, 2 Saund. 44 a, note 4.

² The following case is therefore founded on error: 1875, *Smith v. State*, 42 Tex. 444, 448

§ 1168. **Non-transmissibility of Evidence on Appeal; Jury's View as "Evidence."** (1) On a number of occasions in modern times the notion has been advanced that autoptic preference of the thing itself before the tribunal 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 tribunal below, and because thus the losing party cannot obtain a proper revision of the proceedings by the higher Court. The argument is best set forth in the following passage:

1872, *Downey, J.*, in *Jeffersonville M. & I. R. Co. v. Bowen*, 40 Ind. 548: "It is urged . . . that in no case where the jury has had a view of the place in which any material fact occurred . . . can the evidence be got into the record, as it would be impossible to put into the bill of exceptions the impressions made upon the minds of the jury by such view: and that in this way all benefit of appeal to this Court, so far as any question is concerned which depends upon all the evidence being in the record, would be wholly cut off. It is further contended that whether the jury shall have a view of the place, etc., is a matter entirely in the discretion of the Court, and that the Court may thus in its discretion deprive a party of the right to have questions depending on the evidence reviewed in this Court, even in cases of the greatest moment. It is urged that under the rule in that case [a contrary one] a party might be convicted and sentenced to be hanged on wholly insufficient evidence; yet if the prosecutor has got an order for the jury to view the place, and they have done so, it would be impossible to get the judgment reversed, no matter how insufficient the evidence might have been."

This notion has been sanctioned in a few jurisdictions, in forbidding the inspection of a person's appearance as evidence of his age,¹ and of a child's features as evidence of another's paternity,² and also in forbidding the resort to a view by a jury.³ But the notion has now been generally repudiated, even in the jurisdictions where it once obtained,⁴ and the propriety of inspection or view by the tribunal is regarded as not to be impugned because of this consideration.⁵

(apparently declaring all views unlawful, because of the statutory abolition of "vouchers, views, escoigns," and wagers of battle and of law, Pasch. Dig. art. 1468; a curious misunderstanding of the meaning of the "view" there referred to).

¹ 1867, *Stephenson v. State*, 28 Ind. 272 (age of a defendant as over 14; the personal appearance of the defendant not to be considered because "it will, so far as that issuable fact is involved, deprive the defendant of this right of review"); 1876, *Thinger v. State*, 53 id. 251, 253 (selling liquor to a minor; the appearance of the alleged minor not to be considered; "there is no mode of putting such evidence upon the record in order that it may be passed upon by an appellate tribunal"); 1878, *Robinius v. State*, 63 id. 235, 237 (selling liquor to a minor; same); 1878, *Swigart v. State*, 64 id. 598 (same); 1885, *Bird v. State*, 104 id. 385, 389, 3 N. E. 827 (same); 1891, *McGuire v. State*, — Tex. App. —, 15 S. W. 917 (knowingly selling liquor to a minor; the buyer's appearance forbidden to be considered by the jury, partly on this ground).

² 1885, *Hanawalt v. State*, 64 Wis. 84, 87, 24

N. W. 489 (inspection of an infant to determine resemblance, excluded partly because of no probative value, partly because "this Court upon appeal could not reverse their verdict," since not all the evidence would be presented on appeal).

³ 1875, *Smith v. State*, 42 Tex. 444, 448 (disapproving a view of a sow, partly on this ground).

⁴ Except perhaps in Wisconsin.

⁵ 1875, *Wright v. Carpenter*, 49 Cal. 607, 610 (but the jury are not to "take into consideration the result of their own examination," on the theory of *Close v. Samm*, *infra*); 1872, *Jeffersonville M. & I. R. Co. v. Bowen*, 40 Ind. 545, 547 (injury on a railroad track; the jury had viewed the premises; the sufficiency of the evidence considered, and the jury's inspection treated as proper, but not a source of evidence, following the reasoning of *Close v. Samm*, *Iowa, infra*; overruling *Evansville T. & C. G. R. Co. v. Cochran*, 1858, 10 Ind. 560); 1872, *Gagg v. Vetter*, 41 id. 228, 258 (*fire* attributed to sparks from a brewery chimney; the premises had been viewed by the jury; same ruling); 1875, *Heady v. Turnpike Co.*, 52 id. 117, 124 (view is not "part of the evidence in the case");

(2) But unfortunately the reasons upon which this repudiation has proceeded have not always been sound ones,— have indeed sometimes been dangerous and misleading. The correct reasons for this repudiation are sufficiently apparent. In the first place, the principle which allows a superior court to review the evidence given at a trial below does not necessarily imply that the evidence is to be stated and incorporated in its entirety but only so far as it is feasible to do so; and, so far as legislation has introduced new modes of revision by superior courts, it cannot be supposed to have intended by implication to change established modes of trial.⁶ In the second place, there is not the slightest precedent for such a novel suggestion; for it was never made at the bar until 1834 and never judicially recognized until 1858, and yet jury-views and other modes of autoptic preference had long been established methods in procedure. In the third place, the Courts had already established a much more radical doctrine to the contrary effect, namely, that a verdict objected to as against the weight of evidence might nevertheless be supported on appeal for the very reason that the jury might have proceeded in part upon knowledge obtained at a view which could not be fully laid before the superior court:

1840, *Shaw, C. J., in Davis v. Jenny*, 1 Metc. 222 (denying the proposition that a Court cannot set aside a verdict based upon inspection): "The authority of the Court to set aside a verdict does not depend upon the nature and quality of the evidence upon which the jury have found it; though it often happens that the character of the evidence is such as to afford the jury much better means of judging of it than the Court can have of reviewing it,— as where much depends upon localities and the jury have a view, or upon minute circumstances and there is conflicting testimony, or upon the credit of a witness who is strongly impeached by one set of witnesses and supported by another. In all such cases the consideration that the jury had means of judging of facts which cannot after-

1880, *Indianapolis v. Scott*, 72 id. 196, 204 (same; jury's testing a rotten sleeper viewed, held not misconduct); 1885, *Shular v. State*, 105 id. 289, 295, 4 N. E. 870 (principle of *Bowen's case* reaffirmed); 1887, *Louisville N. A. & C. R. Co. v. Wood*, 113 id. 544, 550, 14 N. E. 572, 16 N. E. 197 (general doctrine of *Cochran's case* repudiated, except perhaps where inspection is the chief source of evidence in the case); 1869, *Close v. Samm*, 27 Ia. 503, 507 (trespass by flowage upon land; a jury's view allowed; their view held not a source of evidence, so as to prevent a ruling as to the sufficiency of the evidence in the record; see quotation *post*); 1892, *Morrison v. R. Co.*, 84 id. 663, 51 N. W. 75; 1889, *Topeka v. Martineau*, 42 Kan. 387, 22 Pac. 419 (instruction to consider "the result of your observation in connection with the evidence," approved; theory that the results cannot be considered on appeal, repudiated; see quotation *post*); 1834, *Parks v. Boston*, 15 Pick. 198, 200, 209 (Messrs. Rand and Dexter raised the point that if the knowledge acquired by a view were to be used, "a new trial could never be granted on the ground that the verdict was against the weight of the evidence in cases where a view was had; for it would be impossible to say how far the jury acted upon their

own knowledge, and how far upon the testimony offered by the parties"; but *Shaw, C. J.*, repudiated this and referred to "knowledge acquired by the view" as proper); 1885, *State v. Stair*, 87 Mo. 268, 272 (blood-stained clothing of the deceased, identified by witnesses, shown to the jury; "the argument that these garments were not and could not be filed with the bill of exceptions, and therefore should not have been examined, by the jurors, is no reason for excluding them, the descriptive evidence is sufficient to enable this Court to pass upon the competency and relevancy of the evidence"); 1883, *Hart v. State*, 15 Tex. App. 202, 228 (repudiating the doctrine entirely; see quotation *post*).

⁶ 1869 *Wright, J. diss., in Close v. Samm*, 27 Ia. 503, 513 ("The Legislature doubtless considered this very difficultly, and yet deemed it better to give this power (the Court judging when it should be exercised), even though the difficulty of knowing upon what the verdict was based, than to withhold it entirely"). Compare the following: 1899, *Bridgewater v. State*, 153 Ind. 560, 55 N. E. 737 (reproving the attachment of knives, etc., to the bill of exceptions on appeal).

wards be laid before the Court in their complete strength and fulness will always have a prevailing and often a decisive influence upon the judgment of the Court in support of the verdict."⁷

Finally, the sanction of such a doctrine as the present one would lead to the absurd and impracticable consequence that autoptic preference, as a source of the jury's belief, should be radically prohibited. The following passage expounds the correct reasons for repudiating such a doctrine:

1883, *White, P. J.*, in *Hart v. State*, 15 Tex. App. 202, 228: "[One of the objections to exhibiting the deceased's clothing was] 'because such testimony cannot be made a part of the record herein.' . . . Is it true, or is it a standard test, or even a test at all, that the legality and admissibility of evidence depends upon the fact that it must be such as can and must be incorporated into and brought up by the record? We know of no such rule announced by any standard work on the law of evidence. If it be true, then the identification, the pointing out of a defendant in Court, is not legitimate or admissible because he cannot be sent up here with the record. A witness' countenance, tone of voice, mode and manner of expression, and general demeanor on the stand, oftentimes influence the jury as much in estimating the weight they give and attach to his testimony as the words he utters, and yet they cannot be sent up with the record. . . . How they have impressed the jury and influenced their verdict are facts known only to themselves, facts which must necessarily be unknown to the defendant, to the trial Court, and to this Court, save as they may be manifested in the verdict, because they cannot be written in the record; and yet they are and always have been the best and most legitimate sources from which a correct estimate of the value of oral evidence is drawn. . . . The doubting Thomas of Scripture could not be made to believe that the resurrected Saviour was indeed the dead and crucified Jesus, until permitted to put his fingers into the nail holes shown in the holy hands and thrust his own hand into the wounded side whence the spear of the Roman soldier let out the life-blood of the dying Lord. In a recent case in England,⁸ not at present accessible, the defendant was on trial for selling grain by a false measure; to solve the question of his guilt, the Court had the supposed false measure and a standard measure brought before the jury and the grain actually measured from the one into the other in the presence of the jury; will any one pretend to say that this was not the best and most satisfactory evidence to the minds of the jury which could possibly be adduced of the fact in issue before them? And could not the fact be sufficiently stated in the record so as to apprise this Court fully of the nature and character of the evidence and mode of proof upon which the verdict was founded? Clearly so, we think."

(3) But another mode, in favor with a few Courts, of repudiating the doctrine in question, is to invoke the theory that the *jury's inspection is not an obtaining of evidence*, and to hold that the bill of exceptions may therefore be said to contain all the "evidence" notwithstanding the jury has had a view:

1869, *Cole, J.*, in *Close v. Samm*, 27 Ia. 508 (the trial Court had instructed the jury to find "from all the evidence in the case, and from all the facts and circumstances disclosed on the trial, including your personal examination"; the Supreme Court discussed the

⁷ *Accord*: 1670, *Vaughan, C. J.*, in *Bushel's Case*, 6 How. St. Tr. 999, 1011, *Vaughan* 135 ("The evidence which the jury have of the fact is much other than that [deposed in Court]; for . . . 4. In many cases the jury are to have view necessarily, in many by consent, for their better information; to this evidence likewise the judge is a stranger"); 1863, *Fitchburg R.*

Co. v. Eastern R. Co., 6 All. 98; 1882, *Feoria & F. R. Co. v. Barnum*, 107 Ill. 160; 1890, *Shepherd v. Camden*, 82 Me. 535, 537, 20 Atl. 91; 1885, *Omaha & R. V. R. Co. v. Walker*, 17 Nebr. 432, 23 N. W. 348.

⁸ The learned judge possibly had in mind the case of *Chenier v. Watson* (cited *post*, § 1181), before Lord Kenyon, in 1797.

objection that the jury should not have based their verdict "in any degree upon personal examination"): "It seems to us that it [the purpose of the statutory view] was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party. . . . [After referring to the additional objection that the bill of exceptions should contain all the evidence.] It is a general rule, certainly, if not universal, that the jury must base their verdict upon the evidence delivered to them in open Court, and they may not take into consideration facts known to them personally but outside of the evidence produced before them in Court; if a party would avail himself of the facts known to a juror, he must have him sworn and examined as other witnesses."

To this mode of evasion there are two conclusive answers. The first is that, if this theory were sound, then no valid bill of exceptions of any trial has ever been drawn up, since the demeanor of witnesses on the stand is always some evidence on the point of their credit⁹ and no bill of exceptions has ever been able to embody this evidence with ink and paper. The second is that it is wholly incorrect in principle to suppose that an autoptic inspection by the tribunal does not supply it with evidence; for, although that which is received is neither testimonial nor circumstantial evidence, nevertheless it is an even more direct and satisfactory source of proof, whether it be termed "evidence" or not.¹⁰ The suggestion that, in a view or any other mode of inspection by the jury, they are merely "enabled better to comprehend the testimony," and do not consult an additional source of knowledge, can be easily shown to be simply not correct in fact. The following passages well expose the fallacy of the notion that the jury's view is not an obtaining of evidence, in the sense of consulting additional sources of knowledge:

1884, *Lyon, J.*, in *Washburn v. R. Co.*, 59 Wis. 364, 368, 18 N. W. 328: "The object of a view is to acquaint the jury with the physical situation, conditions, and surroundings of the thing seen. What they see they know absolutely. . . . For example, if a witness testify that a farm is hilly and rugged, when the view has disclosed to the jury, and to every juror alike, that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned, no contrary testimony of witnesses on the stand is needed to authorize the jury to find the fact as it is, in disregard of testimony given in court."

1898, *Bissell, J.*, in *Denver T. & F. W. R. Co. v. Ditch Co.*, 11 Colo. App. 41, 52 Pac. 224: "We are very frank to say we do not appreciate the refined distinction which is drawn by some of the authorities, wherein it is held that the jury are not at liberty to regard what they have seen as evidence in the case, but must utterly reject it otherwise than as an aid to the understanding of the testimony offered. The folly of it is apparent from the constitution of the human mind, and the well-understood processes by which juries arrive at conclusions. Many illustrations which forcibly express these ideas may be found in the cases. If a dozen witnesses should testify that there was no window on the north side of the house from which one man had sworn that he viewed the affray, and the jurors on view should see the window, all lawyers would know that it would be futile, on the argument, to insist to the jury that their verdict must be based on the non-existence of the window since the point had been sustained by a vast preponderance in the number of

⁹ *Ante*, § 946.

¹⁰ *Ante*, § 1150.

witnesses. In this mining community, lawyers who have had to do with litigations over lode claims, where the controversy respects the existence of an apex or the continuity of a vein, will understand that if a jury descended to inspect a mine, and the jury had on it a half-dozen miners, it would be folly to expect a verdict if those workmen, from their inspection, concluded that the crevice was a vein, and that it was or was not continuous. If the miners believed from their inspection that the crevice was a thing that they would follow, though a hundred men might swear they could not obtain an assay from it, and a hundred professional witnesses might swear that the vein was not continuous, yet, if these miners believed that the stained seam was a thing which they would have followed in the development of the property had they owned it, their verdict would be that it was a vein, and was continuous, providing the subsequent development showed that at the end of it there was a large body of valuable ore. We are therefore quite unable to appreciate the reasoning by which Courts hold that a charge of this description is necessarily erroneous [nameily, that the jury are to determine according to the evidence and their observations]."

1898, *Henshaw, J.*, in *People v. Milner*, 122 Cal. 171, 54 Pac. 833: "[That the jury receive evidence] certainly is the case. If, for example, it were material to determine whether a hole in the panel of a door was or was not caused by a bullet, it would be permissible to remove the panel, to bring it into the court room, offer and have it received in evidence, and submit it to the inspection of the jury. It would not for a moment be doubted, if this procedure were adopted, but that the physical object was evidence in the case. If, instead of so doing, the Court should direct that the place where the material fact occurred should be viewed by the jury, and the jury should be conducted to the spot, and the panel of the door pointed out to them, would it be any the less the reception of evidence because obtained in this way? Certainly not."

The theory that a jury's view does not involve the obtaining of evidence has come before the Courts for consideration in many cases involving the propriety of instructions to juries and the weight to be accorded by juries to witnesses' testimony; and, in spite of some favoring precedents,¹¹ it has in most jurisdictions been repudiated.¹²

¹¹ See in the following notes some of the earlier cases in California and Pennsylvania, and the latest cases in Illinois, Minnesota, and Wisconsin.

¹² The following list includes cases on both sides; the Indiana and Iowa cases have been placed *supra*, par. (1): Cal.: 1875, *Wright v. Carpenter*, 49 Cal. 607 (the jury are not to consider the result of their inspection as evidence); 1886, *People v. Bush*, 68 id. 623, 630, 10 Pac. 169 ("It is impossible that a jury could go and view such a place without receiving some evidence, through one of their senses, viz., that of sight"); 1898, *People v. Milner*, 122 id. 171, 54 Pac. 833 (a view is the obtaining of evidence; *Wright v. Carpenter* repudiated; see quotation *supra*); Colo.: 1898, *Denver T. & F. W. R. Co. v. Ditch Co.* (see quotation *supra*); Conn.: 1899, *McGar v. Bristol*, 71 Conn. 652, 42 Atl. 1000 (after a view of premises by triors, "its situation and state . . . are as fully in evidence as if they had been presented to his consideration through descriptions given by witnesses under oath"); Ill.: 1874, *Peoria A. & D. R. Co. v. Sawyer*, 71 Ill. 361, 364 ("the facts derived from such examination would still have been a part of the evidence"); 1877, *Mitchell v. R. Co.*, 85 id. 566 (view may furnish basis of conclusions

as well as other evidence); 1883, *Peoria & F. R. Co. v. Barnum*, 107 id. 160 (jury's "personal observation" a source of evidence); 1884, *Culbertson & B. Packing Co. v. Chicago*, 111 id. 651, 655 (jury may "take into account such facts as they learned by viewing the property"); 1891, *Springer v. Chicago* (quoted *ante*, § 1162); 1892, *Maywood Co. v. Maywood*, 140 id. 216, 223, 29 N. E. 704 (an instruction to consider "such facts as they learned by the view, the same being in the nature of evidence and to be considered as such," approved); 1893, *Peoria G. & C. Co. v. R. Co.*, 146 id. 372, 382, 34 N. E. 550 ("in the nature of evidence"); 1894, *Vane v. Evanston*, 150 id. 616, 621, 37 N. E. 901 (preceding cases distinguished as involving views under the eminent domain statute; for common-law views, the purpose is merely "to understand and apply the evidence"); 1898, *Rock I. & P. R. Co. v. Brewing Co.*, 174 id. 547, 51 N. E. 572 (in eminent domain views, "the conclusions drawn by the jury from their view are in the nature of evidence"); and so the following cases: 1902, *Lanquist v. Chicago*, 200 id. 69, 65 N. E. 681; 1903, *East & W. I. R. Co. v. Miller*, 201 id. 413, 66 N. E. 275; Kan.: 1889, *Kansas C. & S. R. Co. v. Baird*, 41 Kan. 69, 21 Pac. 227 (a view may furnish evidence of the need of crossings); 1889, *Topeka*

The general result is, then, that it is no objection to the process of autoptic preference, at a view or in court, that the bill of exceptions cannot be made to transcribe faithfully the sources of belief thus laid before the jury; but that there are sound reasons for repudiating this objection without a resort to the unsound theory that a view, or any other form of autoptic preference, does not involve the consideration of evidence by the jury.

v. Martineau (cited *supra*, par. 1); 1897, *Chicago K. & W. R. Co. v. Parsons*, 51 *id.* 408, 410, 32 *Pac.* 1083 (a view is "at most but one means of bringing evidence before them, letting the thing itself testify"); *Mo.*: 1890, *Shepherd v. Camden*, 82 *Mo.* 535, 30 *Atl.* 91 (jury have "a right to take into consideration what they saw"); *Mass.*: 1883, *Tully v. R. Co.*, 134 *Mass.* 499, 503 (objection that a ruling that the plaintiff had not offered sufficient evidence could not be made after a view, repudiated, because such a ruling should take into consideration the contingency that knowledge was obtained at a view; "in most cases of a view, a jury must of necessity acquire a certain amount of information, which they may properly treat as evidence in the case"); 1890, *Menerd v. R. Co.*, 150 *id.* 386, 388, 23 *N. E.* 214 (by a view the jury learned that a flagman had been placed at a crossing since the accident; whether this could be "treated as a part of the evidence," for purposes of comment in argument, not decided); *Minn.*: 1894, *Schnitz v. Bower*, 57 *Minn.* 493, 59 *N. W.* 631 (removing lateral support; the view is merely to apply the evidence); 1901, *Northwestern M. L. I. Co. v. Sun Ins. Office*, 85 *id.* 65, 88 *N. W.* 372 (the jury is not to use the knowledge obtained at a view); *Nebr.*: 1900, *Chicago, Rock I. & P. R. Co. v. Farwell*, 59 *Nehr.* 544, 81 *N. W.* 443 (a view "is evidence"); *N. H.*: 1861, *Dowey v. Williams*, 43 *N. H.* 384, 387 (not clear); *N. J.*: 1902, *DeGray v. R. Co.*, 68 *N. J. L.* 454, 53 *Atl.* 200 (*Close v. Samm, Ia.*, followed; jurors' view of telephone structures apparently held not to furnish evidence); *Pa.*: 1890, *Flower v. R. Co.*, 132 *Pa.* 524, 19 *Atl.* 274 (a view merely illustrates the testimony; said merely in cautioning the jury not to repudiate the testimony entirely); 1891, *Hoffman v. R. Co.*, 143 *id.* 503, 22 *Atl.* 823 (approving the preceding case); 1899, *Shano v. Bridge*

Co., 189 *id.* 245, 42 *Atl.* 128 (eminent domain; the jury may act upon "what they saw and knew"); *U. S.*: 1898, *U. S. v. Benfert B. Co.*, 37 *Fed.* 35, 38 (eminent domain; view may furnish evidence); *Wash.*: 1902, *Seattle & N. R. Co. v. Roeder*, 30 *Wash.* 244, 70 *Pac.* 498 (the jury "are told that, where there is a conflict in the testimony, they may resort to the evidence of their senses on the view to determine the truth; and this, we think, is correct"); *W. Va.*: 1894, *Fox v. B. & O. R. Co.*, 34 *W. Va.* 466, 12 *S. E.* 757 (the view is to "better understand the evidence," but the jury may take into consideration the impressions gained by sight of the place); 1902, *State v. Henry*, 51 *id.* 283, 41 *S. E.* 439 (a request that the jury "are not to take into consideration anything they saw or any impression they received at the view," held not improperly refused); *Wis.*: 1883, *Neilson v. R. Co.*, 58 *Wis.* 516, 523, 17 *N. W.* 310 (jury's view of premises allowed to be taken as source of knowledge); 1884, *Washburn v. R. Co.*, 59 *id.* 364, 368, 18 *N. W.* 328 (view may be taken by jury as a source of knowledge); 1885, *Johnson v. Boorman*, 63 *id.* 268, 275 (*Washburn v. R. Co.* approved); *Minckwitz v. R. Co.*, 64 *id.* 403, 407, 25 *N. W.* 438 (view is to "assist in weighing and applying the evidence"); 1886, *Seefeld v. R. Co.*, 67 *id.* 98, 100, 29 *N. W.* 904 (view is to "enable the jury to determine the weight of conflicting testimony"); 1887, *Sasse v. State*, 68 *id.* 530, 537, 32 *N. W.* 849 (an instruction "what they saw legally becomes a part of the evidence in the case," disapproved; the *Washburn* case misunderstood and practically repudiated).

Distinguish the following: 1901, *London G. J. Co. v. Lavell*, 1 *Ch.* 135 (judge's inspection of omnibuses, upon the issue whether the defendant's was such an imitation of the plaintiff's as to deceive customers, held insufficient, without other evidence).

PART II.

RULES OF AUXILIARY PROBATIVE POLICY.

INTRODUCTION.

GENERAL SURVEY OF AUXILIARY RULES.

CHAPTER XXXVIII.

§ 1171. Nature of the Rules.
 § 1172. Summary of the Rules.
 § 1173. "Best Evidence" Principle; History of the Phrase.

§ 1174. Same: Scope of the Phrase.
 § 1175. Primary and Secondary Evidence.

§ 1171. *Nature of the Rules.* The subject of Relevancy, with which the preceding Part is concerned, is primarily one of logic, of the sufficiency of probative value, of the propriety of an inference. Taking the peculiar point of view of an investigation by judge and jury, the law asks whether a given fact, offered as the basis of an inference to a given proposition, is worth being admitted for the jury's consideration (*ante*, § 12). Whether the defective operation of another machine is probative to show the condition of the machine in question; whether the testimony of a person who was insane last January is admissible to show the existence of the fact thus asserted, — these are types of the questions with which the principles of Relevancy are concerned. It is true that, in examining those principles, it is often practically convenient (as noted *ante*, § 42) to treat at the same time the effect of certain principles of Auxiliary Policy properly belonging here, in Part II, because the combined operation of the two sets of principles has often to be considered at one time in order to ascertain the resultant working rule. But this is merely on grounds of practical convenience in exposition. It remains true that the principles of Relevancy, as forming by themselves a separate set of rules, are concerned merely with the question whether a given fact is under any circumstances to be regarded as furnishing a sufficiently probative inference to be worth considering by the jury.

Assume, then, that these principles of relevancy have been satisfied, and that certain facts, so far as concerns their logical bearing and probative value, have passed the gauntlet and are evidentially worthy to be considered. There still may remain for them another gauntlet to pass. They may be amenable to certain other rules, applicable to specific classes of evidential material, and designed to strengthen here and there the evidential fabric and to secure it against dangers and weaknesses pointed out by experience. These auxiliary rules have nothing to do with relevancy as such, *i. e.* regarded

as the minimum requirement for admissibility. They assume relevancy, and then under special circumstances apply an extra safeguard designed to meet special dangers. They may be said to be artificial as distinguished from natural rules; that is, they do not, as do the rules of relevancy, simply analyze the natural process of inference and belief; but they contrive a specific safeguard to be applied where experience has shown it desirable. Moreover, their operation is on lines distinct from those of relevancy; for the same fact, though it is always relevant to prove the same proposition, may or may not come under the ban of one of these auxiliary rules, according to circumstances having no connection with relevancy. For example, the circumstance that a person planned to execute a will of a certain tenor is regarded as relevant to show that a lost will executed by him was of that tenor; yet, by a certain rule of preference, the document itself must be produced, and only if it is unavailable may this circumstantial evidence be used. Again, by another rule, sometimes laid down, the circumstantial evidence alone will in such cases not be regarded; it first must be quantitatively strengthened by the testimony of one who has read the document. Again, the assertion of a father of a family as to the age of his child is a fact always relevant (in the sense that the assertor is a qualified witness) to show the child's age; nevertheless, it will, under some circumstances, not be received unless it is made on the stand, under oath and subject to cross-examination. Again, the testimony of any person who has seen a testator sign a will is relevant, in the sense that the person is a qualified witness; yet, if there is another person available who has attested the will by his signature, the latter must first be called to the stand before the former can be listened to.

These rules of Auxiliary Policy, then, form a set of rules over and above and independent of the rules depending on the principles of Relevancy. They are distinguished from the rules of Relevancy (Part I) in resting not upon an analysis of the process of inference, but upon expedients designed to avoid special dangers irrespective of the nature of the inference and affecting in common various kinds of evidence resting upon various inferences. They are distinguished from the rules of Extrinsic Policy (Part III) in having for their purpose the strengthening of the mass of evidence and in avoiding probative dangers, and not the avoidance of collateral disadvantages unconnected with the object of securing good evidence. They include the most characteristic features of the Anglo-American law of evidence; and they are, on the whole, and apart from minor abuses, justified by experience as a valuable part of the system.

§ 1172. **Summary of the Rules.** These rules may best be grouped and analyzed, not according to their respective policies — which may be complex and varied — but according to the actual operation of the rule — the result which the rule produces in its application. For this purpose the rules seem divisible into five great classes, which may be termed, respectively, Preferential, Analytic (or Scrutinative), Prophylactic, Simplificative, and Quantitative (or Synthetic).

1. The nature of the *Preferential* rules is that they prefer one kind of evidence to another. This they may do in one of two ways: (a) they may require one kind of evidence to be brought in before any other can be resorted to, and may refuse provisionally to listen to the latter until the former is procured or is shown to be inaccessible; or (b) they may prefer one kind of evidence absolutely, i. e. they may require its production, and, so long as it is available, consider no other kind of evidence, even after the preferred kind has been supplied. With reference to the kinds of evidence thus preferred, these rules are of the following scope: (1) There is a rule of preference for the inspection of the thing itself, in place of any evidence, either circumstantial or testimonial, about the thing; this is the rule of *Primariness*, as sometimes termed (treated *post*, §§ 1177-1282), and concerns itself solely with *documents*. The preference here is solely of the conditional sort above-named, and not of the absolute sort. The questions that here arise are, in general, to what objects this rule of preference applies, under what conditions — the object ceasing to be available for production — the preference ceases, and to what exceptions the rule is subject. (2) There is, next, a preference as between various kinds of *testimonial evidence*. One kind of witness may, for various reasons, be required to be called in preference to another. Here the two kinds of preference, conditional and absolute, are both found. (a) The chief example of the former sort is the rule requiring an *attesting witness* to be called; the chief questions that here arise concern the kind of document to which the rule applies; the number of witnesses that must be called; the conditions of non-availability of the attesting witnesses which dispense with calling them; if they are unavailable, what the next grade or step of testimony should be, — the maker's handwriting or the attesting witness' or both; whether an exception exists where the opponent admits the document's execution, or claims under it, or where it is an ancient document or a registered deed, and the like. Other examples of this kind of rule are sometimes found in requirements that the eye-witnesses to a crime must all be called, or that the owner of stolen goods must be called to prove their loss, or that the alleged writer of a document must be called to identify it. (b) Of the absolute preference of one witness above another, the chief example is the rule preferring a magistrate's *official report* of testimony delivered before him. The preference here, when held to be absolute, is so in the sense that this report is not allowed to be shown erroneous, i. e. the magistrate's report is preferred so as to stand against that of any other person whatever. Another example of such a rule is the preference given to the *enrolment of a statute* as certified to by the presiding officers of the Legislature, the Governor, and the Secretary of State; where this doctrine obtains, these persons' testimony is made to stand against that of any other persons.

2. The nature of the *Analytic* (or *Scrutinative*) rules is to subject a certain kind of evidence to tests calculated to exhibit and expose its possible weaknesses and to make clear to the tribunal the precise value that it deserves. There is in effect but one rule of this sort, the Hearsay rule. By this rule,

two such tests or securities for trustworthiness are required to be applied to testimonial evidence, — the tests of cross-examination and confrontation; but the second is entirely subsidiary to the first, so that the essential purpose of this rule is that which is attained by bringing the witness to the stand and analyzing his assertions by the potent resolvent of cross-examination. The chief questions that arise in connection with this rule are whether the rule has in a given case been satisfied by adequate opportunity for cross-examination, whether certain classes of testimonial assertions are to be received exceptionally without undergoing these tests, and where the line is to be drawn between utterances to which the rule does and does not apply.

3. The nature of the *Prophylactic* rules is to endeavor by artificial expedients to remove, before the evidence is introduced, such sources of danger and distrust as experience may have shown to lurk within it. These are thus contrasted, on the one hand, with the Analytic rules, which achieve their purpose by exposing the weaknesses to plain view, and, on the other hand, with the Quantitative rules, which effect their object by cumulating a quantity of evidence sufficient to outweigh its individual weaknesses. The Prophylactic rules employ five expedients, — the oath, the perjury-penalty, publicity of proceedings, separation of witnesses, and prior notice of evidence to the opponent. Their common aim is by these expedients to eliminate in advance the dangers which are inherent in certain kinds of evidence.

4. The nature of the *Simplificative* rules is to reject a certain kind of evidence which though in itself relevant and trustworthy is likely under certain conditions to confuse the process of proof. These differ from the other four groups, as to practical effect, in that they do not accept the evidence when tested or strengthened by some artificial expedient — such as cross-examination, or oath, or numbers of witnesses — but simply exclude it, either absolutely or conditionally. The chief rules are those which exclude (1) evidence offered at an improper time, (2) testimony of an excessive number of witnesses, or of particular persons (such as a judge or counsel) likely to be over-influential, or of opinion, when superfluous and likely to be abused, (3) circumstantial evidence (such as an accused's moral character) likely to cause undue prejudice.

5. The nature of the *Quantitative* (or Synthetic) rules is that in given cases they require certain kinds of evidence to be associated with other evidence before the case will be allowed to go to the jury. There are three general classes of such rules. (1) A rule may prescribe a definite number of witnesses as the minimum. On a charge of treason, for example, two witnesses are almost universally required; and, on an issue of testamentary execution, two witnesses, or more, are generally required. (2) A rule may prescribe that in given cases one witness is not sufficient unless additionally there is circumstantial evidence of a specified sort. It is sometimes required, for example, that an accomplice's testimony must be thus corroborated, and that the testimony of a woman said to have been seduced or raped must be thus corroborated. (3) A rule may prescribe that one kind of circumstantial

evidence shall on certain issues be insufficient without other circumstantial evidence; for example, for the execution of an ancient document not testified to by witnesses, the circumstance of age alone may be held insufficient without the accompanying circumstances of appropriate custody, long possession, or the like; or the exchange of marriage consent may be regarded in certain issues as not sufficiently evidenced by the circumstance of cohabitation. These quantitative rules are in our system of law relatively few and unimportant.

There is no one term traditionally given to this group of auxiliary rules, here termed rules of Auxiliary Probative Policy; but it is necessary now to examine the scope of a phrase which has long been used as covering some of them, — the "best evidence" principle.

§ 1173. "Best Evidence" Principle; History of the Phrase. The history of the phrase has been traced, once for all and without the possibility of better statement, by Professor Thayer:¹

"The phrase first appears in our cases, I believe, after the English revolution, in C. J. Holt's time. That is an early period for anything like a rule of evidence, properly so-called. Such rules could not well come into prominence, or be much insisted on, while the jury were allowed to find verdicts on their own knowledge; and that power of the jury had been elaborately asserted as a leading ground of the judgment in *Bushell's Case* in 1670, by Vaughan, C. J., speaking for the court. Finding the rule, then, at the end of the seventeenth century, let us trace it down, not too minutely. In the year 1699-1700, in *Ford v. Hopkins*, in allowing a goldsmith's note as evidence against a stranger of the fact that the goldsmith had received money, Holt, C. J., says that they must take notice of the usages of trade; 'the best proof that the nature of the thing will afford is only required.' This is the earliest instance of the use of the phrase that I remember. This or its synonyms is repeatedly used by Holt and others. . . . The phrase now became familiar, and it continued to hold a great place throughout the eighteenth century. Chief Baron Gilbert introduced the expression into his book on Evidence, and recognized the rule which requires of a party the best evidence that he can produce, as the chief rule of the whole subject. . . . It is said in Gilbert's book that 'the first, therefore, and most signal rule in relation to evidence is this, that a man must have the utmost evidence the nature of the fact is capable of.' . . . The true meaning of the rule of law that requires the greatest evidence that the nature of the thing is capable of is this, that no such evidence shall be brought which *ex natura rei* supposes still a greater evidence behind, in the parties' own possession and power. Why did he not produce the better evidence? he asks; and he illustrates by what was always the stock example, the case of offering 'a copy of a deed or will where he ought to produce the original.' . . . The Courts also were using the same and even more emphatic language. In 1740, Lord Hardwicke declared that 'the rule of evidence is that the best evidence that the circumstances of the case will allow must be given. There is no rule of evidence to be laid down in this court but a reasonable one, such as the nature of the thing to be proved will admit of.' And in 1792 Lord Loughborough said 'that all common-law courts ought to proceed upon the general rule, namely, the best evidence that the nature of the case will admit, I perfectly agree.' But the great, conspicuous instance in which this doctrine was asserted and applied was in the famous and historical case of *Omychund v. Barker*, in 1744, growing out of the extension of British commerce in India, where the question was on receiving in an English court the testimony of a native heathen Hindoo, taken in India, on an oath conformed to the usages of his religion. In this case, Willes, J., resorted to this rule, and Lord

¹ Preliminary Treatise on Evidence, 489 ff.
1879

Hardwicke, sitting as Chancellor, with great emphasis said: 'The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.' . . . 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. It had become perfectly true that in many cases it made no difference whatever whether a man offered the best evidence that he could or not, — the best evidence that the nature of the case admitted, the best *ex natura rei*, as some judges said, or the best, *rebus sic stantibus*, as others said; none the less it was, in many cases, rejected. . . . As regards the main rule of the Best Evidence, in its general application, the text-books which followed Gilbert, beginning with Peake in 1801, and continuing with the leading treatises of Phillips in 1814, Starkie in 1824, Greenleaf in 1842, Taylor in 1848, and Best in 1849 all repeat it. But it is accompanied now with so many explanations and qualifications as to indicate the need of some simpler and truer statement, which should exclude any mention of this as a working rule of our system. Indeed it would probably have dropped naturally out of use long ago, if it had not come to be a convenient, short description of the rule as to proving the contents of a writing. Regarded as a general rule, the trouble with it is that it is not true to the facts and does not hold out in its application; and in so far as it does apply, it is unnecessary and un-instructive. 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."

§ 1174. **Same: Scope of the Phrase.** The phrase about producing the best evidence, then, is merely a loose and shifting name for various specific rules. Each of these stands upon its own basis of principle, and each of them has its own history, independent of the phrase. The rules were not created by deduction from the principle implied in the phrase; but the phrase came to be used as descriptive of the rules already existing. What were these rules?

(1) Chiefly, and usually, the phrase was employed for the rule that the terms of a document must be proved by the *production of the document* itself, in preference to evidence about the document (*post*, §§ 1177-1282). This is the use that has longest survived, and its illustrations are too numerous to need citation.

(2) It has also often been employed to designate the *Hearsay rule*, *i. e.* the rule excluding assertions, offered to prove the facts asserted, and made by persons speaking out of court and not subject to the test of cross-examination (*post*, §§ 1360-1810). Testimony on the stand is "best" in the sense that it is not regarded as trustworthy until it has been subjected to this great test of cross-examination. This usage has almost disappeared, but it was once not uncommon.¹

(3) It was also much employed to designate the group of rules by which the testimony of certain classes of witnesses is preferred to that of certain others. The party is required to resort first to the former, because, for varying reasons, their testimony is regarded as "best." The rule requiring

¹ *E. g.*, 1709, Holt, C. J., in *Altham v. Anglesea*, 11 Mod. 210.
1380

the production of an *attesting witness* (*post*, §§ 1287-1321) was the chief of these, and the one most frequently designated by the phrase "best evidence";² but this employment of it is also now not often met with.

(4) There are a few scattered instances of the employment of the phrase in connection with certain principles of substantive law. It is sometimes said, for example, that the record of a Court is the best evidence of its proceedings, as compared with other testimony 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 will be regarded as the *acta* of the Court; and so the frequent questions involving this subject are in reality questions of the law as to what constitutes for legal purposes a judicial act (*post*, § 2450). Again, the notary's or magistrate's record of a married woman's acknowledgment of consent to her deed, though sometimes spoken of as the "best evidence," is, as generally treated, not as a preferred testimony to the act, but as the very judicial act itself and the only thing to which the law will attach legal consequences.³ Again, the parol-evidence rule in general,⁴ though sometimes associated with the phrase "best evidence,"⁵ 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.

(5) Rarely, the phrase is still invoked in odd connections, to justify some rule already established on definite and independent grounds.⁶

The sooner the phrase is wholly abandoned, the better.⁷

§ 1175. **Primary and Secondary Evidence.** The distinction between the "best evidence" that is first required, and the inferior evidence that is allowed when the "best" is unattainable has come to be designated (apparently through the currency given it by Mr. Christian's essay and by Mr. Best's treatise) by the terms Primary and Secondary Evidence. These terms, which are in themselves not wholly unsatisfactory, are open to serious objections. One is that the rule requiring the production of documents is not a rule requiring evidence, but a rule preferring the thing itself (*ante*, § 1150) to any evidence about the thing; what is produced is not "primary evidence," in any significant sense; and the term tends to conceal the true nature of the rule's effect. The other objection is that, so far as the term is understood to

² *E. g.*, 1796, *Grose, J.*, in *Stone's Trial*, 25 *How. St. Tr.* 1313; 1804, *Per curiam*, in *Jones v. Lovell*, 1 *Cr. C. C.* 183. It was used in 1744, by *Lord Hardwicke, L. C.*, in *Omichund v. Barker*, 1 *Atk.* 1, 45, to designate both (2) and (3) *supra*; it was used in 1812, by *Kent, C. J.*, in *Coleman v. Southwick*, 9 *Johns.* 49, to designate both (1) and (2) *supra*; and such groupings of two or more of these three rules under the single phrase are elsewhere to be met with.

³ *Post*, § 1352.

⁴ *Post*, § 2400.

⁵ *E. g.*, *Best, C. J.*, in *Strother v. Barr*, 5 *Bing.* 136, 151; *Ga. Code* 1895, § 5166.

⁶ *E. g.*, 1767, *concessal* arguing in *Morris v. Miller*, 4 *Burr.* 2057 (proof of marriage by eye-

witness); 1866, *Doe, J.*, in *Boardman v. Woodman*, 47 *N. H.* 120, 145, 146 (applying it to personal opinion by lay witnesses to sanity); 1896, *Vigus v. O'Bannon*, 119 *Ill.* 334, 348, 8 *N. E.* 778 (used in connection with evidence that a party had no notice of a fact); 1892, *Stirling v. Wagner*, 4 *Wyo.* 5, 31 *Pac.* 1032 (used in reference to one testifying to a long course of business without producing the books).

⁷ Professor Thayer's just criticisms (quoted *ante*, § 1173) on the modern futility of the phrase had long ago been anticipated, in part, by the great exposé of legal cant: 1827, *Jeremy Bentham, Rationale of Judicial Evidence*, b. IX, pt. VI, c. IV (*Bowring's ed.*, vol. VII, p. 554).

group together all rules exacting a certain quality of evidence when it is available,¹ it groups rules which are in practical tenor essentially distinct,— for the Hearsay rule and the Attesting Witness rule and the Documentary Original rule cannot be thus united. On the whole, it should be abandoned as more likely to confuse than to clarify the application of the various auxiliary rules which naturally form an independent group in our system of evidence.²

¹ 1892, Lord Esher, M. R., in *Lucas v. Williams*, 2 Q. B. 113, 116 ("Primary and 'secondary' evidence mean this: primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence").

² The following is an example of this: Cal. C. C. P. 1872, §§ 1829, 1830 ("Primary evidence is that kind of evidence which under every possible circumstance affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents. Secondary evidence is that which is inferior to primary.")

TITLE I: PREFERENTIAL RULES.

SUB-TITLE I: PRODUCTION OF DOCUMENTARY ORIGINALS.

CHAPTER XXXIX.

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§ 1188. Dispensing with Production does not dispense with Authentication.

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A. INTRODUCTORY.

§ 1177. **History of the Rule.** The rule requiring the production of writings before the tribunal is one of the few rules in our system of evidence that run back earlier than the 1700s. In this rule we find a continuous existence, under one form or another, as far back as the history of our legal system takes us. But this history finds the rule in three stages: first, the stage of a form of trial, — trial by *carta* or document; next, the stage of a rule of pleading in jury trial, — the rule of *profert*; and finally the modern rule of production in evidence. These stages overlap to some extent, but they are nevertheless distinct.

(1) *Trial by documents.* This is the primitive aspect of the rule:

1898, Professor J. B. Thayer, *Preliminary Treatise on Evidence*, 504: "The vast majority of documents used in trials in early times were no doubt of the solemn, constitutive, and dispositive kind, — instruments under seal, records, certificates of high officials, public registers, and the like. Such documents, if the authenticity of them were not denied, 'imported verity,' as the phrase was, — fixed liability and determined rights. As questions were tried by record and by Domesday Book, so they were tried by other documents. As has been said, 'If a man said he was bound [e.g. by a sealed instrument], he was bound.'¹ Of course, therefore, whoever would use a document of this character must produce it, just as the Court had to have the jury in court, in trial (or proof) by jury, and the record, in trial (or proof) by record. As the trial by jury displaced one after another of the older modes of trial, sometimes these were mingled with it in a confused way; the procedure about joining attesting witnesses to deeds with the jury is probably an instance of this, — a combination of the old trial by witnesses with the newer trial by jury."²

Thus in the first stage the contrast and competition is between trial before the judges with deed-witnesses and trial by the jury; but this contrast tends to disappear, and the witnesses go out with the jury and investigate the deed.

(2) *Profert in pleading.* In the second stage, the contrast is between documents which are brought into court and formally presented in pleading to the consideration of the jury, and documents which are taken into consideration by the jury without this formal presentation. The jury at this time might freely go upon their own knowledge in reaching a verdict, and their consideration of documents not presented in court would thus at first not be an unnatural thing. Nevertheless, certain questions would arise:

1898, Professor Thayer, *ubi supra*, 105: "How if one who should have pleaded a charter or record did not plead it, relying, perhaps, on the jury, who might know of it? Could they find a matter of record or a deed without having it shown them? . . . Where a charter gave a ground of action or defence, it must regularly, as we have said, be pleaded; if admitted, it might save going to the assize. If it were not pleaded, one could not regularly use it in evidence to the jury; but the jury could have it if they wished: 'If a charter be put forward to inform the assize after they are sworn and charged, the charter will not be received unless they ask for it. To have the charter inform the assize,

¹ Holmes, *The Common Law*, 262.

² See also Thayer, pp. 13, 97, 104 ff. For the earlier aspects, in Germanic peoples, of the use

of documentary originals, see Eresslau, *Handbuch der Urkundenlehre* (1889), I, pp. 78-84.

one should plead on the charter and say thus: "He did not die seised, etc., for he enfeoffed us by this charter," and then put forward the charter to inform."³ . . . In 1319⁴ Scharshulle, J., is reported as saying that since a warranty requires a speciality, if it be not pleaded or put in evidence, a finding of it by the assize shall not be received. . . . In 1419-20,⁵ in a case much debated, it was held, with some difference of opinion among the judges, that a jury cannot in a special verdict find a deed which has not been pleaded or given in evidence; 'Hull [J.]: This deed is only the private intent of a man, which can be known only by writing; and if the writing be shown, it may lawfully be avoided in several ways, as for non-sane memory, being within age, imprisonment, or because it was made before the ancestor's death, and the like; things which the party cannot plead unless he have oyer of the deed and it be shown.'

This last passage introduces us to the peculiar nature of the second stage, *i. e.* the rule of profert, as a doctrine of pleading. The notion that the jury might go upon private knowledge obtained by them anywhere and everywhere was not substantially repudiated until the 1700s; but in the meantime there were various streams of tendency in that direction. One of them is here seen in the policy of requiring the important documents to be presented before the jury in court and forbidding them to be dealt with by the jury unless so presented. This policy does not come into force suddenly; in 1340, the jury found a record, though it was not produced, in part, by "its being commonly said in the country that there was such a plea and such a judgment rendered in the said form."⁶ But the rule of requiring profert in court tended to prevail and to become exclusive. Profert must be made (as the judge above quoted explains) so that the opponent, before the jury goes out, may have a proper opportunity to plead against the document and bring his defences to the jury's consideration. It must be remembered that at the earlier part of this stage the contrast is thus between the jury's use of a document properly produced to them in court and their use of one irregularly obtained afterwards. It is not a contrast between the formal allegation of a document in the pleadings and its later production in evidence: for the pleadings were oral, the counsel constantly stated facts testimonially to the jury, in connection with the true pleading or statement of the claim,⁷ and the assertion or claim about a document — the pleading of it — would not be in essence a separate process from that of showing it, making profert, putting it in as evidence; the allegation and the showing or profert were a part of the same process.

But when the time came that oral pleading disappeared, and the written pleading became a process entirely separate from that of putting in evidence at the trial, the doctrine of profert took on a new phase, the distinctive one which it bears as it appears in our classical common-law treatises on pleading in the early 1800s, at a time when the doctrine was coming to its end. In this phase, the rule of profert now required that a certain allegation be made in the written pleading, namely, after the statement of title by document, the allegation that the document was hereby *prolatum in curiam*; and

³ 1292; Y. B. 20 & 21 Edw. I, 20.

⁴ Y. B. 13 & 14 Edw. III, 80.

⁵ Y. B. 7 H. V. 5, pl. 3.

⁶ Y. B. 14 Edw. III, 25; cited in Thayer 109.

⁷ Thayer, *ubi supra*, 120.

though it was not actually produced and attacked, yet the opponent might crave *oyer* (i. e. the "hearing" it read, a relic of the days of oral pleading and actual instant production) and the proponent's counsel must then send it to the opponent's representative and allow a copy to be taken.⁸ In this degenerate and technical aspect of the rule as merely one of pleading, it need not further be considered here.⁹ This contrast between the presence and absence of a purely formal allegation in the pleading has no significance for the present subject.

(3) *The rule of production in evidence.* The contrast that remains to investigate is that between a rule requiring the production in evidence of writings and the absence of such a rule. It is apparent that, so far as the rule of *profert* obtained, and from the earliest time of its obtaining, there was in effect a rule of evidence on the subject; i. e. when, in the time of oral pleadings and evidence-production merged in one process, the rule required a document to be alleged and shown, this was a rule of evidence at the same time that it was a rule of pleading. Moreover, even in the later times of written pleadings, there would be a rule of evidence so far as there was a rule of pleading; for if it was necessary in the pleading to allege a fictitious showing of the document and then to give an actual *oyer* or sight of it to the opponent on request, the document would thus be ready for production in evidence also. The rule of *profert* in pleading, therefore, virtually enforced at the same time a rule of production in evidence. There was in practice no need of discriminating a separate rule of evidence; and, so far as one was thought of, it would run on all fours with the rule of pleading. Nevertheless, the law of the early 1800s does present us with a rule of evidence requiring production, which is by that time so far distinct from the rule of pleading that its scope is much larger and its requirements therefore more exacting, while its application is made as of a rule independent of the *profert* rule. It is thus worth while to ascertain how this independent growth came about; for the pleading-rule of *profert* had for some time been crystallized in a technical form and was no longer capable of contributing directly to this expansion of the rule of evidence.

But first it is necessary to notice the limits of the rule of *profert*, in order to understand the field that remained to be covered by a rule of evidence applicable to documents in general. The rule of *profert* applied (1) in the first place only to documents under seal¹⁰ and to judicial records.¹¹ (2) Furthermore, it applied in civil cases only; there thus remained practically the entire scope of criminal trials to be covered by the rule of evidence. (3) Finally, the rule was dispensed with — at least by gradual steps, stretching over two centuries — where the document was lost,¹² or in the hands of the

⁸ Stephen, *Pleading*, 382, and note 86; the author there points out the historical fact that the *profert* rule was an indirect successor of trial by charter; so also Thayer, *ubi supra*, 504.

⁹ It was abolished in England in 1852; St. 15 & 16 Vict. c. 76, § 35.

¹⁰ 1683, *Aylesbury v. Harvey*, 3 Lev. 204;

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1828, *Tidd's Practice*, 9th ed., I, 590; though this rule was by the 1800s much relaxed. The restriction was natural enough, in the light of the history of the seal and its significance for documents (*post*, § 2426).

¹¹ *Tidd*, 587.

¹² Cases cited *post*, § 1193.

opponent,¹³ or, in certain cases, in the hands of a stranger,¹⁴ or was only collateral to the main issue;¹⁵ but these limitations (except the last) were also perpetuated in the rule of evidence, so that there are under this head no radical steps of expansion to be noted.

At what time, then, did the rule of evidence come to include in its scope the documents exempted by the first two above limitations of the rule of preference?

(a) In *civil cases*, it is plain that during the 1500s no independent rule of evidence yet required the production of writings in general. At this period, whatever document was not brought in by virtue of the preferred rule in pleading might be established without any production; and this might sometimes suffice even for a record:

1571, *News v. Lark*, 2 Plowd. 403, 410 a; assize of disseisin; part of the evidence was a recovery suffered; objection, "that the recovery was not shewn under the seal, or at least the roll of it should have been alledged particularly, so that the Court might see it, because it is resident in this Court, and they might have informed the jury of it after they had perused it. . . . But all the other justices [except Harper] argued to the contrary. For . . . whatever they [the jury] may take conuance of of themselves may be given in evidence by parol, or by copies, or by other argument of truth. But in pleading, a man cannot make himself a title in any case by a record without shewing it under the great seal; and if a record be pleaded in bar, the party shall have a day to bring it in under the great seal (as Weston, Justice, said), and so he shall plead it without shewing it. But such day to bring it in shall not be where it is given in evidence, but the finding by the jury is sufficient, and they may find it of themselves, although it is not shewn to them in evidence; . . . and as they may find it, so by the same reason they may take instruction concerning it from every circumstance that carries an appearance of truth."

Somewhere during the 1600s the expansion and independent growth of the rule of evidence began. It was during this period that the jury came to be substantially restricted to information furnished them by evidence in court,¹⁶ and the course of this development would naturally put emphasis on the production of all writings in court. Thus the early contrast between the jury's use of a document out of court and their use of it in court would become unimportant. The contrast would come to be between a document actually produced by a witness and a document merely spoken of by him; and the latter practice would be regarded as irregular. By the beginning of the 1700s and onwards the rule is found applied to miscellaneous writings,¹⁷ although when a formal statement of it is made, the scope is still sometimes not so broad;¹⁸ and only by the beginning of the 1800s do the practitioners

¹³ *Post*, § 1199.

¹⁴ *Post*, § 1211.

¹⁵ *Post*, § 1252.

¹⁶ *Post*, § 2032; Thayer, *ubi supra*, 122.

¹⁷ 1699, *Anon.*, 1 *Ld. Raym.* 731 (rule applied to a note); 1702, *Geery v. Hopkins*, 2 *Id.* 851 (applied to East India Company's cash-book and transfer-book and a "note of acceptance"); 1724, *Downes v. Mooreman*, *Bunbury* 189 (applied to an agreement between abbot and monks); 1734, *R. v. Canterbury*, *Rldgw. temp. Hardw.* 81 (applied to statutes of All Souls College); 1737, *Goodier v. Lake*, 1 *Atk.* 446

(applied to "an original note of hand"); 1750, *Cole v. Gibson*, 1 *Ves. Sr.* 503, 505 (L. C. Hardwicke declared that there was no distinction as to "collateral" evidence; "so it is in the case of letters, which are always used by way of collateral, circumstantial evidence to prove the facts"); 1789, *Cates v. Winter*, 3 *T. R.* 306 (license to let horses); 1802, *Livingston v. Rogers*, 2 *Johns. Cas.* 488, 1 *Cal. Cas.* 27 (letter).

¹⁸ 1749, *Whitfield v. Fansset*, 1 *Ves. Sr.* 387 (L. C. Hardwicke: "The rule is that the best evidence must be used that can be had, first

who were writers of treatises explicitly state it to cover all kinds of writings.¹⁹ Moreover, all through the 1700s the rule was understood not to apply to writings which were only "collateral" to the issue,²⁰ — a limitation borrowed from the profert tradition; and this restriction, though it did not expressly exempt from the rule unsealed writings, must no doubt practically have had some influence, for many of the miscellaneous writings, particularly letters, would usually be "collateral" to the issue. Nevertheless, that restriction does not account for the recorded practice, as the criminal trials show.

(b) In *criminal cases*, the rule appears, as late as the 1600s, not to have been settled upon as broadly applicable, even to records:

1640, *Earl of Stafford's Trial*, 3 How. St. Tr. 1427, 1432, 1434; the prosecution charged among other things, "1, that by proclamation he had restrained selling of flax; 2, that he had ordered the making of yarn of such and such lengths and number of threads; . . . for proof hereof they brought, 1, the proclamation about the restraint; 2, the warrant for seizing the forfeited goods"; then, proceeding, they charged the unlawful billeting of soldiers on private persons, and "Serjeant Savil was called, who produced the copy of the warrant upon which he had settled the soldiers"; then the defendant objected that this copy was no evidence, "1, because no transcript, but the original only, can make faith before the King's Bench in a matter of debt; . . . if copies be at any time received, they are such as are given in upon oath to have been compared with the originals which are upon record," and that this copy was not only not so sworn but that the Serjeant was prejudiced to swear in his own exculpation and was therefore incompetent; "the point seemed exceeding weighty, and in effect was the ground-work of the whole article [of charge]"; and "after a very hot contestation" the Lords "resolved that this copy should not be admitted, and desired them to proceed to other proofs," which consisted of impartial testimony that "he heard of such a warrant," and "he hath seen such a warrant under the deputy's hand and seal."

Certain it is that through this whole century no fixed rule of production existed for the miscellaneous writings that become relevant in a criminal trial. They were often produced, and often not produced nor accounted for; and when they were accounted for, the explanation was made, as likely as not, only on cross-examination, or to forestall the jury's suspicion or the judge's criticism, and not as a preliminary required by firm and accepted rule.²¹ Under Lord Holt, however, the first quarter of the 1700s finds the

the original; . . . this extends not only to deeds but to records"); ante 1767, Buller, *Nisi Prius*, 253 (deeds).

¹⁹ 1801, Peake, *Evidence*, 97 ("Of private deeds, or other instruments, the production of the original, if in existence, and in the power of the party using it, is always required"); 1814, Phillips, *Evidence*, 435 ("deeds, agreements, etc."); 1824, Starkie, *Evidence*, 368 ("deed, agreement, or other private instrument"); 1810, Swift, *Evidence*, 25, 31 (uses indifferently the terms "private writings," "deeds," "instrument").

²⁰ Post, § 1252.

²¹ 1632, *Sherfield's Trial*, 3 How. St. Tr. 519, 527 (material document, not produced); 1637, *Bastwick's Trial*, ib. 711, 743 (Bastwick's book

having charged that the prelate had forged an Article of Religion, Archbishop Laud quoted his printed copies of the Articles to show the Article's presence, and then, since "it is not fit concerning . . . an Article of such consequence . . . you should rely upon my copies," produced "from the public records in my office, here under my officer's hand, who is a public notary," a copy of the original Article); 1637, *Bishop of Lincoln's Trial*, ib. 803, 804 (libellous letters produced); 1642, *Duke of Richmond's Trial*, 4 id. 111, 113 (letter produced); 1644, *Archbishop Laud's Trial*, ib. 315, 407 (same); 480 (another document not produced; defendant argues, "Why is not this paper produced? Out of all doubt it would [have been], had there appeared any such thing in it"); 1647, *Morris'*

rule (coincidentally with its progress in civil cases) regularly acknowledged in practice, and applied to all kinds of writings.²² And yet fifty years later it was possible to dispute and necessary to decide plainly that there was no difference in the doctrine for criminal cases.²³

As a rule of evidence, then, in contrast to a rule of pleading, the last and largest stage of the modern rule as now universally accepted cannot be said to have been reached until the 1700s. No doubt its slow development was due in part to the difficulty of plainly differentiating it from the analogous but narrowly restricted doctrine of profer in pleading.

§ 1178. *Analysis of Topics.* In following the application of the rule, it will be convenient to divide the subject under three heads: B. the rule of production itself; C. the exceptions; D. the accessory rules applicable in case of non-production, — these last depending on separate principles of evidence.

The rule may be stated, for convenience in examining its details and distinctions, in the following parts:

- (a) *In proving a writing,*
- (b) *Production must be made,*
- (c) *Unless it is not feasible,*
- (d) *Of the writing itself,*
- (e) *Whenever the purpose is to establish its terms.*

Trial, 1h 951, 954 (forgery of an act of Parliament; there was "a view of the said writings, being by their lordships' orders brought into the House"); 1649, King Charles' Trial, ib. 993, 1102 (warrant to the king's soldiers, produced as "the same original warrant"); 1653, Faulconer's Trial, 5 id. 323, 347, 349, 353 (perjury in a deposition; the original was carefully shown to have been lost, and was proved by copy; a certain petition, material in the proof, was produced in the original); 1656, Slingaby's Trial, 1b. 871, 878 (a royal Commission produced and read; but a letter, testified to without production); 1678, Whitebread's Trial, 7 id. 79, 114, 118 (Ontes having testified to the contents of a register of treasonable doings kept by the defendants, the Court tells the defendant, "You would do well to show us your book"; W.: "We never kept any"; then letters found in the defendant's papers were produced for the prosecution); 1679, same set of trials, ib. 311, 349, 355, 359 (testimony to a bill of exchange, not produced, because it had been taken by another person; but some letters were produced; L. C. J. Scroggs: "Then say you, 'It is wonderful that since they say they saw such and such letters, they should not produce them'? Why, they did not belong to them"); 1680, Earl of Stafford's Trial, 7 id. 1293, 1318, 1443 (Dugdale, the informer, testifies to the contents of treasonable papers; afterwards, he is asked to explain why they are not produced, and states that they were destroyed); 1681, P'nnket's Trial, 8 id. 447, 459 (documents' contents given without accounting for them). 475 (papers produced); 1682, Lord Grey's Trial,

9 id. 127, 147 (important letter of defendant referred to by plaintiff's witness, but not produced because she "had it not here"); 1685, Fernley's Trial, 11 id. 381, 423 (production not asked for); 1696, Charnock's Trial, 12 id. 1377, 1402 (same); 1696, Rookwood's Trial, 13 id. 139, 199 (list of names given to witness by defendant; testified to without producing or accounting for it); 1702, Swendsen's Trial, 14 id. 559, 562 (forcible marriage; the terms of the license testified to without producing it).

²² 1696, Vaughan's Trial, 13 How. St. Tr. 495, 519 (Witness: "I had a letter about it"; L. C. J. Holt: "Where is that letter?"; Witness: "I have it not here"; L. C. J.: "Give not an evidence of a letter, without the letter were here; it ought to have been produced"); 1704, Tutchli's Trial, 14 id. 1095, 1111, 1114 (libel; certain original papers required to be accounted for); 1717, Francis's Trial, 15 id. 897, 921 (contents of letter stated without producing; but afterwards, on objection, production offered); 1722, Laver's Trial, 16 id. 93, 170, 176, 182, 186 (contents of letters stated without producing; as regards their absence is accounted for on cross-examination). In 1802, McNally (on Evidence) writing chiefly for criminal cases, does not mention the rule.

²³ 1772, Buller, J., in *Att'y-Gen'l v. Le Merchant*, 2 T. R. 201 ("The rule of evidence in both cases [criminal and civil] is the same, that is, to have the best evidence that is in the power of the party to produce, which means that, if the original can possibly be had, it shall be required"; here, applying it to a letter); 1808, *Com. v. Messinger*, 1 Binn. 273, 274, 282.

B. THE RULE ITSELF.

(a) "In proving a Writing,"

§ 1179. **Reason of the Rule.** An important question is whether the rule is restricted to writings, or whether it includes also other chattels or material objects. It is necessary, for ascertaining this, first to examine the reasons of policy that have been put forward for the rule in general. These may be gathered from the following passages:

1611, *Dr. Leyfield's Case*, 10 Co. Rep. 92 a: "It was resolved that the lessee for years in the case at bar ought to shew the letters patent made to the lessee for life. For it is a maxim in the law that . . . sitho' he who is privy claims but parcel of the original estate, yet he ought to shew the original deed to the Court; and the reason that deeds being so pleaded shall be shewed to the Court is that to every deed two things are requisite and necessary; the one, that it be sufficient in law, and that is called the legal part, because the judgment of that belongs to the judges of the law; the other concerns matter of fact, sc. if it be sealed and delivered as a deed, and the trial thereof belongs to the country. And therefore every deed ought to approve itself, and to be proved by others, — approve itself upon its shewing forth to the Court in two manners: 1. As to the composition of the words to be sufficient in law, and the Court shall judge that; 2. That it be not razed or interlined in material points or places; . . . 3. That it may appear to the Court and to the party if it was upon conditional limitation or power of a revocation in the deed. . . . And these are the reasons of the law that deeds pleaded in court shall be shewed forth to the Court. And therefore it appears that it is dangerous to suffer any who by the law in pleading ought to shew the deed itself to the Court, upon the general issue to prove in evidence to a jury by witnesses that there was such a deed, which they have heard and read; or to prove it by a copy; for the viciousness, rasures, or interlineations, or other imperfections in these cases will not appear to the Court, or peradventure the deed may be upon conditional limitation or with power of revocation, and by this way truth and justice and the true reason of the common law would be subverted."¹

1641, *Earl of Suffolk v. Greenwill*, Ch. Rep. 89, 92: "The Court held it very dangerous to admit the contents and sufficiencies of deeds to be proved by the testimony of witnesses, the construction of deeds being the office of the Court."

1696, *Holt, C. J.*, in *Steyner v. Droitwich*, Skinner 623, said that though an original may be evidence, "yet a copy would not, for it is liable to the mistake of the transcriber."

1811, *Mr. Burrows*, arguing, in *Sheridan's Trial*, 31 How. St. Tr. 660: "There is nothing about which the law is more sacred than keeping away the vague and fluctuating recollection of the contents of written instruments, when it is possible to produce the instruments themselves."

1828, *Tenterden, L. C. J.*, in *Vincent v. Cole*, M. & M. 257: "I have always (perhaps more so than other judges) acted most strictly on the rule that what is in writing shall be proved only 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."

1832, *Maule, J.*, in *MacDonnell v. Evans*, 11 C. B. 942: "It is a general rule . . . that if you want to get at the contents of a written document, the proper way is to produce it if you can. That is a rule in which the common sense of mankind concurs. If the paper is in the possession of the party who seeks to have the jury infer something from its contents, he should let them see it."

¹ Accord: 1613, *Read v. Hide*, 3 Co. Inst. 173.
1391

These reasons are simple and obvious enough, as dictated by common sense and long experience. They may be summed up in this way: (1) As between a supposed literal copy and the original, the copy is always liable to errors on the part of the copyist, whether by wilfulness or by inadvertence; this contingency wholly disappears when the original is produced. Moreover, the original may contain, and the copy will lack, such features of handwriting, paper, and the like, as may afford the opponent valuable means of learning legitimate objections to the significance of the document; (2) As between oral testimony, based on recollection, and the original, the added risk, almost the certainty, exists, of errors of recollection due to the difficulty of carrying in the memory literally the tenor of the document.

§ 1180. **Same: Spurious Reasons.** It is worth while to note the nature of these reasons, because currency has been given, since the quasi-philosophic treatise of Chief Baron Gilbert, to a reason which is superficially attractive in itself, yet is not only insufficient in principle but quite inconsistent with the detailed terms of the rule as everywhere accepted. This reason has been thus stated:

Ante 1726, Chief Baron Gilbert, Evidence, 4: "There can be no demonstration of a fact without the best evidence that the nature of the thing is capable of. Less evidence doth create but opinion and surmise, and does not leave a man the entire satisfaction that arises from demonstration. For if it be plainly seen in the nature of the transaction that there is some more evidence that doth not appear, the very not producing it is a presumption that it would have detected something more than appears already. . . . No such evidence shall be brought which *ex natura rei* supposes still a greater evidence behind in the party's own possession and power; . . . for if the other greater evidence did not make against the party, why did he not produce it to the Court? As if a man offers a copy of a deed or will where he ought to produce the original, this carries a presumption that there is something more in the deed or will that makes against the party, or else he would have produced it."

1820, Holroyd, J., in *Brewster v. Sewall*, 3 B. & Ald. 296, 302: "Now the reason why the law requires the original instrument to be produced is this, that other evidence is not so satisfactory, where the original instrument is in the possession of the party and where it is in his power to produce it or get it produced provided he gives notice. In either of these cases, if he does not produce it or take the necessary steps to obtain its production, but resorts to other evidence, the fair presumption is that the original document would not answer his purpose, and that it would differ from the secondary evidence which it gives."¹

The fallacy about this reason is that, even if it were shown not to exist, *i. e.* if the Court were satisfied that the proponent of the document was acting in perfect good faith (as, where he had no reason to believe that the original's terms would be needed or would be disputed), it would still be proper to require the document, in order to guard against honest errors of testimony and to allow the opponent to gain such enlightenment as he could from the appearance of the original; the rule should apply to honest as well as to dishonest parties. Moreover, that this is not the reason actually relied upon is

¹ This reason has been often advanced; *e. g.*: 664; and in *Doe v. Ross*, 7 *id.* 102; 1828, Marshall, C. J., in *Taylor v. Riggs*, 1 *Pet.* 591, 596.

seen in certain details of the rule; for the possession of the document by a disinterested third person would relieve the proponent from the suspicion of fraudulent suppression, yet the rule applies equally to that case; and the possession by the opponent himself with the right not to produce it will also serve to dismiss the suspicion, yet the rule applies equally to that case. Finally, if the above reason were the correct one, the rule would equally apply to objects other than writings; yet it is generally conceded that it does not. It may be added that, so far as concerns the above reason, it would have been sufficient to allow the jury to make an inference from the non-production (*ante*, § 291), and it would not have been necessary to require actual production. This reason, then, while it undoubtedly adds force to the rule in many instances, may be regarded as not forming the real and working reason of the rule.²

§ 1181. **Rule not applicable to Ordinary Uninscribed Chattels.** The real reason indicated for the rule will show why it has come to be generally accepted that only documents, or things bearing writing, can be within the purview of the rule. In the first place, it is in the terms and the construction of language that the special risk of error lies. To remember, for example, the color of a horse is a simple matter in comparison with remembering or even accurately transcribing the terms of a written warranty about the horse. In the second place, it is chiefly in respect to language that slight inaccuracies are likely to be of important legal consequence. A mistake, for example, in counting the number of bushels in a bin of wheat can hardly lead to serious consequences, but a mistake in a few letters of an ordinary deed may represent it as giving to Jones instead of to Jonas or as giving five hundred instead of four hundred acres. For these reasons, it is entirely proper that a rule of such strictness should not be applied so broadly as to require the production of anything but writings; and such is the accepted doctrine:

1874, *Coleridge, C. J.*, in *R. v. Francis*, L. R. 1 C. C. R. 123, 132 (not requiring a clustering, said to be false, to be produced): "When the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents. . . . But there is no case whatever deciding that when the issue is as to the state of a chattel, *e. g.* the soundness of a horse or the equality of the hulk of the goods to the sample, the production of the chattel is primary evidence and that no other evidence can be given till the chattel is produced in court for the inspection of the jury."

1844, *Marshall, J.*, in *Clarke v. Robinson*, 5 B. Monr. 53 (declining to require production of a slave warranted sound): "It is now contended that as the evidence of one's own senses is the best of which extrinsic facts are susceptible, the testimony of witnesses is of an inferior grade, and therefore should not be allowed when the fact or thing itself to which it relates can be exhibited to the jury. This principle may have prevailed to some extent in the ancient jurisprudence of England, when the jury was brought from the actual vicinage of the transaction which they were to try, and in many cases affecting the realty were sent out to have a view of the premises. We suppose it was never required in cases involving mere personal property that the jury should act upon their own view of the thing. . . . The rule requiring the best evidence does not require that the jury shall in all cases where it is practicable be furnished with the means of personally know-

² Compare the quotation from *Attorney-General v. LeMerchant*, *post*, § 1199.

ing the fact. Except in cases of written instruments or records, although there may be more satisfactory means of knowledge, there is no higher grade of testimony as a means of communicating facts to a jury than the statement of a witness who has himself had the best means of knowledge. . . . We will not say that there may not be cases involving the condition or qualities of particular articles, in which the party having the custody may be permitted or perhaps even required to exhibit it to the jury as affording the most satisfactory means of knowledge; but the Court must have a discretion in these cases to prevent misconception or imposition."¹

Nevertheless, it is conceivable that upon occasion the particular features of an uninscribed chattel may be so open to misconstruction and may become so material to the issue that it would be proper to require production; in other words, if the two conditions above named as peculiar to writings occur for a thing not a writing, then the rule may well apply. Lord Kenyon's well-known ruling about the bushel-measure is an excellent illustration of this;² and a few other instances, less significant of principle, are recorded.³ A correct solution would seem to be to leave to the discretion of the trial Court the occasional application of the rule to uninscribed chattels.

§ 1182. **Rule as applicable to Inscribed Chattels.** It is impossible to say that any settled doctrine has found favor respecting the application of the rule to material objects, not paper, bearing inscriptions in words. There are inherent difficulties. It is impracticable to base any distinction upon the material bearing the inscription; for a notice-board or a tombstone may deserve the application of the rule as well as a sheet of note-paper. Nor is it practicable to distinguish according to the number of words; for each number is but one higher than the preceding, and a broker's note of ten words or a baggage-check of a few initials may need inspection as much as a lengthy lease for ninety-nine years. Nor can the purpose of the words be material; for the memorandum-tick made for private verification may become as important as the deed intended for public registration. No Court seems to have attempted, and certainly no Court has achieved, a satisfactory test for the distinction to be drawn. There are precedents requiring and precedents not requiring production, — precedents often entirely irreconcilable if one were seeking an inflexible rule.¹ But there is no reason for making such a rule;

¹ *Accord*: 1874, *R. v. Francis*, L. R. 2 C. C. R. 128 (not requiring the production of a ring said to be counterfeit); 1892, *Lucas v. Williams*, 2 Q. B. 113 (infringement of copyright of painting by publishing a photographic copy of it; proof of the photograph's being a copy, allowed without requiring the production of the painting); 1844, *Clarke v. Robinson*, 5 B. Monr. 55 (warranty of slave's soundness; to show her condition, production not required; quoted *supra*); 1869, *Com. v. Pope*, 103 Mass. 440 (condition of clothes, etc., testified to without production); 1886, *Com. v. Welch*, 134 id. 473 (illegal liquor-selling; the contents of a tumbler said to contain liquor, and carried away by the witness, not required to be produced); 1899, *State v. McAfee*, 148 Mo. 370, 379, 50 S. W. 82 (deceased's shirt, not required to be produced); 1882, *Heney v. Smith*, 10 Or. 349, 355 (condi-

tion of hat of injured person; rule not applicable).

² 1797, *Cheney v. Watson*, Peake Add. Cas. 123 (assumpsit on a warranty that wheat should weigh 59 pounds per bushel; a witness being asked whether the plaintiff's bushel had not been tried and found to correspond with the public Belford bushel, and the latter but not the former measure being in court, Kenyon, L. C. J., "was of opinion that the question could not be asked . . . without producing the originals; . . . the best evidence the nature of the case would admit of was a production of both measures in court, and a comparison of them before the jury").

³ 1835, *Lewis v. Hartley*, 7 C. & P. 405 (dog identifiable by marks; production required); and some of the cases in note 1, § 1182.

¹ The precedents of both sorts are as follows:

the rational and practical solution is to allow the trial Court in discretion to require production of an inscribed chattel wherever it seems highly desirable in order to ascertain accurately a material fact. It should be added that the series of English rulings in which it was held, in certain prosecutions for sedition, that the banners bearing inscriptions alleged to import treasonable purposes, need not be produced,² must be regarded as wholly unjustifiable. The very differences that existed, in some of the trials, in the testimonies of different witnesses as to the inscriptions' precise terms, and the materiality, in such trials, of these differences, should indicate the propriety of applying the rule, within discretionary limits; and it may be thought that those rulings would to-day not be followed even in England.³

England: 1706, Feilding's Trial, 13 How. St. Tr. 1347 (Witness: "I know Mr. Feilding by sight; he bought a gold ring of me, but I cannot remember the time"; Counsel: "Was there any poxy in it?" "Yes, I graved a poxy whilst he took a turn in the alley; the poxy was by his direction, 'Tibi soli'"); 1805, *R. v. Johnson*, 7 East 65, 66, 29 How. St. Tr. 437 (postmark on an envelope; rule applied); 1842, *R. v. Edge, Wills*, Circ. Evid., 5th Am. ed. 212, Maule, B. (inscription on a coffin plate; rule applied); 1843, *R. v. Hinley*, 1 Cox Cr. 13 (rule applied to the address on a hamper, by Maule, J.; but he added: "Suppose an inscription on a bale marked 'XX'; would it be necessary to produce the bale?"); 1847, *Burrell v. North*, 2 C. & K. 680, 682, *semble* (rule applied to the direction on a parcel); 1864, *R. v. Farr*, 4 F. & F. 336, Channell, B. (stealing a ring; as a part of the description to identify it, a question was asked as to the inscription; rule applied); *United States*: 1874, *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 451, 462 (boxes of a passenger killed on railroad; inscription proved without production; "if a sign were painted on a house, it would hardly be contended that the house would have to be produced, nor can it be said that the law converts the court-room into a receptacle for wagons, boxes, tombstones, and the like, on which one's name may be written"); 1793, *State v. Osborn*, 1 Root 152 (passing a counterfeit sixpence; production required); 1793, *State v. Blodget*, *ib.* (forged paper money; rule applied); 1858, *Whitney v. State*, 10 Ind. 404 (selling lottery tickets, partly printed; production required); 1877, *Frazer v. State*, 58 Ind. 8, 11 (envelope bearing on the outside directions to the stakeholder for delivery of the stake within; production required); 1878, *Caldwell v. State*, 63 *id.* 283 (*same*); 1898, *Wright v. State*, 88 Md. 436, 41 Atl. 795 (rule applied to inscription on wrapper of butter-package); 1858, *Com. v. Blood*, 11 Gray 74, 77 (labels of "rye whiskey" on jugs; production not required); 1855, *Bryant v. Stillwell*, 24 Pa. 314, 317 ("maps, surveys, and drawings are not to be distinguished from other papers in this respect"; here, a plan of a house); 1876, *U. S. v. Babcock*, 3 Dillon 571, 574 (superscription on an envelope; rule not applicable); 1878, *U. S. v. De Graff*, 14 Blatchf. 381, 385 (evading customs laws; testimony to shipping-marks on barrel-

heads; rule not applicable). Compare also the criminal cases *post*, § 1203, where the rule was assumed to be applicable to paper-money, etc.

§ 1746, *Fletcher's Trial*, 18 How. St. Tr. 353 (a flag with the motto, "Liberty and Property, Church and King"; rule not applied); 1781, *Lord George Gordon's Trial*, 21 *id.* 513 (banners inscribed "Protestant Association" and "No Popery"; rule not applied); 1820, *R. v. Hunt*, 1 State Tr. n. s. 171, 232, 252, 3 B. & Ald. 566, 569 (sixteen flags, with such mottoes as "No borough-mongering," "Unite and be free," "Equal representation or death," "Taxation without equal representation is tyrannical and unjust," "No corn laws," "The rights of man," were seized by the police at a meeting; *Abbott, C. J.*: "[1] There is no authority to show that, in a criminal case, ensigns, banners, or other things exhibited to public view, and of which the effect depends upon such public exhibition, must be produced or accounted for on the part either of the prosecutor or of the defendant. . . . Inscriptions used on such occasions are the public expression of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings. . . . [2] The difficulty of such a deduction [of identity of the things when produced], and the impossibility that must occur in many cases of either producing the things themselves or of showing what has become of them, shows the unreasonableness of requiring the proof of the things themselves"; 1820, *R. v. Dewhurst*, 1 State Tr. n. s. 529, 542, 594 (*similar*); 1833, *R. v. Fursey*, 6 C. & P. 81, 86, 3 State Tr. n. s. 543, 560 (proclamation, forbidding riotous meeting, posted on a building-wall; production not required, on the authority of *R. v. Hunt*, but the real reason apparently was that here the placard was affixed to a wall. — *as* in § 1214, *post*; banners bearing death's head, etc., and "Liberty or Death"; production not required); 1839, *R. v. Stephens*, *ib.* 1189, 1196 (inscriptions on banners; production not required); 1843, *R. v. O'Connell*, 5 *id.* 1, 245 (inscriptions on banners described, without producing the banners).

§ 1843, *R. v. Hinley*, 1 Cox Cr. 13 (Maule, J., after quoting the passage of *Abbott, C. J.*, in *R. v. Hunt*, *supra*: "I confess that is not very satisfactory to me, for the circumstance of its being a public expression of feeling is no reason why the best proof should not be given. The

§ 1183. **Rule applicable to all Kinds of Writings.** When the thing in question comes strictly within the class commonly termed "documents" or "writings," i. e. things of paper or parchment employed solely as a material for bearing words written or printed in the form of complete clauses or sentences expressing connected thought, there is no further distinction to be made. The rule is applicable to all kinds of writings. The original doctrine of profert affected only records and instruments under seal, and applied in civil cases only; but by a gradual development, already noticed (*ante*, § 1177), the rule requiring production in evidence came to be settled, by the 1700s, as including in its scope any and every kind of document, from a record or a deed to a letter or a memorandum, and as applicable equally in criminal and in civil cases.

(b) "*Production must be made,*"

§ 1185. **What constitutes Production; Witness testifying to a document not before him.** The notion of the rule is that the terms of the document shall be placed before the tribunal and the opponent for personal inspection.

(1) It is not necessary that the *proponent* of the document should *himself* be the one actually to bring it in; if it is in court when he wishes to prove its terms, that is enough.¹

(2) When the tribunal has delegated its function of hearing testimony to a *lower tribunal* or officer, production there will be sufficient;² but production already made before a magistrate or trial Court would not suffice where on appeal the trial of facts is in theory commenced anew in the superior Court.

(3) Production implies either the *handing* of the writing to the tribunal for perusal, or, if that is not demanded, at least the reading aloud of the writing by counsel or witness;³ that a witness, for example, tells about the writing's contents does not suffice, even though he has it at the time in his possession in court.⁴

(4) The production is for the benefit of the tribunal, *not the opponent*.⁵

reason why the writings are to be produced is because that is so much better a way of proving it than having it from the memory of any one else"; 1859, *Butler v Mountgarret*, 6 H. L. C. 639 (Lord Wensleydale, upon counsel alluding to the ruling that banners containing words need not be produced: "That is on account of the inconvenience, perhaps the impossibility, of procuring the banners").

¹ 1593, *Wymark's Case*, 5 Co. Rep. 75 ("When a deed is in court, one may take advantage of it without having it in hand. . . . When the deed is by one shewed to the Court, it is not respective as to him, but all others shall take advantage thereof"). So for production by the opponent: *post*, § 1209.

² Production before a referee to take testimony will usually be sufficient: 1873, *Bohlman v. Coffin*, 4 Or. 313, 316. But otherwise for production before an officer merely taking a deposition, unless a statute expressly gives exemption; e. g.: Minn. Gen. St. 1894, §§ 5741,

5742 (production, before officer taking deposition, of account-books or of verified letter-press copies of letters accounted for, to be equivalent to production at trial, copies being annexed to the deposition).

³ 1860, *Hanna, J.*, in *Thornburgh v. R. Co.*, 14 Ind. 499, 501 ("Upon the introduction of a record it is usually read to the jury by the witness who may have it in charge, or by some attorney who may be engaged in the cause. It is not often, nor is it necessary, in ordinary cases, that it should be handed to each juror, unless in cases when inspection for a particular purpose is necessary").

⁴ 1897, *Mt. Sterling Bank v. Bowen*. — Ky. —, 43 S. W. 483 (that the document is in the witness' hands is insufficient).

⁵ 1874, *Hilyard v. Harrison*, 37 N. J. L. 170 (plaintiff offered tax warrants and duplicates in evidence at a hearing; an order to deliver them to defendant's possession for inspection, held improper; but an order of exhibition for inspec-

his right of inspection, whether at or before trial, rests on other principles (*post*, §§ 1857-1861; *ante*, §§ 753, 762).

(5) The production is not for the benefit of a *witness*; hence, the document need not be perused by a witness or shown to him; except in consequence of certain independent principles. (a) The rule (*ante*, § 1025) that a witness must be asked about a *self-contradictory statement*, before the opponent may prove it, has erroneously been held by some Courts to require that a writing containing such a statement must be shown to him before it is offered in evidence (*post*, § 1259). (b) When a witness is asked to *identify the signature* of a document, the document must be before him (on the principle of §§ 653, 693, *ante*), because an observation of the specific document, as well as a knowledge of the type of handwriting, is necessary.⁶ But where the witness has already seen the document before testifying, that is sufficient;⁷ the usual instance is when the document's production for other purposes is excused because of its loss.⁸ Moreover, when the witness' testimony does not involve an identification of the handwriting of the document, he need not have it before him when testifying.⁹

§ 1186. **Production of Original always Allowable.** The rule is that production *must* be made; it says nothing, in itself, as to whether production *may* be made. But it has already been seen (*ante*, § 1151) that autoptic preference, or production for the tribunal's inspection, of any evidential object is always allowable, in the absence of any specific rule of policy to the contrary. If then a party who, under the present principle, is exempted from producing a document in proof of its contents, and might prove them by copy if he wished, prefers nevertheless to produce and show the original, he may of course do so. This principle seems obvious enough, but it has constantly to be pointed out anew by the Courts:

tion in open court or before a court officer or before the producing party or his attorney was held demandable).

⁶ 1841, *Neale v. McKinstry*, 7 Mo. 128, 132 (witness testifying by deposition to a note not before him, excused).

But whether the document must be sent out of the jurisdiction for an absent deponent ought to depend on the circumstances: 1809, *Amory v. Fellowes*, 5 Mass. 219, 225 ("It may not be necessary to send the will back after it has been filed here, to obtain the testimony of the subscribing witnesses. . . . But a case may be so circumstanced that the will must be sent back to the subscribing witnesses"); 1854, *Commercial Bank v. Union Bank*, 11 N. Y. 203, 209 (draft shown by copy in the deposition-interrogatories; "a party is never called upon to risk the loss of valuable original papers, by annexing them to a commission to be transmitted to a distant State or country for execution"). Statutes sometimes provide for sending a will to an attesting witness giving his deposition: Cal. C. C. P. 1872, §§ 1307, 1317, as amended in 1901 (see quotation *post*, § 1304; for the validity of this amendment, see *ante*, § 488); Miss. Annot. Code

1892, § 1819. Compare the cases as to photographic copies of documents submitted to handwriting witnesses: *ante*, § 797, *post*, §§ 2010, 2019.

⁷ 1824, *Dartnall v. Howard*, Ry. & Mo. 169 (where it was necessary to identify the defendant as one who had signed an answer in Chancery not produced, a person who had examined the signature was allowed to testify, without having the writing before him).

⁸ 1849, *Segond v. Roach*, 4 La. An. 54; 1888, *Vye v. Alexander*, 28 N. Br. 89, 95; 1889, *Alexander v. Vye*, 16 Can. Sup. 501 (Gwynne, J., *diss.*, quoted *ante*, § 697); 1890, *Halifax Banking Co. v. Smith*, 29 N. Br. 462, 469 (*Vye v. Alexander* approved; here, a writing not produced, but admitted to be genuine).

⁹ 1902, *Harkness v. Smith*, 115 Ga. 350, 41 S. E. 634 (a deed-copy may be used for a deposition, where the witness speaks only to the consideration of the deed as identified by its tenor); 1899, *Clark v. Butts*, 78 Minn. 373, 81 N. W. 11 (whether a name was in a deed before execution; deed need not be shown to witness; otherwise perhaps for expert opinion on alteration).

1878, *Campbell, J.*, in *Clymer v. Cameron*, 55 Miss. 503, 505: "It is only as a substitute for the original that a copy is ever admitted. The original is always the best evidence, and it is only because of the impossibility or inconvenience of producing the original that a copy is admitted in its stead in any case. . . . It is because the original is evidence that a copy may be received; and it is always allowable to introduce an original record where it can be produced."¹

The same principle allows the production of the record-book of recorded or registered deeds, so far as it may be regarded as an original with reference to certified copies of it;² but here the question may further arise how far the

¹ *Accord: Eng.*: 1720, *Brocas v. Mayor*, 1 Stra. 307 (municipal corporate records); *Can.*: 1841, *Lintou v. Wilson*, 1 Kerr N. Br. 223, 232, 241, 245 ("When a statute says that a copy shall be evidence, I cannot think that it excludes the original unless it expressly says the copy shall be the only evidence"); *Ala.*: 1842, *Lawson v. Orear*, 4 Ala. 156, 158 (Court record books); 1844, *Carwile v. House*, 6 Id. 719, 711 (execution); 1887, *Stevenson v. Moody*, 85 Id. 33, 35, 4 So. 595 (Probate Court record); *Colo.*: 1900, *McAllister v. People*, 28 Colo. 156, 63 Pac. 308; *Conn.*: 1858, *Gray v. Davis*, 27 Conn. 447, 454 ("The object being to lay before the triers the real contents of the record, it would be absurd to hold that the best possible evidence, when adduced, should be excluded because inferior evidence by copy would be admissible"); *Fla.*: 1903, *Ferrell v. State*, — Fla. —, 34 So. 220 (record of marriage license); *Ga.*: 1855, *Dobbs v. Justices*, 17 Ga. 624, 629, 1884, *Rogers v. Tillman*, 72 Id. 479, 481 (record of Court of another county, admitted); "a certified copy of this record could not have been higher or better evidence than the original"; but compare the Georgia cases *infra*, note 4); *Ill.*: 1870, *Willoughby v. Dewey*, 54 Ill. 266, 268 (original justice's docket); 1875, *Stevison v. Earnest*, 80 Id. 513, 517 (records of Court; general principle affirmed); 1886, *Taylor v. Adams*, 115 Id. 570, 573, 4 N. E. 837 (foreclosure proceedings); *Ind.*: 1860, *Wiseman v. Risinger*, 14 Ind. 461; 1865, *Green v. Indianapolis*, 25 Id. 490, 492 (proceedings of a municipal corporation); 1874, *James v. Turnpike Co.*, 47 Id. 379, 381 (articles of association); 1876, *Britton v. State*, 54 Id. 535, 541 (justice's judgment); 1878, *Kennard v. Carter*, 64 Id. 31, 40 (same); 1878, *Miller v. Harrington*, 61 Id. 503, 508 (same); 1880, *Jones v. Levi*, 72 Id. 586, 591; 1881, *Hes v. Watson*, 76 Id. 359, 360; 1881, *Hall v. Bishop*, 78 Id. 370, 372; 1883, *Anderson v. Ackerman*, 88 Id. 481, 492; *La.*: 1817, *Baudin v. Pollock*, 4 Mart. 613 (notary's records); 1827, *Priou v. Adams*, 5 Id. n.s. 691; *Me.*: 1874, *Sawyer v. Garcelon*, 63 Me. 25 (record of conviction; "strictly speaking, it is the best and only original evidence of the facts recited in it; a verified copy of the record, though admissible, is still only secondary evidence"); *Mass.*: 1839, *Brooks v. Daniels*, 22 Pick. 498, 500 (record of a court-martial's proceedings); 1850, *Odlorne v. Bacon*, 6 Cnsh. 185, 190 (record of a probate court; a statutory sanction for attested copies does not prevent the original's use); 1850, *Greene v. Durfee*, 1b. 362 (bankrupt's order of discharge); 1859, *Day v.*

Moore, 13 Gray 522, 524 (original writ, return, and execution); *Mich.*: 1856, *Lacey v. Davis*, 4 Mich. 140, 150 (deed recorded); *Miss.*: 1878, *Clymer v. Cameron*, 55 Miss. 533 (official record of tax-sales); *N. Y.*: C. C. P. 1877, § 950 (docket of justice in adjoining State may be produced, if properly authenticated by justice's oral testimony); *Oh.*: 1833, *Winthrop v. Grimes*, Wright 330; 1829, *King v. Kenny*, 4 Oh. 79, 83 (highway commissioners' records); 1867, *Sheehan v. Davis*, 17 Oh. St. 571, 580 (deed); *Pa.*: 1826, *Eisenhart v. Slaymaker*, 14 S. & R. 153, 155; 1851, *Garrigues v. Harris*, 16 Pa. St. 344, 351; 1856, *Miller v. Hale*, 26 Id. 432, 435 (assessment-book); *Tex.*: 1856, *Houze v. Honzo*, 16 Tex. 598, 601 (judicial record); *U. S.*: 1903, *Bradley T. Co. v. White*, 58 C. C. A. 55, 121 Feil. 779 (court files); *Va.*: 1868, *Enillard v. Thomas*, 19 Gratt. 14, 18 (order-book from another Court); *Wash.*: 1902, *Smith v. Veysey*, 30 Wash. 18, 70 Pnc. 94 (homestead declaration); *Wis.*: 1867, *Weisbrod v. R. Co.*, 21 Wis. 602, 616.

² *Ala.*: 1883, *Huckabee v. Shepherd*, 75 Ala. 342, 344 (register of a deed); 1887, *Stevenson v. Moody*, 85 Id. 33, 35, 4 So. 595 (record-book of exemptions kept in Probate Court); 1891, *Jones v. Hagler*, 95 Id. 529, 532, 10 So. 345 (record of deed); 1892, *Cofer v. Scroggins*, 98 Id. 342, 345, 13 So. 115 (same); 1895, *Gay v. Rogers*, 109 Id. 626, 629, 26 So. 37 (mortgage record-book); *Cal.*: C. C. P. 1872, § 1951, as amended March 1, 1889 (record of recorded instrument); *Colo.*: 1873, *Eyster v. Gaff*, 2 Colo. 228, 230 (deed record-book); *Ga.*: 1898, *Richardson v. Whitworth*, 103 Ga. 741, 30 S. E. 573 (record-book); *Ind.*: 1872, *Bowers v. VanWinkle*, 41 Ind. 432, 435 (deed-record); 1874, *Patterson v. Dallas*, 46 Id. 48 (same); 1881, *Lenta v. Martin*, 75 Id. 228, 235 (same); *Mo.*: 1887, *Smiley v. Cockrell*, 92 Mo. 103, 112, 4 S. W. 443 (deed-record); *Pa.*: 1840, *Harvey v. Thomas*, 10 Watts 67, 76 ("The words of the law are that copies of the deeds, etc., are to be evidence; now the record-book is a copy of the deed or it is nothing; . . . copies from the record, or the record, have always been admitted as evidence"); *S. C.*: 1897, *State v. Crocker*, 49 S. C. 242, 27 S. E. 49 (distinguishing *Duren v. Sinclair*, 22 S. C. 361, on the ground that the statutory requirement of 10 days' notice, *post*, § 1225, applied properly to certified copies only, and not to the record itself, and that in that case a proof of loss was made; *Jones, J.*, *diss.*); *Contra*: 1859, *Hanson v. Armstrong*, 22 Ill. 442, 445 (record-book not admitted).

registration is authorized by law, and how far even the record-book as only a copy of the original is admissible; so that other principles (*post*, § 1224) must be understood to be equally involved.

In a few instances, original public records have been excluded; but those rulings may be attributed to one of four special considerations. (1) If the law forbids the removal of a document from a public office to produce it in court is to produce evidence obtained by a *violation of the law*. This, however, is generally regarded as no objection to the reception of evidence, and therefore should not in itself exclude a public document thus illegally removed.³ (2) Irrespective of any specific prohibition against removal, it has been thought by a few Courts that the policy of *preserving public records from loss or injury* (*post*, § 2182) may be incidentally enforced by refusing to accept the original when removed from its proper place and offered in evidence.⁴ (3) In some instances the exclusion is apparently due in part to the thought that the *genuineness of the original* can not be as safely proved by a stranger bringing in the records, as by a clerk certifying to a copy in his office with the records in their place;⁵ but this consideration is apparently influenced by other principles concerning Authentication (*post*, §§ 1278, 2158), and can have no proper bearing on the propriety of using the original when properly authenticated. (4) Finally, the exclusion has sometimes been due to a misunderstanding of the purpose of *statutes making certified copies evidence*.⁶ Such statutes aim usually both to dispense with the original's production (*post*, § 1218) and to qualify the recording clerk to be a hearsay witness to the execution of the original (*post*, § 1677), — in other words, to supply additional kinds of evidence. It is therefore a total misapprehension of their meaning to rule that, because they merely make copies admissible, therefore originals are not made evidence; they are not expressly so made by the statute, because they were admissible already without the statute.⁷

³ See the cases collected under the general principle, *post*, §§ 2182, 2183.

⁴ 1892, *Tharpe v. Pearce*, 89 Ga. 194, 15 S. E. 46 (Alabama justice's docket, proved by himself, not admitted); 1896, *Ellis v. Mills*, 99 id. 490, 27 S. E. 740 (a plea and answer from another Court of the same county; excluded; *Atkinson, J.*: "The answer to this is that the law has pointed out one method of authentication only, and the Courts are not at liberty to recognize an entirely different manner of proving records. Aside from this, however, upon considerations of public policy, original documents should be excluded in courts other than those in which they are rendered, otherwise the temptation to attorneys and officers of the court to withdraw from the files original records for the purpose of using them as evidence in distant portions of the State might lead to their loss or destruction, and thus produce unnecessary confusion in the keeping of those things which should stand as permanent memorials of the action of the several courts." 1902, *Daniel v. State*, 114 id. 533, 40 S. E. 805 (county commissioners' records, held improperly proved by original minutes); 1833, *Nichol v. Ridley*, 5 Yerg. 63, 65, *semble*

(original papers of judicial records, not to be used because of danger to records). Compare the similar cases cited *post*, § 2182.

⁵ The following cases may be thus explained: 1883, *Bigham v. Coleman*, 71 Ga. 176, 192 (record of court in another county, proved by attorney, excluded; obscure); 1901, *Cramer v. Truitt*, 113 id. 967, 39 S. E. 459 (original record from superior court, not receivable in justice's court, where not admitted genuine); 1901, *State v. Chaney*, 93 Md. 71, 48 Atl. 1057 (original affidavit before justice on hasty charge, held improperly transmitted to circuit court); 1855, *Wallis v. Beauchamp*, 15 Tex. 305, *semble*; 1883, *Hardin v. Blackshear*, 60 id. 132, 135.

⁶ 1803, *Burdon v. Rickets*, 2 Camp. 121, note (a statute made the copy of a contract of purchase of a land-tx title evidence; held, that the original was not thereby made evidence); 1897, *Belt v. State*, 103 Ga. 12, 29 S. E. 451 (original declaration and judgment in another trial, excluded, because the certified copy was "primary evidence").

⁷ Distinguish, however, the Hearsay question; e. g. if the question is whether a tax-assessor's list is admissible, the first question

§ 1187. **Dispensing with Authentication does not dispense with Production.** The authentication of a document (*post*, §§ 2129-2169), *i. e.* proof that it was executed as it purports to be, is often dispensed with, by statute, where the opponent, by failing to traverse its genuineness, is taken as having admitted that fact. Nevertheless, the rule requiring production still applies and must be satisfied.¹

§ 1188. **Dispensing with Production does not dispense with Authentication.** Conversely, the satisfaction of the present rule, by some circumstance dispensing with production, leaves it still necessary to authenticate the absent document, by such evidence of execution as is sufficient according to the principles of Authentication (*post*, §§ 2129-2169); attention has frequently to be called to this plain principle.¹

§ 1189. **Order of Proof as between Execution, Loss, and Contents.** The rules for order of proof form a separate body of doctrine (*post*, §§ 1866-1900). But it will be here convenient to notice the order of proof proper to satisfy the requirements of these two preceding rules when applied to one and the same document.

(1) *Execution vs. contents.* Where, in consequence of the unavailability of the original, the contents are to be proved by testimony, the question whether

is whether the assessor's official assertion not made in court is admissible under the Hearsay rule (*post*, § 1640); if it is, then, so far as the present principle goes, the original list may be produced, even though a statute declares the official list provable by copy.

¹ 1872, *New York H. & N. R. Co. v. Hunt*, 39 Conn. 75, 80; 1853, *Matossey v. Frosh*, 9 Tex. 610, 613; 1824, *Sebree v. Dorr*, 9 Wheat. 558, 563 ("The production of the originals might still be justly required, to ascertain its conformity with the declaration, to ascertain whether it remained in its genuine state, to verify the title by assignment in the plaintiff, to trace any payments which might have been made and endorsed, and to secure the party from a recovery by a *bona fide* holder under a subsequent assignment"; here said of a note). *Contra*: 1899, *Knight v. Whitmore*, 125 Cal. 198, 57 Pac. 891, *semble*. For cases under Illinois statutes, see *post*, § 1225.

(On an analogous principle, the applicability of the presumption of a lost grant, arising after twenty years' possession, does not exempt the claimant from producing or accounting for a specific deed which he also invokes in support of his claim: 1845, *Reynolds v. Quattlebaum*, 2 Rich. 140, 144.)

¹ 1863, *Dickson v. M'Farlane*, 22 U. C. Q. B. 539; 1859, *Shorter v. Sheppard*, 33 Ala. 648; 1885, *Comer v. Hart*, 79 id. 389, 394; 1888, *Potts v. Coleman*, 86 id. 94, 101, 5 So. 780; 1853, *Sinclair v. Wood*, 3 Cal. 98, 100; Cal. C. C. P. 1872, § 1937; 1873, *Hobson v. Porter*, 2 Colo. 28; 1847, *Kelsey v. Hammer*, 18 Conn. 311, 317; 1858, *Heard v. McKee*, 26 Ga. 332; 1860, *Bigelow v. Young*, 30 id. 121, 124; 1860, *Oliver v. Persons*, *ib.* 391, 397; 1888, *Calloun v. Calloun*, 81 id. 91, 6 S. E. 913; 1898, *Dasher*

v. Ellis, 102 id. 830, 30 S. E. 544; 1845, *Murray v. Buchanan*, 7 Blackf. 549; 1862, *Corse v. Sanford*, 14 Ia. 235; 1890, *Bray v. Flickinger*, 79 id. 313, 314, 44 N. W. 534; 1893, *Stevens v. State*, 50 Kan. 712, 715, 32 Pac. 350; 1818, *Embry v. Millar*, 1 A. K. Marsh. 300; 1823, *McIntire v. Funk*, Litt. Sel. C. 425, 427; 1823, *Elmondorff v. Carmichael*, 3 Litt. 473, 479; 1897, *Fox v. Pedigo*, — Ky. —, 40 S. W. 249; 1898, *Helton v. Asher*, 103 id. 730, 46 S. W. 22; 1831, *Thomas v. Thomas*, 2 Ia. 68, 166, 168; 1840, *Boothe v. Dorsey*, 11 G. & J. 247, 252; 1889, *Wakefield v. Day*, 41 Minn. 344, 347, 43 N. W. 71; 1897, *Weiler v. Monroe Co.*, 74 Miss. 682, 22 So. 188; 1852, *Perry v. Roberts*, 17 Mo. 36; 1873, *Yankee v. Thompson*, 51 id. 241, 244; 1827, *Colby v. Kenniston*, 4 N. H. 262, 265; 1844, *Bachelor v. Nutting*, 16 id. 261, 263; 1902, *Garland v. Foster Co. S. Bank*, 11 N. D. 374, 92 N. W. 452; 1828, *Richmond v. Patterson*, 3 Oh. 369 (record proved by examined copy must be shown to have been lawfully kept); 1845, *Flinn v. M'Gonigle*, 9 W. & S. 75, 76 ("Light evidence is sufficient for this purpose"); 1849, *Stone v. Thomas*, 12 Pa. 209 (lost note; genuineness not sufficiently evidenced); 1850, *Porter v. Wilson*, 13 id. 641, 646 (articles of partnership; proof held insufficient); 1870, *Krise v. Neason*, 66 id. 253, 258 ("evidence of the genuineness of the original . . . must be of the most positive and unequivocal kind"); 1818, *Howell v. House*, 2 Mill Const. 80, 83; 1830, *Stuckdale v. Young*, 3 Strohh. 501, 505; 1897, *Carey v. Williams*, 25 C. C. A. 227, 79 Fed. 906, 908.

Proof of contents and of execution may of course come from *different witnesses*: 1896, *Painter v. Ladyard*, 109 Mich. 568, 67 N. W. 901.

the execution (or, as it is sometimes put, the existence, or the genuineness) of the document should first be shown, or its contents should first be shown, is not easy of solution. On the one hand, it is difficult to prove, for example, that A executed a deed of certain land, without to some extent referring to its tenor to identify it. On the other hand, to allow the contents to be first fully set forth and proved involves the risk of making an impression on the jury such as would be improper in case the proof of execution later falls to the ground. The latter consideration has usually been regarded as the more important, at least for the purpose of establishing a usual rule; and accordingly it has long been common to say that there must first be evidence of execution before evidence of contents is offered:

1737, *Goodier v. Lake*, 1 Atk. 446: "Where an original note of hand is lost, and a copy of it is offered in evidence to serve any particular purpose in a cause, you must shew sufficient probability to satisfy the Court that the original note was genuine, before you will be allowed to read the copy."

1820, *Kimball v. Morrill*, 4 Greenl. 368, 370: "When a party, on an issue to the country, would avail himself of an instrument in writing, lost by time and accident, he should first prove that an instrument was duly executed with the formalities required by law; . . . then, and not till then, he is permitted to give evidence of its contents."¹

Nevertheless, the trial Court ought to have a discretion to allow the evidence of contents to come first, where it is more convenient and where an assurance is given (on the principle of § 1871, *post*) that the other proof will be later put in; and such is the expressed doctrine of some Courts,² which others also would probably recognize on occasion. Moreover, where the execution is the real point in dispute, and the jury will have to consider it fully in any case, it would always be proper to receive the copy first and then go into the main matter in dispute.³

¹ *Eng.*: 1696, *R. v. Culpepper*, Skinner 673 (though a copy is receivable, "yet they never permitted it except it be proved that there was such a deed executed"); 1749, *Whitfield v. Fausset*, 1 Ves. Sr. 387 (*L. C. Hardwicke*: "The law requires a proper foundation to be laid: . . . first, to prove that such a deed once existed"); *Del.*: 1855, *Bartholomew v. Edwards*, 1 Houst. 17, 25 (first, existence, then loss, then contents); *s. c.* lb. 247, 250 (same; the first two being proved to the Court); *Ga.*: Code 1895, § 5174 (but slight evidence suffices, where no "direct issue" is made); 1896, *Baker v. Adams*, 99 Ga. 135, 25 S. E. 28 (the original lost, and the maker having testified to its authenticity, a copy was received); 1898, *Hayden v. Mitchell*, 103 id. 431, 30 S. E. 287 (execution and existence must first be shown); 1898, *Smith v. Smith*, 106 id. 303, 31 S. E. 762 (must show not merely existence, but due execution); 1900, *Garbutt L. Co. v. Greas L. Co.*, 111 id. 821, 35 S. E. 686 (same); 1900, *Gibson v. Thornton*, 112 id. 328, 37 S. E. 406 (same); *Ill.*: 1861, *Dickinson v. Breeden*, 25 Ill. 186 (existence of original must first be proved); 1866, *Demiinger v. McConnell*, 41 id. 227, 232 (intimating that statute of 1861, *post*, § 1225, was passed to obviate the effect of the preceding ruling);

1866, *Fisk v. Kissane*, 42 Id. 87 (declaring that the same affidavit or testimony used to prove loss need not speak to the existence of the original); *Pa.*: 1899, *McKenna v. McMichael*, 189 Pa. 440, 42 Atl. 14 (will; some evidence of exclusion required first); *S. C.*: 1830, *Stockdale v. Young*, 3 Strobb. 501, 504 (first existence and execution, then loss, then contents); 1895, *Hobbs v. Beard*, 43 S. C. 370, 21 S. E. 305 (first loss, then execution, then contents).

² 1872, *Groff v. Ramsey*, 19 Minn. 44, 60 (the order of proof is in the trial Court's discretion); 1827, *Allen v. Parish*, 3 Oh. 107, 121 (the regular order should be distinct, — existence, execution, loss, and contents; but at times it may be convenient to go into all at once; good opinion).

³ 1870, *Stowe v. Querner*, L. R. 5 Exch. 155 (action on a policy of insurance; plea, no policy made; to show the terms of the policy, a copy of the document, already admitted by the defendant to be a copy, was received without preliminary settlement by the judge of the execution of an original, because that execution was the main issue; *Bramwell, B.*: "The distinction is really this: Where the objection to the reading of a copy concedes that there was primary evidence of some sort in existence but

(2) *Execution vs. loss.* It is difficult to prove that a specific document is lost without referring to some extent to its existence and its genuineness as existing. On the other hand (it is argued), to prove the existence and execution of a specific document, before it appears that the document cannot be produced, is on principle improper. These conflicting considerations have led to opposing rulings; by some Courts it is said that evidence of existence and execution must come before evidence of loss;⁴ and by some the opposite order is laid down;⁵ while sometimes it is properly left to the trial Court's discretion.⁶ The problem may more easily be solved by noting the distinction between existence and execution; *e.g.* suppose A to be testifying to the loss of a deed of Blackacre purporting to be signed by X; while on the one hand it is not necessary for this purpose first to prove that X did sign it, yet on the other it may be impossible for A to describe what is lost unless he does refer to the purporting signature; in other words, proof of the existence of a document bearing certain features is necessary and proper before it can be shown lost, but proof of its due execution is not necessary or proper until after a showing of loss.

(3) *Loss vs. contents.* That a specific document was lost can hardly be shown without some general reference to its tenor; nevertheless, the rule being clear that the contents cannot be proved by testimony until loss or the like is shown, the reference to the tenor of the document in proving its loss must be no more than is necessary to describe its general features. It is always possible, however, for the trial Court, on the assurance (*post*, § 1871) that loss will later be proved, to admit first the testimony to the document's contents.⁷

§ 1190. *Production made; may a Copy also be offered?* If the rule is satisfied by the original's production, may a copy also be used? On principle, it may; for the principle requires merely that the inspection of the original be made as the preferred source of evidence, and does not exclude other competent evidence. Ordinarily, a Court would probably exclude a copy as

defective in some collateral matter — as, for instance, where the objection is a pure stamp-objection —, the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy and leave the main question to the jury.”)

⁴ 1886, *Terpening v. Holton*, 9 Colo. 306 (proof of execution, then of loss, here allowed); 1851, *Porter v. Ferguson*, 4 Fla. 102, 104, *semble* (existence, then loss); 1837, *Mattocks v. Stearns*, 9 Vt. 326, 334 (the usual order of evidence is first the proof of existence, and then the proof of unavailability; no decision given as to possible reasons for a reversed order).

⁵ 1901, *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663; 1832, *Shrowders v. Harper*, 1 Harringt. 444 (loss first, then execution and contents); 1837, *Hutchinson v. Gordon*, 2 id. 179, *semble*

(same); 1844, *State v. McCoy*, 2 Speer 711, 714 (a question whether the witness had seen a certain power of attorney, excluded; rule repudiated that existence and execution must be shown before loss); 1858, *Bateman v. Bateman*, 21 Tex. 432 (loss, then existence and contents, here allowed); and compare some of the citations *supra*, note 1.

⁶ 1848, *Fitch v. Bogue*, 19 Conn. 285, 290 (the order of proof, as between existence and loss, is not fixed, but depends on the case).

⁷ *E.g.*: 1890, *Cross v. Williams*, 72 Mo. 577, 579 (allowing proof of contents, then of loss); and compare the citations *supra*, note 1.

For the question whether an opponent's destruction of a document is an admission of its terms as the proponent claims them, without further evidence on his part, see *ante*, § 291. For the question at what stage the opponent's evidence may be put in on the question of loss, etc., see *post*, § 1870.

superfluous;¹ but where a copy was in effect valuable testimony to the terms of the original—for example, where the original is claimed to have been altered since the time when the copy was made—it might properly be received.²

(c) "Unless it is not feasible,"

§ 1192. **General Principle; Unavailability of the Original; Proof to the Judge.** (1) The essential principle of preferred evidence is that it is to be procured and offered *if it can be had* (*ante*, § 1172). That thought dominates both the present rule preferring production of the document itself and the ensuing class of rules preferring one kind of witness to another kind (*post*, § 1286). The thought is here not that a certain kind of evidence is absolutely necessary, but that a certain kind is to be used if it is available. If it is not available, then it is not insisted upon:

1831, *Porter, J.*, in *Thomas v. Thomas*, 1 I.A. 166, 168: "That rule which is the most universal, namely, that the best evidence the nature of the case will admit, shall be produced, decides this objection; for it [the rule] is only another form of expression for the idea that when you lose the higher proof you may offer the next best in your power. The case admits of no better evidence than that which you possess, if the superior proof has been lost without your fault. The rule does not mean that men's rights are to be sacrificed and their property lost because they cannot guard against events beyond their control; it only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it."

The various classes of cases with which the following sections deal are but related instances of this general feature, that production of the writing itself is not required if production is under the circumstances not feasible. That the document is lost, detained by the opponent, held by a third person, physically irremovable, legally irremovable, practically irremovable, or otherwise unavailable without great inconvenience,—all these situations rest on the general notion that production is not feasible.

(2) *Historically*, this liberal and rational principle is not of ancient date. The more formal notions of the earlier methods of procedure stood on rigid requirements; and the modifications of these came in only gradually. Most of them were worked out while the doctrine of profert was still in force (*ante*, § 1177). The growth of each one can better be noticed under the respective heads. It will be seen that the profert, or showing of a deed or record in court, was dispensable, as early as Lord Coke's time, where the document was in the hands of a third person, under certain conditions (*post*, § 1211), or where it was detained in the custody of the law (*post*, § 1215), or where it had been destroyed by fire; but this last was an innovation of serious importance (*post*, § 1193); and the ordinary case of a lost document, *i. e.* one not demonstrably destroyed but simply not to be found, was not

¹ 1828, *Dean v. Carnahan*, 7 Mart. n. s. 258.
² 1847, *Wilbur v. Wilbur*, 13 Metc. 405 (the plaintiff offered a copy of an execution-levy; the defendant produced the original contain-

ing alterations; the question was whether the plaintiff or the defendant was bound to explain); *post*, § 1226, n. 7. Compare the use of photographic enlargements of handwriting, *ante*, § 797.

fairly settled, as dispensing with production, until the late 1700s (*post*, § 1193).

(3) The determination of this preliminary fact of unavailability is for the judge, not the jury, upon the general principle (*post*, § 2550) that questions of fact preliminary to the admissibility of evidence are for the judge.¹

§ 1193. (1) *Loss or Destruction; History.* It was apparently a step of some consequence when in 1611, in *Dr. Leyfield's Case*,¹ the Court resolved that "in great and notorious extremities, as by casualty of fire," profert of a deed might be dispensed with. Even this concession had to be enforced, during the ensuing century, by repeated rulings; and other instances of equally "great and notorious extremity" with fire, such as robbery, were added only slowly.² In these precedents, the "loss" of a document is frequently mentioned as equivalent to destruction by fire, in serving as an excuse; but the term evidently signified either an actual destruction or a disappearance through the acts of other persons, and not merely a disappearance through the party's own negligence or a mere impossibility of discovering a mislaid document; for the treatise-writers all through the 1700s,³ and

¹ 1640, *Smith v. Sleep*, 1 C. & K. 48; 1856, *Glasell v. Mason*, 32 Ala. 719; 1858, *Bagley v. McMickle*, 9 Cal. 430, 449; 1848, *Fitch v. Bogue*, 19 Conn. 283, 290; Ga. Code 1895, § 5172; 1894, *Grimes v. Hilliary*, 150 Ill. 141, 145, 38 N. E. 977; 1834, *Page v. Page*, 15 Mich. 368, 374; 1819, *Jackson v. Frier*, 16 John. 193, 195; 1880, *Rosendorf v. Hirschberg*, 8 Or. 240, 242 (whether the original is lost, is for the Court; whether the copy is correct, for the jury); 1824, *Enre v. Pittman*, 3 Hawks 364, 371, 375 (where the secondary evidence, together with the evidence of loss or apprehension, was conditionally but improperly submitted to the jury); 1844, *Kelly v. Craig*, 5 Ired. 129, 133; 1850, *Porter v. Wilson*, 13 Pa. St. 641, 648; 1853, *Tyree v. Magness*, 1 Sneed 278, 277; 1870, *South Express Co. v. Womack*, 1 Hoisk. 258, 262 (the ruling is presumed correct, if the evidence of loss is not embodied in the record of evidence).

As to the proper stage for introducing the opponent's evidence, see *post*, § 1870. That the trial Court's discretion governs the sufficiency of proof of loss, see *post*, § 1194.

² 1611, *Leyfield's Case*, 10 Co. 88, 92 ("Yet in great and notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there, if that should appear to the Judges, they may, in favor of him who has so great a loss by fire, anffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction").

³ *Ante* 1661, *Anon.*, *Jenkins* 19 ("In cases where charters have been lost by fire, burning of houses, rebellion, or when robbers have destroyed them, the law in such cases of necessity allows the proof of charters without shewing them. *Necessitas facit licitum quod alias non est licitum*"); 1664, *Knight v. Danier*, *Hardr.* 323 (a burnt record of conviction; other evidence admitted, the conviction not being the

main issue); 1696, *R. v. Culpepper*, *Skinner* 673 ("in the case of a deed lost or burnt they would admit a copy or counterpart of the contents"); 1696, *Lynch v. Clerke*, 3 Salk. 134, *Holt*, C. J. ("burnt or lost"; production excused); 1697, *Barley's Case*, 5 Mod. 210 (lost deed; production excused); 1699, *Medlicott v. Joyner*, 2 Keble 546, 1 Mod. 4 (a deed burnt; production excused); 1699, *Underhill v. Durham*, *Freen.* 509 (a survey burnt in the great fire of London; copy admitted); 1711, *Sir E. Seymour's Case*, 10 Mod. 8 (if lost "by inevitable accident," provable by copy); 1722, *Robinson v. Davis*, 1 Stra. 528 (robbery of a document in the mail; copy allowed); 1740, *Villiers v. Villiers*, 2 Atk. 71 (*Hardwicke, L. C.*, allows an exemption in case of a loss and of proof of "the manner of its being lost; unless it happens to be destroyed by fire, or lost by robbery, or any unforeseen or unavoidable accident, which are sufficient excuses of themselves"); 1744, *Onichand v. Barker*, 1 id. 21, 49 (*Hardwicke, L. C.*: "Where the original is lost, a copy may be admitted"); 1744, *Snellgrove v. Bally*, 3 id. 214 (upon loss of a deed, copy allowable; but otherwise of a bond); 1754, *Saltern v. Melhish*, *Ambl.* 247 ("a reasonable account of the deed being lost or destroyed" suffices); 1774, *Mayor of Hull v. Horner*, *Cowp.* 102 (*Mansfield, L. C. J.*; lost deed; copy admitted).

⁴ *Ante* 1736, *Gilbert*, *Evidence*, 95 ("a man cannot make his own fault in losing of the deeda any part of his excuse"; but to prove that "burned with fire" suffices); *ante* 1767, *Buller*, *Nisi Prius*, 252 ("no party shall take advantage of his own negligence in not keeping of his deeda, which in all cases ought to be fairly produced to the court"); 1765, *Blackstone*, *Commentaries*, III, 368 ("if that be positively proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like)," then production is excused).

even later,⁴ predicate of such an excusing loss that it must be without the party's fault or negligence and not a mere case of inability to find. It is not until the decision of *Read v. Brookman*, in 1789,⁵ that all cases of genuine loss are assimilated as instances of a general principle. From the time of that decision, the rule that an actual loss of any sort, making the document practically unavailable, suffices to excuse production, seems to have been fully accepted by the profession.⁶

§ 1194. **Same: General Tests for Sufficiency of Proof of Loss; Trial Court's Discretion.** In strictness, no doubt, a "destruction" signifies that the thing no longer exists, while a "loss" signifies merely that it cannot be discovered. Nevertheless, for practical purposes, the two come together for consideration in this rule. In the first place, the moment that the destruction becomes questionable at all (*i. e.* when not proved by eye-witnesses of a burning or tearing), the inquiry is raised whether the search for it has been sufficient; and, in the next place, the proof of a loss usually carries the implication that the thing not found has ceased to exist, and thus assimilates the case to one of destruction. Thus, the great question to which so many judges have devoted so much pains — the establishment of a test for the sufficiency of proof of loss — includes practically not only the cases of loss in the narrower sense but also the cases in which destruction is more or less explicitly put forward as the reason for non-production.¹

The question thus resolves itself into an inquiry as to the *sufficiency of the search*; and the discovery of the island of Atlantis has occasioned no less arduous and no less vain efforts than the attempt to frame a fixed and just rule for the conduct of this inquiry. At the outset of the subject, then, it should be plainly understood — as great judges have so often told the bar, and as their successors and the bar have in new generations as often forgotten — that *there is not and cannot be any universal or fixed rule to test the sufficiency of the search* for a document alleged to be lost. The inquiry must depend entirely on the circumstances of the case. The following classical passages expound this doctrine in various forms:

1820, *Abbott, C. J.*, in *Brewster v. Sewell*, 3 B. & Aid. 296; libel for charging the plaintiff with defrauding an insurance company; an expired policy was to be proved; whether the company or the plaintiff last had the policy was not certain; the plaintiff and his attorney had searched his premises in vain; *Abbott, C. J.*: "All evidence is to be considered with regard to the matter with respect to which it is produced. Now it appears

⁴ 1810, *Swift, Evidence*, 31 ("loss or destruction . . . by accident, without any fault on his part").

⁵ 1789, *Read v. Brookman*, 3 T. R. 151 (a demurrer to a plea, excusing profert on the ground that it was "lost and destroyed by time and accident," was overruled. *Buller, J.*: "The rule laid down by Lord Coke [in *Leyfield's Case*] extends to all cases of extreme necessity; those which he mentions are only put as instances; and wherever a similar necessity exists, the same rule holds. . . . It was said that the plaintiff was not without remedy, for that a Court of Equity would give him relief. But

that argument is no answer in a Court of Law; we are not to consider what a Court of Equity in the plenitude of its power may do"; 1796, *R. v. Metheringham*, 6 Id. 356 (loss of an order of removal of a pauper; oral proof allowed).

⁶ It has sometimes been doubted whether a lost will or record was provable with the same evidence as other lost documents (*loc. cit.*, § 1267). A lost negotiable instrument may be proved by copy; but the restrictions that have been enforced in that connection are matters of substantive law.

¹ As pointed out by Colcock, J., in *Peay v. Picket*, 3 McCord 318, 322 (1825).

to be a very different thing, whether the subject of inquiry be a useless paper, which may reasonably be supposed to be lost, or whether it is an important document which the party might have an interest in keeping, and for the non-production of which no satisfactory reason is assigned. . . . This being a case, therefore, where the loss or destruction of the paper may almost be presumed, very slight evidence of its loss or destruction is sufficient."³

1846, *Pollock, C. B.*, in *Gathercole v. Miall*, 15 M. & W. 319, 329: "The evidence of a document being lost, upon which secondary evidence may be given of its contents, may vary much, according to the nature of the paper itself, the custody it is in, and indeed all the surrounding circumstances of the particular matter before the Court and jury. A paper of considerable importance, which is not likely to be permitted to perish, may call for a much more minute and accurate search than that which may be considered as waste paper, which nobody would be likely to take care of"; *Alderson, B.*: "The question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for. . . . If we were speaking of an envelope, in which a letter had been received, and a person said, 'I have searched for it among my papers, I cannot find it,' surely that would be sufficient. So with respect to an old newspaper which has been at a public coffee-room; if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A. B.,' then I should have said you ought to go to A. B. and see if A. B. has not got that which it is proved he took away."

1833, *Thompson, J.*, in *Minor v. Tillotson*, 7 Pet. 99: "The rules of evidence are adopted for practical purposes in the administration of justice. . . . The extent to which the rule is to be pushed, in a case like the present, is governed in some measure by circumstances. If any suspicion hangs over the instrument, or that it is designedly withheld, a more rigid inquiry should be made into the reasons for its non-production. But when there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original."

1880, *Depue, J.*, in *Johnson v. Arnwine*, 42 N. J. L. 451, 454: "Proof of loss or destruction so fully as to exclude every hypothesis of the existence of the original is not required. The question is always one of due diligence in the effort to procure the original before evidence of its contents is resorted to. As a general rule 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. If any suspicion hangs over the instrument, or there are circumstances tending to excite a suspicion that it is designedly withheld, the most rigid inquiry should be made into the reasons for its non-production. . . . No absolute rule has been or can be laid down, defining what search shall be considered as a search prosecuted with due diligence. The degree of diligence which shall be considered necessary in any case will depend on the circumstances, — the character and importance of the paper, the purposes for which it is proposed to use it, and the place where a paper of that kind may naturally be supposed to be likely to be found."

1886, *Stone, C. J.*, in *Jernigan v. State*, 81 Ala. 58, 60, 1 So. 72: "In accounting for the absence of a writing, material testimony in the cause, so as to let in secondary evidence of its contents, no universal rule can be declared which will be applicable to every case. The testimony is addressed to the presiding judge, and he pronounces on its sufficiency. He must be reasonably convinced that it has been lost, destroyed, or is beyond the reach of the Court's process. A material inquiry in such cases is whether or not there was a probable motive for withholding this highest and best evidence. Whenever the Court is able to answer this inquiry in the negative, less evidence will satisfy its con-

³ 1824, *Best, J.*, in *Freeman v. Arkell*, 2 B. & C. 494 ("That principle [of relativity] is fully established by the case of *Brewster v. Sewell*").

science than if auspicious circumstances attended the transaction. As a rule, there must be careful search at the place where it was last known to be, if its place of custody can be traced or remembered. If not, then such search must be made at any and every place where it would likely be found."

This general principle of relativity, that the sufficiency of the search depends upon the circumstances of the case, is sometimes expressed in the form of a standard of diligence; the search, it is said, must appear to have been made with *such diligence as was reasonable upon all the facts of the case in hand*. The party proving the document must have used all reasonable means to obtain the original.³

It follows, properly, that the determination of the sufficiency of the search and in general of the proof of the fact of loss should be left entirely to the *trial Court's discretion*. This important deduction has been admirably expounded in the following passage:

1815, *Denman*, L. C. J., in *R. v. Kenilworth*, 7 Q. B. 642, 649; "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.' But this is a question much fitter for the Court which tries than for us. They have to determine whether evidence is satisfactory, whether the search has been made *bona fide*, whether

³ *Eng.*: 1815, *Ellenborough*, L. C. J., in *R. v. Morton*, 4 M. & S. 48 ("The making search, and using due diligence, are terms applicable to some known or probable place or person, in respect of which diligence may be used"); 1827, *Gully v. Exeter*, 4 Bing. 290, 298 (depends upon "the importance of the deed and the particular circumstances of each case"); 1847, *Alderson*, II., in *Doe v. Clifford*, 2 C. & K. 448, 451 ("The law lays down rules to compel the production of primary evidence before secondary evidence can be given; but if a person has taken all reasonable means to produce primary evidence, then and then only he may give secondary evidence"); 1863, *Quilter v. Jorss*, 14 C. B. n. s. 747, 750 (reasonable exertions required); *Can.*: 1856, *Tiffany v. McCumber*, 13 U. C. Q. B. 159, 162 (the degree of diligence depends on the circumstances); 1865, *Russell v. Fraser*, 15 U. C. C. P. 375, 380; *U. S.*: 1837, *Witter v. Latham*, 12 Conn. 392, 399 (must "depend in a great measure on the circumstances of each particular case"); 1847, *Kelsey v. Hanner*, 18 id. 311, 316 (same); 1853, *Waller v. School District*, 22 id. 326, 334 (same); 1849, *Doe v. Biggers*, 6 Ga. 188, 194 (depends on "the circumstances of each case," and is therefore left to the trial Court; but there are some general principles; "the object of the proof is to establish a reasonable presumption of the loss of the instrument; 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 suggests and which were accessible to him; good faith and reasonable diligence are the requisites, and the diligence must have reference to the nature of the case"); 1848, *Mariner v.*

Sanders, 10 Ill. 113, 118 (depends on the circumstances); 1858, *Simpson v. Norton*, 45 Mc. 281, 288 (depends "much upon the circumstances of the case"; an instructive illustration of the search required, — here, for a probate record); 1852, *Glenn v. Rogers*, 3 Md. 312, 320 (depends much on the character and value of the instrument; the offeror must have "in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would suggest and which were accessible to him"); 1852, *Pickard v. Bailey*, 26 N. H. 152, 167 ("each decision depends so much on the circumstances of the individual case that no inflexible rule can be laid down"); 1819, *Jackson v. Frier*, 16 John 193, 196 ("No precise rule" exists, except that "diligent search and inquiry should be made of those persons in whose custody the law presumes the deed to be"); 1820, *Jackson v. Root*, 18 id. 60, 73 (pointing out that less search is required for a document of slight value; here, an abandoned contract); 1833, *Wells v. Martin*, 1 Oh. St. 386 ("The ruling must depend upon the circumstances of each particular case"); 1854, *Woodward, J.*, in *Bell v. Young*, 3 Grant Pa. 175 ("When diligent search has been made unsuccessfully for a paper by the person in whose hands the law presumes it to be, it is in judgment of law a lost paper"); 1880, *Congdon v. Morgan*, 14 S. C. 587, 593 ("no absolute rule on the subject"; search for a deed here held sufficient on the facts); 1861, *Thrall v. Todd*, 34 Vt. 97 (the offeror must show that "he has in good faith reasonably exhausted all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him").

there has been due diligence, and so on. It is a mere waste of time on our part to listen to special pleading on the subject. To what employment shall we be devoted, if such questions are to be brought before us as matters of law!"⁴

§ 1195. *Same: Specific Tests and Rulings.* Although the greater number of Courts have from time to time expressed approval of the controlling principle that the sufficiency of the search should be left to the trial Court, this principle is nevertheless often sinned against.

In the first place, there is an occasional tendency to prescribe some specific method of search in the shape of a fixed rule. It is sometimes said, for example, that the search must be made in the place where the document was last known to be, or that inquiry must be made of the *last custodian*, or that the last custodian must be summoned.¹ These requirements are sensible enough as hints or warnings to the trial Court, but they are not fit to be erected into fixed rules.

In the second place, most Courts are found now and then deliberately disregarding the principle of the trial Court's discretion and reviewing on

⁴ *Accord* (though sometimes with qualifications): 1886, *Jernigan v. State*, 81 Ala. 58, 60; 1893, *Wilburn v. State*, 60 Ark. 141, 143, 29 S. W. 149; 1901, *Kenniff v. Canfield*, — Cal. —, 73 Pac. 803; 1882, *Elwell v. Mersick*, 50 Conn. 275; Ga. Code 1895, § 5239; 1871, *Wallace v. Tumlis*, 42 Ga. 462; 1880, *Phillips v. Lindsey*, 63 id. 139, 143; 1876, *Graham v. Campbell*, 56 id. 253, 260; 1890, *Smith v. Brown*, 151 Mass. 334, 340, 24 N. E. 31; 1871, *Stewart v. People*, 23 Mich. 63, 73 (to some extent); 1870, *Christy v. Cavanaugh*, 45 Mo. 375, 377; 1892, *Klein v. Geiselman*, 114 id. 437, 443, 21 S. W. 796 ("the trial judge is to determine the sufficiency of the proof"); 1897, *Hume v. Hopkins*, 140 id. 65, 41 S. W. 784; 1890, *Johuson v. Arnwine*, 42 N. J. L. 451, 458; 1899, *Longstreth v. Korb*, 64 id. 112, 44 Atl. 934; 1821, *Leazure v. Hillegas*, 7 S. & R. 313, 323; 1843, *Flinn v. M'Gonigle*, 9 W. & S. 75 ("Each case must depend on its peculiar circumstances; . . . it is a preliminary inquiry, addressed to the legal discretion of the judge"); 1892, *Gorgas v. Hertz*, 150 Pa. 538, 540, 24 Atl. 756 ("generally left to the discretion of the trial judge"); 1896, *Norris v. Clinkscapes*, 47 S. C. 488, 23 S. E. 797; 1901, *Elrod v. Cochran*, 59 id. 467, 38 S. E. 122; 1853, *Tyree v. Magness*, 1 Sneed 276, 277 ("what is proper diligence must depend much on the circumstances of the case"); 1874, *Durgin v. Danville*, 47 Vt. 95, 101 ("It is always a question of law in the given case whether the rule has been acted on and properly carried into effect"; but "whether the Court below have found facts correctly from the evidence bearing *pro* and *con* upon the existence of the facts of which the rule is predicable" will not be inquired).

¹ The following list of such utterances does not purport to be complete: 1889, *Foster v. State*, 89 Ala. 182, 187, 7 So. 185 ("as a rule, careful search must be made where the document was last known to be or where it would most likely be found"); 1860, *Cook v. Hant*, 24 Ill. 535, 550 ("the rule is well settled that when a paper

has a particular place of deposit, as when it is known to have been in a particular place, or in the hands of a particular person, then that place must be searched by the party setting up the loss, or the person produced or accounted for into whose hands or keeping it has been traced"); 1882, *Rhode v. McLean*, 101 id. 467, 470 (bond; loss sufficiently shown; rule of calling last possessor held not to be an invariable one); 1891, *Mullanphy S. Bank v. Schott*, 135 id. 655, 667, 26 N. E. 640 (corporation book; loss not sufficiently shown; rule of calling last possessor applied); 1889, *Howe v. Fleming*, 123 Ind. 263, 24 N. E. 238 (record; it must appear "that careful and diligent search was made in the office and by one so fully acquainted with the office-records and papers as to make it probable that if the paper was in the office he would find it"; trial Court's discretion here approved); 1880, *Brock v. Cottingham*, 23 Kans. 383, 388 (execution not sufficiently shown lost; the clerk of Court should have been called or his deposition taken; the last custodian's testimony is not always necessary, except in the above class of cases, but it should be "the general rule"); 1846, *Drake v. Ramey*, 2 Rich. 37, 39 ("a search in the place where it was most likely to be found" suffices); 1833, *Pharis v. Lambert*, 1 Sneed 228, 230 (warrant last seen in the offeror's attorney's hand; the attorney required to be sworn or accounted for); 1853, *Tyree v. Magness*, 1h. 276, 278 (paper in the cause; search among the clerk's papers, but not by the clerk, insufficient); 1835, *Vaulx v. Merriwether*, 2 id. 683 (deed of deceased grantee; search among the grantee's papers, without search at the registry or among the deceased's representative's papers, insufficient); 1870, *Girdner v. Walker*, 1 Heisk. 186, 191 (letters to C., deceased; inquiry of C.'s representative, etc., and search among C.'s papers, required); 1851, *Fletcher v. Jackson*, 23 Vt. 581, 591 (Redfield, J.: "The general rule upon this subject

appeal all the circumstances bearing upon the sufficiency of the search.² These often lengthy and laborious expositions of the facts and their suffi-

is familiar, that reasonable search shall be made in the place where the paper is last known to have been; and if not found there, then its present place of deposit shall be searched out in the usual mode by making inquiry of those most likely to know its whereabouts, and that is of course of the person last known to have had its custody"); 1860, *Moore v. Beattie*, 33 id. 219, 223 (search is to be made by the last custodian; sufficiency of search is for trial Court's discretion).

² The decisions and statutes are as follows: ENGLAND: 1805, *Johnson's Case*, 29 How. St. Tr. 437, 7 East 65 (envelopes; "such probable evidence of the destruction of the thing as to let in parol evidence of its nature"; here a mass of papers, presumably including these, were thrown into the fire); 1807, *Kennington v. Inglis*, 8 East 273, 278, 288 (belligerent trading license, issued by a colonial governor; the expiration and return of the license being shown, the custom to destroy them as waste paper and the search for this one in the office, held sufficient); 1815, *R. v. Morton*, 21 M. & S. 48 (search for an indenture of apprenticeship, held sufficient); 1816, *Bullen v. Michcl*, 4 Dow 297 (copies of old title-taxations admitted, search for the originals proving unavailable); 1824, *Freeman v. Arkell*, 2 B. & C. 494 (information for an indictment returned ignoramus; search at a clerk's office held sufficient on the facts); 1825, *R. v. East Farleigh*, 6 Dowl. & R. 147 (indenture of apprenticeship); 1827, *R. v. Denlo*, 7 B. & C. 620, 622 (same); 1828, *R. v. Stonrbridge*, 8 B. & C. 96 (same); 1831, *R. v. Rawden*, 2 A. & E. 136 (same); 1836, *McGahay v. Alston*, 2 M. & W. 206, 213 (cancelled check in the office of a successor as clerk; search sufficient on the facts); 1837, *Fitz v. Rabbits*, 2 Moo. & Roh. 60 (a lease; search made three years before, for another purpose, held sufficient on the facts); 1843, *R. v. Kenilworth*, 7 Q. B. 642 (indenture of apprenticeship); 1846, *Gathercole v. Miall*, 15 M. & W. 319, 322 (old newspaper, left at certain society rooms; search among members of the society not necessary); 1846, *R. v. Rastrick*, 2 Cox Cr. 39 (parcel-memorandum taken from a shop); 1851, *Richards v. Lewis*, 15 Jur. 512 (search not sufficient); 1852, *R. v. Saffron Hill*, 1 E. & L. 93 (search for a document held not wrongly declared insufficient by the trial Court); 1863, *Quilter v. Joras*, 14 C. B. n. s. 747 (agreement of shipment, taken from the bearer in New York by official searchers for secessionist dispatches); 1872, *R. v. Hall*, 12 Cox Cr. 159 (forged document, in a prosecution for forgery).

CANADA: *N. Br.*: 1842, *Little v. Johnston*, 1 Kerr 496 (letters; search held not sufficient); 1852, *Basterach v. Atkinson*, 2 All. 439, 445 (agreement in third person's hands; loss held sufficiently evidenced); 1855, *Lyman v. Cain*, 3 All. 259 (note taken up; search held sufficient); *N. S.*: 1859, *Barto v. Morris*, 4 N. Sc. 90; 1876, *Hazell v. Dyas*, 11 Id. 36, 42.

UNITED STATES (besides the cases in the

following list, those cited *post*, § 1225, should also be consulted, where a similar question sometimes arises in construing the statutes allowing affidavit-proof of loss of a recorded deed; for loss of books of entry, see also §§ 1532, 1537, *post*): *Alabama*: 1832, *Mitchell v. Mitchell*, 3 Stew. & P. 81, 84 (search by persons unable to read is insufficient); 1839, *Swift v. Fitzhugh*, 9 Port. 39, 52 (deed; loss insufficiently shown on the facts); 1849, *Herdon v. Givens*, 16 Ala. 261, 268 (loss of note insufficiently shown); 1857, *Johnson v. Powell*, 30 Id. 113, 115 (executions; search held sufficient on the facts); 1861, *Preslar v. Stallworth*, 37 Id. 402, 406 (by a clerk of Court, that a note filed was no longer on file and he did not know what had become of it, held insufficient); 1872, *Bogan v. Mc'ntchen*, 48 Id. 493 (search for a letter, not sufficient on the facts); 1876, *Calhoun v. Thompson*, 56 Id. 166, 170 (letter left with a magistrate; search held insufficient); 1879, *Watson v. State*, 63 Id. 19, 22 (loss of justice's records, not sufficiently proved on the facts); 1881, *Donegan v. Wade*, 70 Id. 501, 506 (notice of contest in Probate Court; loss insufficiently proved); 1886, *Jerri-gan v. State*, 81 Id. 58, 60 (note and mortgage; search sufficient on the facts); 1889, *Tanber & D. E. Co. v. Hall*, 89 Id. 628, 629, 7 So. 187 (search for correspondence, held sufficient on the facts); 1892, *Thorn v. Kemp*, 98 Id. 417, 422, 13 So. 747 (summons, etc.; loss, etc., pre-empted from trial Court's finding); 1893, *Bonliien v. State*, 102 Id. 78, 84, 15 So. 341 (dying declaration in writing; search insufficient); 1897, *Phoenix Ass. Co. v. McAnthur*, 116 Id. 659, 22 So. 903 (search for a policy held insufficiently shown); 1897, *O'Neal v. McKinna*, ib. 606, 22 So. 905 (search for warrant handed to grand jury, held insufficient on the facts); 1901, *Laster v. Blackwell*, 128 Id. 143, 30 So. 663 (deed; loss held sufficiently shown on the facts); *Arizona*: 1874, *Rush v. French*, 1 Ariz. 99, 142, 25 Pac. 816 (rules of search laid down); *California*: 1852, *McCaun v. Heach*, 2 Cal. 23 30 (loss of papers said to have been in a trunk; proof not sufficient); 1855, *Norris v. Russell*, 5 Id. 250 (municipal ordinance; notice of tax-sale; search insufficient); 1855, *People v. Clingan*, ib. 389 (certificate of election; loss sufficiently proved); 1856, *Folsom v. Scott*, 6 Id. 460 (deed; search insufficient on the facts); 1861, *Caulfield v. Sanders*, 17 Id. 569, 573 (loss of entry-book not sufficiently shown); 1861, *Merce v. Wallace*, 18 Id. 165, 170 (search for lost deed, held sufficient); 1867, *King v. Rundlett*, 33 Id. 318, 320 (bill of sale; search held insufficient); 1875, *Taylor v. Clark*, 49 Id. 67t (search for lost deed, not sufficient on the facts); 1895, *Samouset v. Mesnager*, 108 Id. 354, 41 Pac. 337 (letter; search held sufficient); *Colorado*: Annot. Stms. 1891, § 1759 (party offering any deed, etc., "or other writing," alleged to have been executed by the opponent, and lost or destroyed; contents cannot be proved "until said party, his agent, or attorney, shall first make oath to the loss or

ciency are ill-judged expenditures of effort for a Supreme Court. Such labor, in Lord Denman's emphatic words, is a "mere waste of time." As

destruction thereof, and to the substance of the same"); 1873, *Hobson v. Porter*, 2 Colo. 28, 31 (search for a contract, held not sufficient); 1876, *Louder v. Stewart*, 3 Id. 47, 49 (search for a power of attorney, held not sufficient); 1877, *Lyon v. Washburn*, lb. 201, 204 (loss of a letter, not sufficiently proved); 1883, *Wells v. Adams*, 7 id. 26, 1 Pac. 698 (loss of a letter, not sufficiently proved); 1886, *Bruus v. Chase*, 9 Id. 225, 227, 11 Pac. 79 (execution; loss sufficiently shown); 1886, *Oppenheimer v. R. Co.*, lb. 320, 322, 12 Pac. 217 (railroad tariff sheet; loss sufficiently shown); 1886, *Billie v. Heukel*, lb. 394, 400, 13 Pac. 420 (letter; loss not sufficiently shown); *Connecticut*: 1830, *State v. DeWolf*, 8 Conn. 93, 100 (mere ignorance of its whereabouts, without search, insufficient); 1837, *Witter v. Latham*, 12 Id. 392, 399 (bankrupt's certificate; bankrupt ignorant of its whereabouts; search not required); 1840, *Stoddard v. Mix*, 14 Id. 12, 17, 22 (loss sufficiently shown); 1847, *Kelsey v. Hanmer*, 18 Id. 311, 316 (deed; sufficient search shown); 1849, *White v. Brown*, 19 Id. 577, 583 (note; loss insufficiently shown); 1853, *Waller v. School District*, 22 Id. 326, 334 (subscription-paper; loss sufficiently shown); *Delaware*: 1841, *Armstrong v. Timmons*, 3 Harringt. 342 (deed; loss insufficiently shown); 1855, *State v. Gemmill*, 1 Houst. 9, 12 (directions to sheriff; loss sufficiently shown); 1855, *Bartholomew v. Edwards*, 1 Houst. 247, 250 (deed; loss not sufficiently shown); *Georgia*: in this State a Court rule governs some of the cases: 1849, *Doe v. Biggers*, 6 Ga. 188, 194 (execution; sufficient search shown); 1851, *Ellis v. Smith*, 10 Id. 253, 259 (same); 1852, *Harper v. Scott*, 12 Id. 125, 135 (agreement; sufficient search shown); 1853, *Molyneux v. Collier*, 13 Id. 406, 413 (execution; search not sufficient); 1853, *Bryan v. Walton*, 14 Id. 185, 194 (will; search not sufficient); 1857, *Allen v. State*, 21 Id. 217, 218 (bail process; search held sufficient); 1858, *Morgan v. Jones*, 24 Id. 155, 160 (letters of administration; loss sufficiently shown); 1858, *Poulet v. Johnson*, 25 Id. 403, 410; 1859, *Sutton v. McLond*, 26 Id. 637, 642 (grant; search held insufficient); 1861, *Roe & McDowell v. Doe & Irwin*, 32 Id. 39, 48 (Court rule applied); 1870, *Cameron v. Kersey*, 41 Id. 40 (Court rule applied); 1872, *Jackson v. Jackson*, 47 Id. 99, 117 (contents of letter not produced, excluded); 1873, *Brown v. Tucker*, lb. 485, 492 (trust-deed; search held insufficient); 1880, *Seisel v. Register*, 65 Id. 662, 664 (execution; search insufficient); 1876, *Southern Georgia & F. R. Co. v. Ayres*, 56 Id. 230, 233 (Court rule applied); 1883, *Inboden v. Mining Co.*, 70 Id. 86, 112 (search for deeds sufficient); 1886, *Nolan v. Pelham*, 77 Id. 262, 269, 2 S. E. 639 (deed; search not sufficient); 1887, *Silva v. Rankin*, 80 Id. 79, 83, 4 S. E. 756 (deeds, etc., sufficiently shown lost); 1888, *Georgia P. R. Co. v. Strickland*, lb. 777, 779, 6 S. E. 27 (original not accounted for); 1901, *Lott v. Huck*, 113 Id. 640, 39 S. E. 70 (search held insufficient on the facts); *Illinois*: 1840, *Dormady v. State Bank*, 3 Ill. 236, 238, 244 (note); 1841, *Palmer v. Logan*, 4 Id. 56, 60 (notes; loss insufficiently shown); 1848, *Mariner v. Saunders*, 10 Id. 113, 118 (deed; search held insufficient); 1854, *Doyle v. Wiley*, 15 Id. 576 (contract; search sufficient on the facts); 1859, *Holbrook v. Trustees*, 22 Id. 539 (treasurer's bond; loss not sufficiently shown); 1860, *Whitehall v. Smith*, 24 Id. 166 (warrant and affidavit; loss not sufficiently shown); 1860, *Cook v. Hunt*, lb. 536, 550 (contract, loss not sufficiently shown, because the person last having custody was not accounted for; see note 1, *supra*); 1860, *Stow v. People*, 25 Id. 69, 73 (deed; loss not sufficiently shown); 1862, *Holbrook v. Trustees*, 28 Id. 187 (bond; loss not sufficiently shown); 1862, *Ellis v. Huff*, 29 Id. 449 (execution; loss sufficiently shown); 1863, *Pardoe v. Ludley*, 31 Id. 174, 184 (deed; search sufficient); 1864, *Owen v. Thomas*, 33 Id. 320, 326 (deed; search apparently held insufficient); 1864, *Kupfer v. Bank*, 34 Id. 328, 356 (draft; loss sufficiently shown); 1864, *McMillan v. Bethold*, 35 Id. 253 (note; loss sufficiently shown); 1865, *Wells v. Miller*, 37 Id. 276, 280 (title-document; loss sufficiently shown); 1866, *Carr v. Miner*, 42 Id. 179, 189 (bill and answer; loss sufficiently shown); 1867, *Sturges v. Hart*, 45 Id. 103, 106 (injunction; loss not sufficiently shown); 1869, *Huls v. Kimball*, 52 Id. 391 (mortgage; loss sufficiently proved); 1872, *Chicago & N. W. R. Co. v. Ingersoll*, 65 Id. 399, 403 (contract; loss not sufficiently shown); 1872, *Case v. Lyman*, 66 Id. 229 (letters; loss sufficiently shown); 1873, *Swearingen v. Gulick*, 67 Id. 208, 212 (deed; loss sufficiently shown); 1875, *Wickenkamp v. Wickenkamp*, 77 Id. 92, 95 (note destroyed; secondary evidence admitted); 1875, *Marlow v. Marlow*, lb. 633 (notes; destruction sufficiently shown); 1875, *Williams v. Case*, 79 Id. 356 (account filed in Court; loss not sufficiently proved); 1876, *Hazen v. Pierson*, 83 Id. 241 (letter; loss not sufficiently shown); 1876, *Crocker v. Lowenthal*, lb. 579, 581 (deed; loss insufficiently shown); 1878, *Moore v. Wright*, 90 Id. 470, 472 (note; loss not sufficiently shown); 1878, *Protection L. I. Co. v. Dill*, 91 Id. 174 (policy of insurance; loss insufficiently proved); 1880, *Taylor v. McIrvin*, 94 Id. 488, 492 (deed; loss insufficiently shown); 1881, *Dugger v. Oglesby*, 99 Id. 405, 409 (deed; loss sufficiently shown); 1883, *Golder v. Brossler*, 105 Id. 419, 429 (deed; loss sufficiently shown); 1884, *Dowden v. Wilson*, 108 Id. 257, 261 (copies of burned depositions used); 1888, *Berdel v. Egan*, 125 Id. 298, 299, 17 N. E. 709 (deed; loss insufficiently shown); 1898, *McDonald v. Stark*, 176 Id. 455, 52 N. E. 37 (loss of recorded town plats, sufficiently shown); 1899, *Mayfield v. Turner*, 180 Id. 332, 54 N. E. 418 (declaration of trust; loss insufficiently shown); 1899, *Harrell v. Enterprise Sav. Bank*, 183 Id. 538, 56 N. E. 63 (deed; search sufficient on the facts); *Indiana*: 1839, *Burke v. Voyles*, 5 Blackf. 190 (award; not sufficiently accounted for); 1843, *McNeely v. Rucker*, 6 Id. 391 (lease; loss not sufficiently shown); 1843

a test for the capabilities of a fine instrument, it would be interesting to set a steam-hammer to crack a nut; but as an habitual occupation, it would be

Depew v. Whealan, lb. 485, 487 (note; same); 1845, Murray v. Buchanan, 7 Id. 549 (execution; same); 1856, Meek v. Spencer, 8 Ind. 118, 119 (memorandum of sale; search insufficient); 1857, Littler v. Franklin, 9 Id. 216 (letter; same); 1859, Little v. Indianapolis, 13 Id. 364 (petition to city council; search sufficient); 1859, Cleveland v. Worrell, lb. 545 (note; same); 1861, Carter v. Edwards, 16 Id. 238 (same); 1862, Steel v. Williams, 18 Id. 161, 165 (transcript; same); 1879, Avam v. Frey, 69 Id. 91, 93 (lease; destruction by defendant shown); 1883, Johnston Harv. Co. v. Bartley, 94 Id. 131, 134 (contract; search held sufficient); 1884, Langdale v. Woollen, 99 Id. 575, 585 (letter; same); 1884, Curme v. Rauh, 100 Id. 247, 253 (mortgage; same); 1886, McComas v. Haas, 107 Id. 512, 516, 8 N. E. 579 (letter; same); 1887, Roehl v. Hanmesser, 114 Id. 311, 319, 15 N. E. 345 (same); 1887, McCormick, H. M. Co. v. Gray, lb. 340, 346, 16 N. E. 767 (contract; loss sufficiently shown); 1888, McNutt v. McNutt, 116 Id. 545, 565, 19 N. E. 115 (same); Iowa: 1851, Steamboat Wisconsin v. Young, 3 Greene 268, 271 (search for invoice sufficiently shown); 1861, Horseman v. Todhunter, 12 Ia. 230, 232 (mortgage; loss not shown); 1868, McCormick v. Grundy Co., 24 Id. 382, 384 (loss of note sufficiently shown); 1876, Grimes v. Simpson College, 42 Id. 589, 590 (contract; loss not sufficiently shown); 1877, Crowe v. Capwell, 47 Id. 426 (note; search insufficient); 1880, Howe M. Co. v. Stiles, 53 Id. 425, 5 N. W. 377 (letters; loss insufficiently shown); 1880, Gimbal v. Salomon, 54 Id. 389, 6 N. W. 582 (letter; loss not shown); 1880, Foster v. Bowman, 55 Id. 237, 240, 7 N. W. 513 (loss of record insufficiently shown); 1882, Hansen v. Ina Co., 57 Id. 741, 742, 11 N. W. 670 (contract of sale; search insufficient); 1883, Louis Cook M. Co. v. Randall, 62 Id. 244, 17 N. W. 507 (contract; loss sufficiently shown); 1886, Hill v. Antman, 68 Id. 630, 27 N. W. 788 (letter; search held insufficient); 1887, Postel v. Palmer, 71 Id. 157, 159, 32 N. W. 257 (positive testimony of loss by custodian; further search unnecessary); 1890, State v. Thompson, 79 Id. 703, 705, 45 N. W. 293 (letters; loss not shown); 1895, Waite v. High, 96 Id. 742, 65 N. W. 397 (search insufficient on the facts); 1899, Williams v. Williams, 108 Id. 91, 78 N. W. 793 (contract; loss not sufficiently shown on the facts); Kansas: 1893, Roberts v. Dixon, 50 Kan. 436, 437, 31 Pac. 1083 (no search at all; production required); Kentucky: 1819, Hart v. Strode, 2 A. K. Marsh. 115 (bond; loss sufficiently shown on the facts); 1820, Hamit v. Lawrence, lb. 366 (lease; same); 1821, McIntire v. Funk, Litt. Sel. C. 425, 427 (bond; same); 1824, May v. Hill, 5 Litt. 307, 309 (bond; same); 1853, Dickerson v. Talbot, 14 B. Monr. 60, 67 (deed; search sufficient on the facts); 1868, Nutall v. Brannin, 5 Bush 11, 18 (letter; search insufficient on the facts); 1870, Penny v. Pindell, 7 Id. 571, 574 (record; same); 1893, Nelson v. Asher, 103 Ky. 730, 46 S. W. 22 (loss not shown); Louisiana: Rev. C. C. 1888, § 2279 (when an "instrument in writing, containing obligations which the party wishes to enforce, has been lost or destroyed, by accident or force, evidence may be given of its contents, provided the party show the loss either by direct testimony, or by such circumstances, supported by the oath of the party, as render the loss probable"); here it is difficult to separate the cases under this statute and at common law and from those belonging under the other statute *post*, § 1225: 1823, Robertson v. Lucas, 1 Mart. n. s. 187, 189 (agreement; loss not sufficiently shown, under the French rule); 1829, Tate v. Penne, 7 Id. 548, 551 (marriage-contract; loss sufficiently shown); 1831, Baines v. Higgins, 1 La. 220, 222 (bill of sale; loss not sufficiently proved); 1842, Thomas v. Turnley, 3 Rob. 206, 210 (deeds; loss sufficiently shown); 1847, Prothro v. Minden Seminary, 2 La. An. 939 (corporate resolution; loss sufficiently shown); 1894, Cochran v. Cochran, 46 Id. 536, 539, 15 So. 37 (agreement; search sufficient on the facts); 1901, Willett v. Andrews, 106 La. 319, 30 So. 883 (deed forming a link in the title to land; advertisement of loss held not necessary under Civ. C. §§ 2279, 2280); Maine: 1848, Wing v. Abbott, 15 Shepl. 367, 373 (judicial record; search not sufficient on the facts); Maryland: 1810, Rusk v. Sowerwine, 3 H. & J. 97 (power of attorney; search insufficient on the facts); 1814, Ringgold v. Galloway, lb. 451, 455 (loss of commissions, etc., not sufficiently proved); 1830, State v. Wayman, 2 J. 254, 283 (search for Chancery records, sufficient on the facts); 1833, Muliiken v. Gill, 1 Gill 60, 66 (horse-pedigree; search held sufficient on the facts); Massachusetts: 1844, Foster v. Mackay, 7 Metc. 531, 537; Michigan: 1850, Higgins v. Watson, 1 Mich. 428, 431 (note; loss sufficiently shown); 1868, Hoagsett v. Ellis, 17 Id. 351, 375 (records of a justice; loss not sufficiently shown); 1871, Stewart v. People, 23 Id. 63, 73 (letter; search held sufficient); 1877, Bottomley v. Goldsmith, 36 Id. 27 (letter; search held sufficient); 1877, King v. Carpenter, 37 Id. 363, 369 (deed; loss sufficiently shown); 1878, People v. Gordon, 39 Id. 259, 262 (loss of justice's files sufficiently shown); 1879, McKeown v. Harvey, 40 Id. 226 (contractor's proposals; search sufficiently shown); 1883, Holcomb v. Mosher, 50 Id. 252, 257, 15 N. W. 129 (deed; search held sufficient); 1885, Huff v. Hall, 56 Id. 456, 457, 23 N. W. 88 (letter; loss insufficiently shown); 1886, Dalton's Appeal, 59 Id. 352, 355, 26 N. W. 539 (petition for guardian; loss sufficiently shown); 1890, Shonler v. Bonander, 80 Id. 531, 534, 45 N. W. 487 (agreement; proof of loss "unsatisfactory"); 1895, Stanley v. Anderson, 107 Id. 384, 65 N. W. 247 (contract recorded with a justice of the peace; loss sufficiently shown); Minnesota: 1861, Gnerin v. Hunt, 6 Minn. 375, 390 (letter; search not sufficiently shown); 1867, Thayer v. Barney, 12 Id. 502, 510, 513 (account-book and receipt; loss sufficiently shown); 1871, Board v. Meagher, 17

plain folly. The Supreme Courts of Judicature spend overmuch time in cracking nuts. Long days of time and tedious pages of reports have been

id. 412, 422 (order for brick; search sufficiently shown); 1881, *Molm v. Barton*, 27 Id. 530, 532, 8 N. W. 765 (bill of sale; loss sufficiently shown); 1886, *Nelson v. Land Co.*, 35 Id. 408, 410, 29 N. W. 121 (sheriff's certificate; search not sufficiently shown); 1896, *Sloema v. Bracy*, 65 Id. 100, 67 N. W. 843 (search held sufficient); 1898, *Windom v. Brown*, ib. 394, 67 N. W. 1028 (search held sufficient); 1901, *Harley v. West St. Paul*, 83 Id. 401, 86 N. W. 427 (ancient copy of surveyor's report, not admitted where original was not searched for); *Mississippi*: 1838, *Doe v. McCaleb*, 2 How. 756, 767 (land-office certificate; search not sufficient); 1846, *Smith v. R. Co.*, 6 Sm. & M. 179, 184 (receipt; loss sufficiently shown); 1854, *Parr v. Gibbons*, 27 *Miss.* 375, 378 (note; loss insufficiently shown); *Missouri*: 1837, *Miller v. Wells*, 5 Mo. 6, 10 (bond; search held sufficient); 1850, *Finney v. College*, 13 Id. 266 (deposition shown to be lost or mislaid); 1852, *Lewin v. Dille*, 17 Id. 64, 69 (agent's instructions, not accounted for); 1862, *Gould v. Trowbridge*, 32 Id. 291, 293 (draft; loss sufficiently shown); 1874, *Parry v. Walser*, 57 Id. 169, 172 (destruction of records sufficiently shown); 1874, *Shaw v. Pershing*, 57 Id. 416, 421 (loss of deed sufficiently shown); 1879, *Stulehaker Mig. Co. v. Dickson*, 70 Id. 272 (contract; search sufficiently shown); 1884, *Blondcau v. Sheridan*, 81 Id. 545, 556 (contract; search held insufficient); 1890, *Henry v. Diviney*, 101 Id. 378, 383, 13 S. W. 1057 (letter; loss sufficiently shown); *Montana*: 1894, *Brocke v. Jordan*, 14 *Mont.* 375, 378, 36 *Pac.* 430 (deed; search held sufficient); *Nebraska*: 1836, *Post v. School District*, 19 *Nehr.* 135, 26 N. W. 911 (bond; loss not sufficiently shown); 1886, *Murphy v. Lyons*, ib. 689, 28 N. W. 328 (affidavit; loss not sufficiently shown); 1890, *Myers v. Beala*, 30 Id. 280, 287, 46 N. W. 479 (exhibit at former trial; loss not sufficiently shown); 1895, *Baltwin v. Burt*, 43 Id. 245, 252, 61 N. W. 601 (mortgage; loss sufficiently shown); 1896, *Regler v. Shreck*, 47 Id. 667, 66 N. W. 618 (legal papers in a case; loss sufficiently shown); *Nevada*: 1869, *Milenovich's Estate*, 5 *Nev.* 160, 186 (order of Probate Court; loss sufficiently shown); *New Hampshire*: 1850, *Forsaith v. Clark*, 21 N. H. 409, 417 (loss of charters, held insufficiently shown); 1852, *Pickard v. Bailey*, 26 Id. 152, 166 (list of lands; search sufficient); *New Jersey*: 1820, *Sterling v. Potts*, 5 N. J. L. 773, 776 (search held insufficient); 1826, *Fox v. Lambson*, 8 Id. 275, 278 (court records; search insufficient); 1832, *Kingwood v. Bethlehem*, 13 Id. 221, 225 (indenture of apprenticeship; search held sufficient); 1832, *Smith v. Axtell*, 1 N. J. Eq. 494, 498 (written agreement between heirs and administrators; search held insufficient); 1865, *Clark v. Hornbeck*, 17 Id. 430, 450 (action against an executor on a note given by him to the testator; search held sufficient); 1880, *Johnson v. Aruwine*, 42 N. J. L. 451, 459 (complaint and warrant last seen with the grand jury; search held sufficient); *New York*: 1813,

Jackson v. Neely, 10 *John.* 374, 376 (deed said to have been in a house destroyed by fire; sufficient search); 1814, *Jackson v. Woolsey*, 11 Id. 446, 454 (deed; search held sufficient); 1825, *Dan v. Brown*, 4 *Cow.* 483, 491 (will; search held insufficient); 1826, *Jackson v. Betts*, 6 Id. 377, 383 (will; search held sufficient); 1826, *Francis v. Ins. Co.*, 6 *Cow.* 404, 416 (British Consul's permit at Antigua; search held sufficient); 1830, *Jackson v. Russell*, 4 *Wend.* 543, 547 (will; search in the Surrogate's Office held sufficient); 1865, *Leland v. Cameron*, 31 N. Y. 115, 120 (lost execution; search held sufficient); *North Carolina*: 1844, *Kelly v. Craig*, 5 *Ired.* 129, 133 (destruction not sufficiently shown); 1895, *Blair v. Brown*, 116 N. C. 631, 21 S. E. 434 (search held sufficient); 1902, *Smith v. Garria*, 131 Id. 34, 42 S. E. 445 (certain legal papers; search held insufficient); *North Dakota*: 1901, *McManna v. Commow*, 10 N. D. 340, 87 N. W. 9 (loss of deed, sufficiently shown); *Ohio*: 1833, *Taylor v. Colvin*, *Wright* 449 (note; loss sufficiently shown); *Oklahoma*: 1893, *Olds v. Congor*, 1 *Okl.* 232, 238, 32 *Pac.* 337 (search held sufficient); *Oregon*: C. C. P. 1892, § 691 (2) (production excused when the original "cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default"); 1881, *Howe v. Taylor*, 9 *Or.* 288 (undertaking as clerk; loss sufficiently shown); 1902, *Harmon v. Decker*, 41 Id. 587, 68 *Pac.* 11 (search held not sufficient); *Pennsylvania*: 1813, *Canfman v. Congregation*, 6 *Binn.* 39, 63 (written agreement; search held sufficient); 1814, *Meyer v. Barker*, ib. 228, 234 (loss sufficiently proved); 1842, *Weir v. Hale*, 3 *W. & S.* 291, 294 (either due diligence or irretrievable loss must be shown); 1850, *Porter v. Wilson*, 13 *Pa. St.* 641, 649 (search held insufficient); 1854, *Bell v. Young*, 1 *Pa.* 175 (search held sufficient for promissory note); 1870, *Krise v. Nesson*, 66 *Pa.* 253, 260 ("when a written agreement was placed by both parties in the hands of a common friend, who afterwards died, diligent search among his papers is all that is required"); 1875, *American Life Ins. Co. v. Rosenagle*, 77 Id. 507, 514 (slight evidence of the loss of ordinary letters between relatives, held sufficient); *South Carolina*: 1803, *Anderson v. Robson*, 2 *Bay* 495, 497 (bill of exchange from over seas; evidence of loss at sea held sufficient); 1814, *Belton v. Briggs*, 4 *De S.* 465 (evidence of loss of deed, held sufficient); 1818, *Sims v. Sims*, 2 *Mill Const.* 225 (search for note, held insufficient); 1824, *North v. Dravton*, *Harp. Eq.* 34, 41, 45 (loss of bond held insufficiently evidenced); 1830, *Stockdale v. Young*, 3 *Stroh.* 501, 506 (evidence of loss of old deed, held sufficient); 1839, *Smith v. Smith*, *Itice* 232, 234, 237 (search for judicial records, sufficient); 1852, *McQueen v. Fletcher*, 4 *Rich. Eq.* 152, 155, 159 (search for judicial records, held sufficient); 1852, *Floyd v. Mintsey*, 5 *Rich.* 361, 363, 372 (search held insufficient);

given up to investigations of detailed facts, under the present principle, resulting in rulings which never ought to be of any significance as precedents. It is to be hoped that this practice will fall into disuse.

§ 1196. **Same: Kinds of Evidence admissible in Proving Loss (Circumstantial, Hearsay, Admissions, Affidavits, etc.)** The ordinary principles otherwise established apply equally to the evidence used to prove the loss of a document. Certain kinds of evidence, however, occasionally raise specific questions concerning their use for the present purpose.

(1) *Circumstantial evidence* is of course proper;¹ it is in truth the commonest, for the evidence of a loss is usually reducible to the circumstance that a document after proper search has not been seen.²

(2) If the circumstances are such that the Court can raise a *presumption of loss*, as matter of law (*post*, §§ 2522, 2523), then this suffices to establish the loss; the lapse of time is a circumstance often thus availed of.³ But it

that the last possessor was dead and had lived out of the jurisdiction did not excuse a failure to inquire of his representatives); 1857, *Berry v. Jourdan*, 11 Rich. 67, 76 (evidence of loss of deed, held sufficient); 1892, *Brooks v. McMeekin*, 37 S. C. 285, 299, 15 S. E. 1019 (search not shown sufficient); *Tennessee*: 1871, *Quincy v. N. A. C. & T. Co.*, 2 Heisk. 596 (insufficient proof of loss, on the facts); 1900, *Whiteside v. Watkins*, — *Tenn.* —, 38 S. W. 1107 (same); 1901, *Davidson L. Co. v. Jones*, — *id.* —, 62 S. W. 386 (same); *Texas*: 1854, *Clifton v. Liller*, 12 Tex. 130 (deed; loss sufficiently shown); 1863, *White v. Burney*, 27 *id.* 50 (deed; loss sufficiently shown); 1883, *Vandergriff v. Piercy*, 59 *id.* 371 (deed; loss insufficiently shown; last custodian's declarations insufficient; he must be called or accounted for); 1885, *Continental Ins. Co. v. Pruitt*, 65 *id.* 125, 128 (schedule of property; loss sufficiently shown); 1889, *Rnby v. Van Valkenburg*, 72 *id.* 459, 468, 10 S. W. 514 (judgment-record; loss sufficiently shown); 1890, *Mugge v. Adams*, 76 *id.* 448, 450, 13 S. W. 330 (letter; loss not shown); 1895, *Cabell v. Holloway*, 10 Tex. Civ. App. 307, 31 S. W. 201 (search held sufficient); *United States*: 1806, *U. S. v. Lambell*, 1 Cr. C. C. 312 (warrant; loss sufficiently shown); 1806, *U. S. v. Wary*, *ib.* 312 (warrant; loss not sufficiently shown); 1822, *Bonklin v. Massie*, 7 Wheat. 122, 131, 154 (loss of assignment sufficiently shown); 1824, *Riggs v. Tayloe*, 9 *id.* 483, 486 ("If he did not tear it up, then it has become lost or mislaid," held sufficient); 1826, *Riggs v. Tayloe*, 2 Cr. C. C. 687, 689 (contract; loss not sufficiently shown); 1833, *Misor v. Tillotson*, 7 Pet. 99 (land-grant; search sufficiently shown); 1835, *Winn v. Patterson*, 9 *id.* 663, 676 (power of attorney; loss sufficiently shown); 1836, *U. S. v. Lodge*, 4 Cr. C. C. 673 (larceny of bank-notes; that they had been passed away, held sufficient evidence of non-availability); 1865, *Simpson v. Dall*, 3 Wall. 460 (letters; loss not sufficiently shown); 1892, *Scanlan v. Hodges*, 10 U. S. App. 352, 361, 3 C. C. A. 113, 52 Fed. 354 (loss not proved); 1902, *Dupee v. Chicago H. S. Co.*, 54 C. C. A. 426, 117 Fed. 40, 44 (search held sufficient);

Vermont: 1831, *Bliss v. Stevens*, 4 Vt. 88, 92 (search for an execution, held sufficient); 1834, *Braintree v. Battles*, 6 *id.* 395, 399 (search for a charter in the proper place of custody, held sufficient); 1839, *Viles v. Monkton*, 11 *id.* 470, 474 (search for lost note, held insufficient); 1842, *Royalton v. R. & W. T. Co.*, 14 *id.* 311, 323 (contract with a town; search held insufficient); 1861, *Thrall v. Todd*, 34 *id.* 97 (assignment of claim; search held insufficient); 1863, *Rutland & B. R. Co. v. Thrall*, 35 *id.* 536, 547 (newspaper notice; proof of loss of whole edition not necessary; diligent search for a copy, sufficient); *Washington*: 1896, *State v. Erving*, 19 Wash. 435, 53 Pac. 717 (letter; loss sufficiently proved); *Wisconsin*: 1858, *Conkey v. Post*, 7 Wis. 131, 137 (note; loss sufficiently shown); 1880, *Mullenback v. Bats*, 49 *id.* 499, 501, 5 N. W. 942 (letter used at a former trial; loss sufficiently shown).

¹ 1831, *Swift v. Stevens*, 8 Conn. 431, 437; 1825, *Peay v. Picket*, 3 McCord 318, 322.

² See the opinion of Colcock, J., in *Peay v. Picket*, *supra*. That direct testimony to the document's destruction is not needed, is apparently the meaning of Courts declaring that the loss need not be proved with absolute certainty; for example: 1862, *Elwell v. Mersick*, 50 Conn. 275 (a "reasonable presumption," even though by slight evidence); 1827, *Tannton Bank v. Richardson*, 5 Pick. 436, 441 (evidence of "absolute, irrecoverable loss" not necessary; "all due diligence having been used in searching for it" is enough); 1868, *Corbett v. Nutt*, 18 Gratt. 624, 633, 638 (proof beyond possibility of mistake, not required; a moral certainty is sufficient). Compare the cases for lost wills (*post*, § 2106).

³ 1843, *R. v. Hinley*, 1 Cox Cr. 13 (a hamper used for sending goods six months before; destruction here held doubtful); 1845, *Pond v. Lockwood*, 8 Ala. 669, 676 (notes paid off and received by the maker several years before, presumed destroyed); 1782, *Morris v. Vanderen*, 1 Dall. 64 (official list of original purchasers of land from William Penn., received, and production of their deeds not required); 1774,

should be noted that, when the presumption of an unknown lost grant (*post*, § 2522) is appealed to, it does not avail to excuse the party from accounting for a specific deed by proving its loss.⁴

(3) The *hearsay statement* of a custodian or other person who has been applied to in the course of a search may be regarded in two aspects. (a) It may be distinctly offered as evidence that the assertion contained in it — the fact of loss or of search — is true, and is thus obnoxious to the Hearsay rule, and inadmissible;⁵ though one Court has ruled otherwise on the ground that for proof to the judge (*post*, § 2550) the ordinary rules do not apply.⁶ (b) But it may also and better be regarded as merely one of the circumstances entering into the sufficiency of the search, *i. e.* not as testimony to the fact asserted, but as a circumstance tending to show that the searcher has not failed in reasonable diligence in not proceeding further (upon the principles of § 245, *ante*, § 1789, *post*). This view has been explained and recognized with approval in England,⁷ and finds some favor in this country also.⁸

(4) *Testimony by the party himself* stands upon the same rules as other

Hurst v. Dippe, lb. 20, *semble* (same received); 1823, *Kingston v. Lesley*, 10 S. & R. 383, 387 (same; the deeds presumed unavailable); 1840, *Tilghman v. Fisher*, 9 Watts 441, 444 (loss of certain old papers presumed from lapse of time); 1871, *Eddy v. Wilson*, 43 Vt. 362, 375 (notice of sale post-d., more than a year before; loss presumed); Va. Code 1887, § 3377 (where any paper was required to be filed in certain public offices before April 10, 1865, if it cannot be found on search there and probable cause exists for believing it destroyed, two years' exercise of the right or franchise depending on it shall on certain conditions be *prima facie* evidence of the filing of such paper).

⁴ 1845, *Reynolds v. Quattlebunn*, 2 R. 140, 144.

⁵ 1858, *Bratt v. Lee*, 7 U. C. C. P. 280 (testimony to a reported search by the plaintiff and his wife, who declared themselves to the witness to be unable to find, held insufficient); 1880, *Brock v. Cottingham*, 23 Kans. 383, 388 (clerk of Court's statements during search for execution by H. and clerk, excluded; his deposition or testimony should be had); 1825, *Governor v. Barkley*, 4 Hawks 20 (declarations of the living administrator of the deceased possessor of the document, not admitted to show the loss); 1886, *Justice v. Luther*, 94 N. C. 793, 798 (depository's hearsay reply, to the witness searching, that the document was lost, held insufficient); 1844, *Cathcart v. Gibson*, 2 Speer 661 (search and hearsay declarations of last possessor's search, insufficient); 1849, *Dunn v. Choate*, 4 Tex. 14, 18 (hearsay statements of the custodian, not sufficient; he must be called if living).

⁶ 1850, *Higgins v. Watson*, 1 Mich. 428, 432 (hearsay confession of thief of document received, "this being a preliminary inquiry, and the testimony being given to the Court and not to the jury").

⁷ 1845, *Denman*, L. C. J., in *R. v. Kenilworth*, 7 Q. B. 642, 649 (disapproving *R. v. Denlo*, *infra*: "It would, I think, have been quite enough to say

that the evidence of a *bona fide* search was such as might satisfy the Sessions [trial Court]. . . . When the party got a reasonable account which showed that the documents could not be found, why was he to go farther?"; *Williams, J.*: "If you let that [declaration] in, there is quite enough to satisfy a reasonable man that the document is lost. If you do not, the search has been carried as far as, upon the admitted evidence, it can go. . . . It is not necessary to call the person who gives the answer, in order to show why he gave it"; 1858, *R. v. Ilrantonree*, 1 E. & E. 51, 57 (indenture of apprenticeship; the inquiries to and answers by persons likely to have the document, held admissible; *Campbell, L. C. J.*: "Any questions may be put for the purpose of showing that there has been a reasonable and *bona fide* search; though the answers to them may not be evidence in the ultimate question before the Court").

The rulings in England and Ireland, however, are not harmonious: 1815, *R. v. Morton*, 4 M. & S. 48, *semble* (admitted); 1827, *R. v. Denio*, 7 B. & C. 620 (excluded); 1828, *R. v. Stourbridge*, 8 Id. 96 (admitted); 1834, *R. v. Rnwden*, 2 A. & E. 156 (not admissible, except when made by one in possession of the document); 1852, *R. v. Saffron Hill*, 1 E. & B. 93, 97 (whether admissible to show that search in other places was unnecessary, not decided); 1876, *Smith v. Smith*, 10 Ir. R. Eq. 273, 276, 280 (inquiries and replies admitted). Compare the rule for a search for an *attesting witness* (*post*, § 1313).

⁸ 1852, *Harper v. Scott*, 12 Ga. 125, 136 (admitted to lay the foundation for proof of search, the declarant being dead); 1868, *Corbett v. Natt*, 18 Gratt. 624, 633, 635 (inquiry for will and probate at the clerk's office, the clerk at the request of the witness making search and reporting the documents to have been among records burnt; held sufficient; though in case of suspicion the calling of the clerk might have been required).

testimony, except in two respects. (a) When the *disqualification of a party* as witness prevailed (*ante*, § 577), it was often an especial hardship to satisfy the requirements of the present rule, because the party would commonly be the only person able to give information of the loss of his document. Accordingly an exception was established in almost every jurisdiction, by which the *party*, in spite of his disqualifying interest, was allowed to testify to the fact of loss; the exception being based by some Courts on the necessity of the case, by others on a broad principle that upon incidental matters provable to the judge the disqualification did not apply.⁹ With the general removal of parties' disqualifications (*ante*, § 577), this exception ceased to exist as such; though it would on principle still apply for disqualified survivors (*ante*, § 578). (b) It became common, in some jurisdictions, to admit merely the *party's affidavit* for the above purpose; thus establishing an exception not only to the rule of disqualification, but also to the hearsay rule (*post*, § 1709).¹⁰ When, therefore, in many jurisdictions, statutes made a certified copy of a recorded deed admissible to prove the execution and contents of the deed, if the original was unavailable, these statutes usually continued the old practice by providing that the party's affidavit should be admissible to prove the loss (*post*, § 1225). The disqualification of parties was by this time removed, so that they might have testified in person on the stand; and the affidavit-allowance was thus only an exception to the hearsay rule. The questions arising under these statutes (which usually allow the affidavit to prove that the document is either lost or out of the party's control) are considered under the subject of registered deeds (*post*, § 1225). The statutory exception, being in strictness only a survival of an exceptional common-law practice, of course does not authorize the use of a stranger's affidavit (*post*, § 1708).

It was sometimes contended that this affidavit of the party was *indispensable*, and not merely allowable;¹¹ but this misunderstanding of the principle was generally repudiated.¹²

(5) Proof of the loss may also be made by the *opponent's admission*.¹³ It may

⁹ The following cases are only a few illustrating the principle: 1858, Bagley v. Eaton, 10 Cal. 126, 146; 1865, Clark v. Hornbeck, 17 N. J. Eq. 430, 450; 1814, Butler v. Warren, 11 John. 57 (*contra*, but repudiated in the next case); 1819, Jackson v. Frier, 16 id. 193, 195; 1822, Chamberlain v. Gorham, 20 id. 144, 146; 1830, Betts v. Jackson, 6 Wend. 173, 177; 1841, Woodworth v. Barker, 2 Hill 172 (limiting the use); 1847, Vedder v. Wilkins, 5 Den. 64.

¹⁰ See, for example: 1844, Bachelder v. Nutting, 16 N. H. 261, 264; 1852, Neally v. Greenough, 25 id. 325, 329; 1828, Tayloe v. Riggs, 1 Pet. 591, 596; and the cases cited *post*, § 1709.

¹¹ 1791, Blanton v. Miller, 1 Haw. 4 ("because no other can safely swear his want of possession").

¹² 1859, Sinton v. McLoud, 26 Ga. 637, 642; 1844, Foster v. Mackay, 7 Metc. 531, 537 (treated as not invariably requisite; here dispensed with).

the record-plaintiff being a nominal party only and having absconded); 1849, Hale v. Barter, 10 Humph. 92 (affidavit by the party himself is not essential, if other sufficient evidence is given); 1831, Doe v. Wion, 5 Pet. 233, 242 (a rule of Court of December, 1823, required the party's affidavit that the document was lost or destroyed and not in his control, as indispensable in addition to other evidence of loss; held, that if sufficient other evidence of loss existed, the rule of Court requiring additionally the affidavit was improper; Johnson, J., diss.).

The rule regarding the necessity of an affidavit of loss in going to equity for relief is not within the present purview.

¹³ 1895, Pentecost v. State, 107 Ala. 81, 18 So. 146.

For the case of the *opponent's own possession and loss*, and the necessity of giving notice in such a case, see *post*, § 1209. For the *opponent's admission of the contents*, see *post*, § 1255.

also be made by the record of judgment in a statutory proceeding to establish the contents of a lost document.¹⁴

(6) In a *criminal prosecution* for larceny, it is enough to prove the fact of the loss of the document by stealing, in order to proceed to establish its contents without production; it is not necessary to prove first the stealing by the defendant.¹⁵

§ 1197. *Same: Discriminations between Loss and other situations.* (1) The statutory conditions on which a certified copy of a *registered deed* will be admitted include usually other things than loss; and these statutory conditions can best be examined in another place (*post*, § 1225). (2) The *fraudulent suppression* or destruction of a document by the opponent, which puts the proponent in the same position as a loss (with reference to the non-necessity of giving notice) may be considered under the head of detention by the opponent (*post*, §§ 1207, 1209). (3) On a charge of *larceny*, so far as the possession is assumed to be in the defendant, the case is governed by the rules applicable to detention by the opponent (*post*, §§ 1200, 1207). (4) The doctrines of the substantive law of *negotiable instruments*, in regard to the conditions upon which an action or a criminal prosecution may be maintained upon them, are not here involved.¹ (5) Certain statutes providing that lost pleadings or documents of title may be *supplied by affidavit* seem to concern only the providing of a copy for purposes of profert or of adjudication, and not to alter the ordinary rules as to proof of loss.²

§ 1198. *Same: Intentional Destruction by Proponent himself.* If it should appear that the party desiring to prove a document had himself destroyed it, with the object of preventing its production in court, the evidence of its contents, which he might then offer, could properly be regarded as in all likelihood false or misleading (*ante*, § 291). It is with this extreme case in mind that a few Courts have inconsiderately laid down an unconditional rule that the proponent's intentional destruction of the document bars him from evidencing its contents in any other way:

1824, *Ewing, C. J.*, in *Broadwell v. Stiles*, 8 N. J. L. 58, 60: "He who voluntarily, without mistake or accident, destroys primary evidence thereby deprives himself of the production and use of secondary evidence. The best evidence is required; and if a

¹⁴ For the sufficiency of a copy thus established, see *post*, §§ 1660, 1662; for the preference, if any, for such a copy, see *post*, §§ 1273, 1347.

For the use of *recitals in old deeds* as evidence of contents, see *post*, §§ 1573, 2143.

¹⁵ The following ruling is of course absurd: 1864, *R. v. Farr*, 4 F. & F. 336 (burglary, and stealing a ring; a question about the inscription on the ring, not allowed; Counsel: "It is proved to have been stolen, so that we cannot produce it"; Channell, B.: "It is not proved to have been stolen by the prisoner, which indeed is the question to be tried").

¹ See, for example: 1809, *Pierson v. Hutchinson*, 2 Camp. 211 (action on a lost negotiable instrument); 1827, *Hansard v. Robinson*, 7 B. & C. 90 (same); *Daniel, Negotiable Instruments*,

II, §§ 1475-1485, 4th ed.; 1901, *Cross v. People*, 192 Ill. 291, 61 N. E. 400 (forgery of a lost instrument may be prosecuted). In some States there is a rule of pleading requiring a *count to set up a lost deed*: 1900, *Hatcher v. Hatcher*, 127 N. C. 200, 37 S. E. 207 (at least, where the proof is not by certified copy). For the requirement as to *lost wills and records*, see *post*, §§ 1267, 2106.

² S. C., St. 1870, C. C. P. 1882, c. 12, § 419 (if original "pleading or paper" is lost, Court may authorize use of copy); Tenn. St. 1819, c. 27, §§ 1-4, Code 1896, §§ 5694-6 (any instrument lost or wrongfully detained by the opponent "may be supplied" by affidavit; if put in issue, may be proved by "competent evidence of its contents").

party, having such in his power, voluntarily destroys it, the law knows no relaxation for him, whatever may be given to accident or misfortune. . . . To admit of evidence under such circumstances is as repugnant to principle as to deny a party the cross-examination of the witnesses of his adversary."

But it is obvious that there may be many cases of intentional destruction which do not present the above extreme features. The intentional destruction may clearly appear to have been natural and proper, or it may be merely open to the bare suspicion of fraudulent suppression; and in such cases the evidence of its contents should be received, subject to comment on the circumstances.¹ The more liberal view is represented in the following passages:

¹ The cases on both sides are as follows: *Eng.*: 1803, *R. v. Johnson*, 7 East 65, 66, 29 How. St. Tr. 437 (envelopes destroyed by fire, after opening, in the ordinary course of business; contents shown); 1807, *Kensington v. Inglis*, 3 East 373, 378, 288 (similar; expired trading license); *Ala.*: 1892, *Koigera v. Crook*, 97 Ala. 732, 735, 13 So. 106 (throwing away a letter containing opponent's admissions; secondary proof allowed); 1896, *Miller v. State*, 110 Id. 63, 20 So. 392 (bastardy; destruction of a letter from the defendant by the complainant at his request, held not to exclude oral evidence); *Bracken v. State*, 111 Id. 66, 20 So. 636 (same); *Cal.*: 1858, *Bagley v. McMickle*, 9 Cal. 430, 435, 448 (destruction by consent; *semble*, production not necessary on the facts; see quotation *supra*); 1858, *Bagley v. Eaton*, 10 Id. 126, 148 (the motive controls; if done under erroneous impression as to its effect, under circumstances free from suspicion of intended fraud, production not required); *Colo.*: 1875, *Sellar v. Clelland*, 3 Colo. 532, 535, 546 (fraudulent purpose must be negated; here, a destruction by joint act of plaintiff and defendant, held not to exclude evidence of contents); 1883, *Breen v. Richardson*, 6 Id. 605 (self-destroyed articles of partnership, allowed on the facts to be proved); *Conn.*: 1823, *Bank of U. S. v. Sill*, 5 Conn. 106, 111 (cutting a bill and sending the halves separately by mail, one half being lost; production not required); *Ill.*: 1867, *Blake v. Fash*, 44 Ill. 302, 304 (voluntary destruction excludes secondary evidence, unless fraudulent design is disproved); *Ind.*: 1859, *Anderson Bridge Co. v. Applegate*, 13 Ind. 339 (contract burned by promisee by way of cancellation; copy excluded); 1877, *Rudolph v. Lane*, 37 Id. 115, 118 (letter torn up after reading; destruction with apparent fraudulent design bars other evidence, unless the fraud is rebutted); *Ia.*: 1899, *Murphy v. Ollberding*, 107 Ia. 547, 78 N. W. 205 (contract blurred by proponent's children with ink; after making a clean copy, he threw away the original; copy admitted); *Ky.*: 1899, *Shields v. Lewis*, — Ky. —, 49 S. W. 803 (breach of promise of marriage; voluntary destruction by plaintiff of defendant's letters, without fraud; other evidence admissible, in trial Court's discretion); *Mo.*: 1858, *Tobin v. Shaw*, 45 Me. 331, 344, 347 ("if it is satisfactorily shown that the act of destruction was not the result of fraudulent intent," other evidence is admissible; here, of letters from the defendant in an action for breach of promise of marriage, the plaintiff having been advised that they would not be needed by her); *Ms.*: 1896, *Wright v. State*, 88 Md. 436, 41 Atl. 795 (throwing away the wrapper of a butter-package; evidence of contents admitted); *Mass.*: 1862, *Joannes v. Bennett*, 5 A.1. 169, 172 (voluntary destruction excludes other evidence, "in the absence of any proof that the destruction was the result of accident or mistake or of other circumstances rebutting any fraudulent purpose or design"); 1870, *Stone v. Sanborn*, 104 Mass. 319, 325 (approving *Joannes v. Bennett*); *Mich.*: 1862, *Gagnis v. Van Gorder*, 10 Mich. 523 (grantee of an unrecorded deed consenting to destruction; evidence of contents excluded on the present principle); 1884, *People v. Sharp*, 53 Id. 523, 525, 19 N. W. 168 (note not kept, and explanation sufficient; production not required); 1892, *People v. Lange*, 90 Id. 454, 456, 51 N. W. 534 (embezzlement; defendant's employers' books suspiciously disappearing, the prosecution was not allowed to resort to evidence of their contents); 1895, *Shrimpton v. Netsorg*, 104 Id. 325, 62 N. W. 343 (letter thrown, after reading, into the waste-basket; other evidence allowed); 1901, *Davis v. Teachout*, 126 Id. 135, 85 N. W. 475 (contract burned, by all parties' consent, because considered useless; proof of contents allowed); *Minn.*: 1866, *Winona v. Huff*, 11 Minn. 119, 130 (when the document is *prima facie* in the offeror's possession, he must show loss or destruction "without his culpability"); *Mo.*: 1846, *Skinner v. Henderson*, 10 Mo. 205 (burning by mutual consent of an illegal contract; contents provable in action to recover money paid); 1902, *Stephan v. Metzger*, 95 Mo. App. 609, 69 S. W. 625 (copy admitted of a fly-leaf account, first torn into pieces by a child, and then thrown away after the account had been copied from the pieces by the party offering the copy); *Mont.*: 1899, *State v. Welch*, 22 Mont. 92, 55 Pac. 927 (mere destruction of letters according to custom, not sufficient to exclude evidence of contents); *N. J.*: 1824, *Broadwell v. Stiles*, 8 N. J. L. 58 (one who had voluntarily erased and blotted out his name as an indorser was not allowed to show otherwise that the name was forged; see quotation *supra*); 1833, *Vananken v. Hornbeck*, 14 Id. 178, 181 (voluntary burning of the note sued on, held to exclude secondary evidence, as an "intentional destruction"); 1863, *Wyckoff v. Wyckoff*, 16

1824, *Todd, J.*, in *Riggs v. Taylor*, 9 Wheat. 493, 497: "It will be admitted that where a writing has been voluntarily destroyed with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its non-production, in such cases the secondary proof ought not to be received. But in cases where the destruction or loss, although voluntary, happens through mistake or accident, the party cannot be charged with default. In this case, the affiant states that if he tore up the paper, it was from a belief that the statements upon which the contract had been made were correct, and that he would have no further use for the paper; in this he was mistaken. If a party should receive the amount of a promissory note in bills and destroy the note, and it was presently discovered that the bills were forgeries, can it be said that the voluntary destruction of the note would prevent the introduction of evidence to prove the contents thereof? Or, if a party should destroy one paper believing it to be a different one, will this deprive him of his rights growing out of the destroyed paper? We think not."

1858, *Field, J.*, in *Bagley v. McMickle*, 9 Cal. 430, 446: "The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible is the prevention of fraud; for if a party is in possession of this evidence and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes which its production would expose and defeat. When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and all secondary or inferior evidence is rejected. If, however, the

N. J. Eq. 401 ("If the instrument was voluntarily destroyed by the party, secondary evidence of its contents will not be admitted, until it be shown that it was done under a mistake, and until every inference of a fraudulent design is repelled"; admitting secondary evidence of a will destroyed by the residuary legatee after the testatrix' death after legal advice that it was invalid and under the honest belief that it was so); 1865, *Clark v. Hornbeck*, 17 id. 430, 451 ("voluntary destruction . . . would excise all evidence of its contents"; said of a note); N. Y.: 1862, *Livingston v. Rogers*, 2 Johns. Cas. 488, 1 Cal. Cas. 27 (a letter left with the attorney, who either carelessly lost it or else destroyed it thinking it needless; Lansing, Ch., was for exclusion on the ground of at least "inexcusable neglect"; the majority were for admission, there being no "reasonable grounds of suspicion of a suppression of the instrument" or "of mala fides in the plaintiff"); 1827, *Jackson v. Lamb*, 7 Cow. 431, 434 (papers hurried during the war of the Revolution and thus probably lost or destroyed; contents admissible); 1834, *Blade v. Noland*, 12 Wend. 173 (voluntary destruction of a note, unexplained by the proponent, excites secondary evidence); 1837, *Clute v. Small*, 17 Wend. 238, 243 (approving the preceding); 1864, *Enders v. Sterobergh*, 40 N. Y. (Keyes) 264, 269 ("If the paper be purposely destroyed by a party having an interest in its contents, it cannot be proved"); 1881, *Steele v. Lord*, 70 id. 280 (destruction by the plaintiff, in good faith and in the course of business, of drafts on which the advances sued for had been made; proof of contents allowed); 1882, *Mason v. Lihbey*, 90 id. 685 (a plaintiff's husband had destroyed old letters from the defendant, in order to reduce the bulk of house-

hold effects when moving to another city; evidence of contents admitted if "his destruction was not to produce a wrong or injury to the opposite party or to create an excuse for its non-production"; the trial Court's discretion to control in applying this principle); N. C.: 1854, *McAulay v. Earhart*, 1 Jones L. 503 (a note paid off and then destroyed; secondary evidence allowed); 1873, *Pollock v. Wilcox*, 68 N. C. 48, 50 (same); Oa.: 1834, *Woods v. Bindall*, *Wright* 507 (destruction of surrendered bond by plaintiff's predecessor; contents allowed to be proved); Pa.: 1841, *Shorts v. Unaugst*, 3 W. & S. 45, 55 (copy admitted, the original having been burned by one who was a nominal plaintiff but really adverse); S. C.: 1892, *State v. Head*, 38 S. C. 258, 260, 16 S. E. 892 (witness read to L. a letter addressed to L., and L. then took it and burnt it; production not required); Tenn.: 1871, *Anderson v. Maberry*, 2 Heisk. 653, 655 (destruction by the offeror's wife of a paper left behind by him in his house; production not required, there being no suspicion of suppression); U. S.: 1824, *Riggs v. Taylor*, 9 Wheat. 483, 487 (voluntary destruction, supposing the paper to be no longer needed; contents allowed; see quotation *supra*); 1824, *Reiner v. Bank*, ib. 581, 597 ("If the circumstances will justify a well-grounded belief that the original paper is kept back by design, no secondary evidence ought to be admitted"); 1832, *T. S. v. Doebler*, 1 Baldw. 519, 520 (letter sent by defendant to accomplice, and probably destroyed by him as a precaution; evidence of the contents, apparently from the accomplice, admitted).

For the inference which may be drawn from a fraudulent motive in destroying the original, see *ante*, § 291.

destruction was made upon an erroneous impression of its effect, under circumstances free from the suspicion of intended fraud, the secondary evidence is admissible. The cause or motive of the destruction is, then, the controlling fact which must determine the admissibility of this evidence in such cases."

The view now generally accepted is that (1) a destruction in the ordinary course of business, and, of course, a destruction by mistake, is sufficient to allow the contents to be shown as in other cases of loss, and that (2) a destruction otherwise made will equally suffice, provided the proponent first removes, to the satisfaction of the judge, any reasonable suspicion of fraud. The precedents, however, are not harmonious.

The question whether a title obtained by deed is revealed in the grantor, by the destruction of the deed with joint consent of grantor and grantee, has sometimes, though improperly, been solved by invoking the present principle;² but the question is in truth one of the substantive law of property-transfer.³

§ 1199. (2) *Detention by Opponent; in General.* This excuse for non-production is *historically* one of the earliest recognized; yet there was a time when it was not conceded.¹ Only in the 1700s was the exemption, by repeated rulings, put beyond doubt.² To-day it is constantly enforced;³ and it applies equally in criminal cases and in civil cases.⁴

¹ The following cases illustrate the argument: 1655, *Speer v. Speer*, 7 Ind. 178 ("The voluntary surrender and destruction of an unrecorded deed may have the effect of divesting the title of the grantee by estopping him from proving the contents"); 1657, *Thompson v. Thompson*, 9 Ill. 323, 328 (delivery to grantor by grantee with intent to surrender title; "he cannot be permitted to allege that a deed is lost and thereupon give parol evidence of its contents, when he has surrendered it to be cancelled; the deed is not lost in such a case"; rule held applicable only to parties to the deed).

² For the authorities, see *Jones, Real Property*, II, § 1259.

³ 1631, *Earl of Suffolk v. Greenville*, 3 Rep. Ch. 89 (deed alleged to be concealed by the defendant; "the Court held it very dangerous to admit the contents and sufficiencies of deeds to be proved by testimony of witnesses"); 1677, *Anon.*, 1 Mod. 266 (the defendant "had gotten the deed into his hands," in an action on a grant of advowson; the Court: "When the law requires that the deed be produced, you have your remedy for the deed at law; we cannot alter the law, nor ought to grant an imparlance [*i. e.* stay]").

⁴ 1633, *Bradford's Case*, Clayt. 15 (copy allowable where defendant "himself hath the deed . . . and will not produce it"); 1662, *Negus v. Reynal*, 1 Keb. 12 (a deed taken away by the defendant; a lease "embezzled" by the plaintiff's lessor; neither required to be produced); 1670, *Moreton v. Horton*, 2 Keb. 483 (a lease "burnt and taken out of the plaintiff's trunk by the defendant," proved orally); 1683, *Carrer v. Pinkney*, 3 Lev. 82 (debt for fees due from one owning a rectory by indenture

from the Dean of L.; held, the indenture need not be shown, "which the defendant *penes se habet*"); 1696, *Lynch v. Clerke*, 3 Balk. 154, Holt, C. J. ("in the possession of the plaintiff [opponent] himself"; copy admissible); 1711, *Sir E. Seymour's case*, 10 Mod. 8 (deed possessed by opponent, provable even with oral testimony, "by a man that had no copy"); 1716, *Young v. Holmes*, 1 Stra. 70 (rule recognized); 1754, *Saltern v. Melhuish*, Amb. 247 (rule recognized); 1773, *Attorney-General v. Le Merchant*, 2 T. R. 201, note (copies of letters of the defendant had been taken while in the hands of the bankruptcy assignees; on notice and failure to produce, on a charge of unlawful importation of tea, the copies were admitted); 1778, *R. v. Watson*, 2 T. R. 199, per Buller, J. (said generally).

⁵ The following cases merely recognize the general principle without ruling upon any of the details; the Codes which recognize it are cited in the ensuing sections: 1836, *Calvert v. Flower*, 7 C. & P. 386; 1795, *Sedgwick v. Waterman*, 2 Root 434; 1869, *Gaff v. Invest. Co.*, 77 Ia. 736, 738, 42 N. W. 550; 830, *Thayer v. Ins. Co.*, 10 Pick. 326, 329; 1852, *Almy v. Reed*, 10 Cnsh. 421, 425; 1884, *Van Ness v. Hadsell*, 54 Mich. 560, 563, 20 N. W. 585; 1886, *Pangborn v. Ins. Co.*, 62 id. 638, 641, 29 N. W. 475 (on cross-examination); 1857, *Cooper v. Granberry*, 33 Miss. 117, 122; 1856, *Cross v. Bell*, 34 N. H. 82, 88; 1814, *Jackson v. Woolsey*, 11 John. 446; 1831, *Life & Fire Ins. Co. v. Ins. Co.*, 7 Wend. 31, 34; 1900, *Strawbridge v. Clamond Tel. Co.*, 195 Pa. 118, 45 Atl. 677.

⁶ 1867, *R. v. Elworthy*, 10 Cox Cr. 579, 582, 583; and see numerous other instances in the ensuing notes.

The *reason* for the excuse is clear; if the opponent detains the document, then it is not available for the proponent, and as the fundamental notion of the general rule is that production is not required where it is not feasible, the rule here falls away and the non-production is excused:

1773, *Buller, J.*, in *Attorney-General v. Le Merchant*, 2 T. R. 201, note: "It was likewise said, in support of the motion, that the reason why copies are permitted to be evidence in common cases is because the party who has them in his custody, and does not produce them, is in some fault for not producing them; it is considered as a misbehavior in him in not producing them, and therefore in criminal cases a man who does not produce them is in no fault at all, and for that reason a copy is not admitted. But I do not take that to be the rule; it is not founded upon any misbehavior of the party, or considering him in fault; but the rule is this: the copies are admitted, when the originals are in the adversary's hands, for the same reason as when the originals are lost by accident; the reason is because the party has not the originals to produce."

It is clear that this notion of *detention by the opponent*, as an excuse for non-production, indicates three essential elements: (a) *possession*, or more broadly, control, by the opponent; (b) *demand*, or notice, made to him by the proponent, signifying that the document will be needed; and (c) *failure*, or refusal, by the opponent to *produce* them in court. Only when these three circumstances coexist can it be said that the document is unavailable because the opponent detains it. The significance of this analysis is shown in the detailed rules.

§ 1200. **Same: (a) Opponent's Possession; What Constitutes Possession.** This element of possession, or control, is not to be tested by any of the technical definitions of possession applicable in other branches of the law. The question here is whether the proponent is unable to produce the document because the opponent has practically the control of it. It is enough for this purpose if the opponent has the control, whether technically named "possession" or not:

1833, *Littledale, J.*, in *Parry v. May*, 1 Moo. & Rob. 280: "The instrument need not be in the actual possession of the party; it is enough if it is in his power; which it would be if in the hands of a party in whom it would be wrongful not to give up possession to him."

(1) It follows that the document need not be actually in the *personal custody* of the opponent himself; it is enough if it be held by a third person on the opponent's behalf and subject to the opponent's demand.¹ The

¹ The precedents cover various situations, and no more detailed rule can be or ought to be laid down: *Eng.*: 1816, *Baldney v. Ritchie*, 1 Stark. 338 (an order of delivery sent to the captain of the defendant's vessel by the defendant; held the possession of the defendant); 1824, *Partridge v. Coates*, Ry. & Mo. 133 (agent's possession sufficient; banker held a customer's agent in holding a check); 1824, *Sinclair v. Stevenson*, 1 C. & P. 582, 585 (agent's possession is the principal's; here the opponent had given it to a third person and did not make it appear that he could not get it back); 1827, *Burton v.*

Payne, 2 id. 520 (a check with the defendant's bankers; no notice necessary to the latter; *Bayley, J.*: "The bankers are your [the defendant's] agents; you would have a right to go to the bankers and demand the check of them"); 1833, *Parry v. May*, 1 Moo. & Rob. 279 (a document in the hands of a common agent of the defendant and a third person, held not in the defendant's control; "he must have such a right to it as would entitle him not merely to inspect but to retain"); 1845, *Robb v. Starkey*, 2 C. & K. 143 (agent's possession sufficient, even though there is merely "evidence to go to the

question whether notice to such a third person to produce is sufficient (*post*, § 1208) is a different one.³ (2) It is immaterial that the document is *out of the jurisdiction*, if it is held there on behalf of the opponent;⁴ the only question can be as to the sufficiency of time allowed by the notice to produce (*post*, § 1208).⁴ (3) A *past recent possession*, not shown to have ceased, will ordinarily be assumed to continue;⁵ a *transfer of possession* by the opponent to a third person after notice received will not take away the proponent's excuse for non-production;⁶ nor, in fairness, should a transfer shortly before notice served, if the opponent did not duly advise the proponent, at the time of notice, that he had transferred it.⁷

§ 1201. **Same: Mode of Proving Possession; Documents sent by Mail.** Difficulties of principle sometimes arise with reference to the evidence offered to prove the opponent's possession so as to take advantage of the present excuse. (1) In the first place, the opponent's possession *must be somehow shown* by the party offering a copy;¹ and the sufficiency of the proof is of course a preliminary question to be determined by the judge.² (2) In the next place, it often happens that the only evidence of such possession is the *mailing of the document*, under cover duly stamped and addressed, to the opponent; this is on general principles (*ante*, § 95) to be regarded as sufficient evidence of its receipt by the addressee, and therefore

jury" of the defendant's agent's custody); 1860, *Irwin v. Lever*, 2 F. & F. 296 (Pollock, C. B.: "The possession of the plaintiff's attorney is the possession of the plaintiff; . . . though they [*i. e.* agents] might perhaps be subpoenaed, it is not necessary to subpoena them; when the principal is a party to the suit, it is sufficient to give the party notice"; here the document was in the hands of an attorney in another suit, different from the one acting in the present suit; notice to the principal held sufficient); 1860, *Blackburn, J.*, in *Wright v. Bunyard*, 2 F. & F. 193, 196 (opponent's banker's possession, held not sufficient); 1860, *Pollock, C. B.*, in *Irwin v. Lever*, *ib.* 296 (opponent's banker's possession sufficient); 1901, *Harloe v. Lambie*, 132 Cal. 133, 64 Pac. 88 (possession of the attorney sufficient); 1894, *Mann v. Aukam*, 4 D. C. App. 51, 55 (possession by a co-defendant, subject to defendant's call, held the possession of defendant); 1782, *Morris v. Vanderou*, 1 Dall. 64, 65 (that deeds were detained by the opponent's lessor under whom he claimed, sufficient); 1832, *U. S. v. Doehler*, 1 Baldw. 519, 522 (forgery; letter sent by defendant to accomplice, asking for more of the forged notes, held to be constructively in defendant's possession).

³ Here the question is whether the opponent could control the document, irrespective of the time required to obtain it, and whether under any circumstances the proponent by giving notice can excuse himself; there the question is whether notice to the agent alone suffices; *i. e.* whether the third person had a duty to communicate it and time to surrender, or whether notice to the opponent alone allows him time to obtain the document.

⁴ 1874, *Gimbel v. Hafford*, 46 Ind. 125, 129

(though out of the State, yet it may be nevertheless within the party's own control).

⁴ For the question whether notice is necessary (here the question is merely whether it is sufficient) to an opponent out of the jurisdiction, see *post*, § 1213.

⁵ 1829, *R. v. Hunter*, 4 C. & P. 128 (former possession presumptively held to continue).

⁶ 1819, *Knighr v. Martin*, Gow 103.

⁷ *Contra*: 1860, *Wright v. Bunyard*, 2 F. & F. 193, 194 (the defendant had transferred it before notice served; copy not allowed, even though the proponent did not know, until the defendant so testified, what had become of it).

¹ The following citations include various instances of proof deemed sufficient on the facts: 1834, *Whitford v. Tutin*, 10 Bing. 395; 1895, *Loeb v. Huddleston*, 105 Ala. 257, 16 So. 714; 1830, *Hughes v. Easten*, 4 J. J. Marsh. 572; 1874, *Sun Ins. Co. v. Earle*, 29 Mich. 406, 411; 1886, *Gage v. Meyers*, 59 Mich. 300, 306, 26 N. W. 522 (mere proof of writing a letter to opponent, the latter denying its receipt, insufficient); 1860, *Deanoy v. McDonuld*, 4 Minn. 515, 518 (documents sufficiently traced to defendant's possession); 1867, *Thayer v. Barney*, 12 id. 502, 512 (same); 1893, *Lovejoy v. Howe*, 55 Minn. 353, 356, 57 N. W. 57 (possession traced to opponent on the facts); 1819, *Wills v. M'Dole*, 5 N. J. L. 501 (that a document was "believed" to be in the possession of the defendant's agent, held insufficient); 1825, *Vasse v. Mifflin*, 4 Wash. C. C. 519 (opponent denied receipt of letter; sending not shown; copy excluded).

² 1841, *Harvey v. Mitchell*, 2 Moo. & Rob. 366; *post*, § 2550.

ought to suffice as evidence of his possession in order to excuse the proponent's non-production after notice to the opponent.³ But this question must be carefully distinguished from another one; the question here is whether it is *sufficient* for the proponent, in excuse, to show this and give notice, as entitling him then to prove the contents; but the question may also be raised whether it is even *necessary* for him to give notice, *i. e.* whether he may not treat it as really a case of loss, and thus prove the contents without having given notice; this involves another consideration (*post*, § 1203).

(3) Whether an *attorney* may be asked as to his possession of a client's document involves the question of privilege (*post*, § 2309).

§ 1202. *Same*: (b) **Notice to Produce: General Principle.** The reason for the simple rule requiring notice has at times been the subject of some singular misunderstandings and fantastic inventions. (1) It has been said, for example, that the opponent must be notified so that the proponent may not impose a false copy upon the Court.¹ The answer to this is, first, that giving notice does not remove this danger, for if the opponent does not produce the original, the proponent's copy may still be false, and, secondly, that the argument would be equally sound for a document in a third person's hands, for which concededly no notice need be given to the opponent. (2) It has also been said that the notice must be given in order to prevent *surprise* on the opponent's part;² the answer to this is, first, that in general no party is obliged to guard against surprising his opponent by warning him of intended evidence (*post*, § 1845); secondly, that if here the purpose were to give the opponent time to discover evidence impeaching or confirming the document, the notice should allow time for such an investigation; yet the law is clear that only time enough to produce the document need be

³ *Accord*: 1899, *Shields v. Lewis*, — Ky. —, 49 S. W. 803 (letter mailed to opponent; evidence of contents receivable); 1837, *Dana v. Kemble*, 19 Pick. 112, 114 (letter left at a hotel, where the usage was to distribute regularly letters so sent; held sufficient; the question is "whether it is sufficiently proved that the letter or document has come to the hands and is in the possession and power of the opposite party"); 1875, *Augur S. A. & G. Co. v. Whittier*, 117 Mass. 451, 453, 455 (letter mailed to opponent, and notice to produce; denial by him of the letter's receipt; a copy admitted); 1879, *Dix v. Atkins*, 128 id. 43 (letter delivered to opponent's clerk, but receipt denied by opponent; held sufficient evidence of possession); 1895, *Sugar Pine D. & L. Co. v. Garrett*, 28 Or. 168, 42 Pac. 129 (letter properly mailed; sufficient on the facts); 1883, *Rosenthal v. Walker*, 111 U. S. 165, 193, 4 Sup. 382 (letters mailed, but said by addressee not to have been received; copies allowed). *Contra*: 1874, *Illinois L. & L. Co. v. Bonner*, 75 Ill. 315 (will sent to complainant by mail; required to be otherwise accounted for); 1851, *Choteau v. Railit*, 20 Oh. 132 (mere deposit in post-office addressed to opponent, not enough).

The only argument in favor of these adverse rulings seems to be that the opponent's *denial of receipt* overcomes the inference resting on the fact of mailing. But if so, as the proponent has shown the mailing and the opponent denies the arrival, the dilemma can be solved only by assuming that the document has miscarried, and the case becomes one of loss, and therefore no notice at all is necessary; see *post*, § 1203.

¹ 1803, *Ellenborough, L. C. J.*, in *Surtees v. Hubbard*, 4 Esp. 203 ("the reason of giving notice . . . was to check a person from giving in evidence what was a false copy"); 1857, *Merrick, C. J.*, in *Williams v. Benton*, 12 La. An. 91 ("The reason of the rule is that possibly the instrument, when produced, will be less favorable to the plaintiffs than the parol proof which they may obtain").

² 1811, *Le Blanc, J.*, in *How v. Hall*, 14 East 274, 276 ("We see the good sense of the rule which requires previous notice to be given . . . that he may not be taken by surprise"); 1831, *Curia*, in *Bank v. Brown*, *Dudley* 62, 64 ("The rule is . . . to prevent his being taken by surprise, in cases where it is uncertain whether such evidence will be used by the adverse party").

allowed; and, thirdly, that if in fact he is not surprised, it is in law still no excuse for not giving notice.

(3) The true reason is that which is naturally deducible from the opponent's situation. He is required to produce the document if he can; he says that he cannot, and shows that he cannot because the opponent has it and will not bring it in; but this essential proposition, that the opponent will not bring it in, can be supported only by showing that the opponent has been requested to do so and has failed to comply with the request. If we translate "notice" by "demand," we shall immediately appreciate the significance of the notice as a requirement. It is a demand for future production by the opponent; and this notice or demand is necessary, in Baron Parke's words,³ "merely to exclude the argument that the party has not taken all reasonable means to procure the original; which he must do before he can be permitted to make use of secondary evidence." This reason is clearly the only correct one, and is not only consistent with the details of the rule, but has frequently been pointed out by the Courts:

1808, *Tughman, C. J.*, in *Com. v. Messinger*, 1 Binn. 273, 274: "Notice must be served on him or his attorney to produce it, because otherwise it cannot appear that the prosecutor might not have had the original if he had chosen to call for it."

1821, *Porter, J.*, in *Abat v. Riou*, 9 Mart. La. 465, 467: "The elementary principle, which requires that the best evidence the nature of the case permits of shall be produced, . . . refuses to a party permission to give secondary evidence of a written document on the ground of its being in possession of his adversary, until he has shown that by giving notice to that adversary to produce it, he has used every exertion in his power that the best evidence might be had."⁴

The cases arising under this requirement involve two sets of questions: the necessity of the notice; and the procedure of giving notice. Under the first head may be considered, in order, cases in which the rule of notice is not applicable; cases in which the rule is satisfied; cases in which, by exception, notice is dispensed with.

§ 1203. **Same: Rule of Notice not Applicable; Documents Lost, or Sent by Mail.** (a) The rule requiring notice to the opponent proceeds on the assumption that the opponent has possession of the document, the object being to show a demand and refusal to produce. Hence, the mere giving of notice or demand, without showing that the opponent had the document demanded, is of no avail.¹

¹ In *Dwyer v. Collins*, quoted more fully *post*, § 1204.

² The following list contains sundry cases merely applying the rule without illustrating any of its details: *Eng.*: 1797, *Molton v. Harris*, 2 Esp. 549; 1835, *Littledale, J.*, in *Doe v. Morris*, 3 A. & E. 46, 50 ("When a document is shown to have been in the possession of a defendant, the plaintiff is not at liberty to talk of it till he has given notice to produce it"); *U. S.*: 1893, *Home Prot. Co. v. Whidden*, 103 Ala. 203; 1896, *Smith v. Holbrook*, 99 Ga. 256, 25 S. E. 627; 1855, *Smith v. Reed*, 7 Ind. 242; 1858,

Mumford v. Thomas, 10 id. 167, 169; 1897, *Perry v. Archard*, 1 I. T. 487, 42 S. W. 421; 1859, *State v. Mayberry*, 48 Me. 218, 239 (Court Rule 27 merely affirms the existing law of evidence); 1820, *Kennedy v. Fowke*, 5 H. & J. 63; 1861, *Morrison v. Welty*, 18 Md. 169, 174; 1871, *Board v. Moore*, 17 Minn. 412, 424; 1877, *Birdsall v. Carter*, 5 Nebr. 517; 1890, *Watson v. Roode*, 30 id. 264, 273, 46 N. W. 491; 1858, *Farnsworth v. Sharp*, 5 Sneed 615; 1840, *U. S. v. Winchester*, 2 McLean 135, 138.

³ 1819, *Knight v. Martin*, Gow 103; 1857, *Bell v. Chandler*, 23 Ga. 356, 359 (execution,

(b) Conversely, the requirement of notice does not apply to the proponent unless he is proceeding on the theory that the opponent has possession; for example, if he is accounting for the document as *lost* or *destroyed*, and not as in possession of the opponent, notice is unnecessary.² It follows that where the document can be shown to have been lost or destroyed while in the opponent's hands,³ or is *admitted by the opponent* to have been destroyed or lost, even out of his own possession,⁴ no notice is necessary: for it is no longer a case of opponent's possession, but of loss. Furthermore, where by the proponent's evidence the document is traced to the opponent's hands — as by the presumption from *mailing* — and the opponent denies the receipt of it, then, even taking the opponent's testimony at its highest value, the whereabouts of the document becomes an unexplainable mystery, and the case is virtually one of loss; so that the proponent should be allowed to prove the contents without having given notice; while, if we take the opponent's testimony as false and assume that he has in truth received the document, his denial is equivalent to an express refusal to produce, which equally puts the plaintiff in the position of being unable to obtain the document (*post*, § 1207), so that notice is unnecessary.⁵

§ 1204. **Same: Rule of Notice Satisfied; (1) Document present in Court.** Where the document is at hand in the court-room, in the opponent's possession, an instant demand is sufficient, and no previous notice, *i. e.* before the

presumably on file); 1823, *Den v. M'Allister*, 7 N. J. L. 46, 55.

Compare the cases cited *ante*, § 1201, requiring possession to be shown.

² 1816, *Teil v. Roberts*, 3 Hayw. 138; 1840, *McCreary v. Hood*, 3 Blackf. 316; 1841, *Linsee v. State*, ib. 601, 603.

For the case of *fraudulent suppression* by the opponent, see *post*, § 1207.

³ *Contra*: 1835, *Doe v. Morris*, 3 A. & E. 46 (notice necessary, even though the plaintiff claims that it can be shown to have been since destroyed).

⁴ 1861, *Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273 (admission of opponent's agent, the custodian, sufficient to prove loss); 1903, *Safe Deposit & T. Co. v. Turner*, — Md. —, 55 Atl. 1023; 1890, *Barinby v. Plummer*, 29 Nebr. 64, 68, 45 N. W. 277. *Contra*: 1873, *Olive v. Adams*, 50 Ala. 373, 375 (notice required, even where the opponent in litigation ten months before had admitted that his bond for title was lost or destroyed); 1885, *Burlington Lumber Co. v. W. C. & M. Co.*, 66 Ia. 292, 23 N. W. 674 (opponent's admission of the loss, etc., of a document, not sufficient to dispense; the opinion erroneously supposes that the reason of the rule aims at allowing the opponent to obtain evidence as to contents or to disprove the existence of the paper, and not merely at giving time for search). But the following case seems to go too far: 1882, *Hope's Appeal*, 48 Mich. 518, 12 N. W. 682 (opponent's denial of existence of document relieves from necessity of production; here, a second will said to have revoked a first, but denied by opponent to exist).

⁵ This situation has given some trouble to the Courts in its solution; but the majority of rulings take the above view; 1884, *Littleton v. Clayton*, 77 Ala. 571, 575 (following *Roberts v. Spencer*, *infra*); 1903, *Bickley v. Bickley*, 136 id. 548, 34 So. 946 (letters said to have been received by the opponent, but their receipt denied by her — no notice required); 1869, *Jones v. Jones*, 38 Cal. 584, 586 (paper presumed in defendant's possession; after notice, defendant disclaimed all knowledge of it; copy allowed); 1877, *Carr v. Smith*, 58 Ga. 361 (where the opponent denies the alleged possession or alleges loss, and thus the case is in effect one of loss for the opponent, no notice is necessary); 1877, *Roberts v. Spencer*, 123 Mass. 397, 399 (document mailed to opponent, but said by him not to have been received; no notice necessary); 1894, *Dunbar v. U. S.*, 156 U. S. 185, 194, 15 Sup. 325 (letters said to be in defendant's possession; defendant denied possession; *semble*, no notice needed); 1901, *Scott v. Bailey*, 73 Vt. 49, 50 Atl. 557. *Contra*: 1879, *Dix v. Atkins*, 128 Mass. 43 (letter delivered to opponent's clerk, but receipt denied by opponent; notice said to be necessary); 1878, *Ferguson v. Henningway*, 38 Mich. 159 (letter to opponent; opponent's failure to recollect receipt of it, no reason for dispensing with notice); 1898, *Clary v. O'Shea*, 72 Minn. 105, 75 N. W. 115 (plaintiff alleged a lease to the defendant, in the latter's possession; defendant denied the existence of such a lease; notice held necessary).

Compare the different but related question in § 1201, *ante*.

trial, is necessary. A contrary view could rest only on some erroneous idea of the reason for requiring notice, — as, for example, that it is to allow the opponent to search for evidence; but as the only reason for it is to make clear that the proponent has demanded and failed to obtain the document and has thus done all that he can to obtain it (*ante*, § 1202), a notice or demand made on the spot, for a document at the moment in court, is here equally satisfactory:

1852, *Parke, B.*, in *Dwyer v. Collins*, 7 Exch. 639: "The next question is whether, the bill being admitted to be in court, parol evidence was admissible on its non-production, or whether a previous notice to produce was necessary. On principle, the answer must depend on the reason why notice to produce is required. If it be to give his opponent notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to explain or confirm it, then no doubt a notice at the trial, though the document be in court, is too late. But if it be merely to enable the party to have the document in court, to produce it if he likes, and if he does not, to enable the opponent to give parol evidence, — if it be merely to exclude the argument that the opponent has not taken all reasonable means to procure the original (which he must do before he can be permitted to make use of secondary evidence), then the demand of production at the trial is sufficient. . . . If this [the former] be the true reason, the measure of the reasonable length of notice would not be the time necessary to procure the document — a comparatively simple inquiry —, but the time necessary to procure evidence to explain or support it, — a very complicated one, depending on the nature of the plaintiff's case and the document itself and its bearing on the cause; and in practice such matters have never been inquired into, but only the time with reference to the custody of the document and the residence and convenience of the party to whom notice has been given, and the like. We think the plaintiff's alleged principle is not the true one on which notice to produce is required, but that it is merely to give a sufficient opportunity to the opposite party to produce it and thereby secure if he pleases the best evidence of the contents; and a request to produce immediately is quite sufficient for that purpose, if it be in court. . . . It would be some scandal to the administration of the law if the plaintiff's objection had prevailed."

1829, *Mills, J.*, in *Dana v. Boyd*, 2 J. J. Marsh. 587, 592: "The design of the notice is that the party may be apprized of the necessity of bringing it in. If it is already there, demand of its production is sufficient notice."¹

¹ In the following citations, the term "not necessary" means that notice before trial is unnecessary and that notice at the trial suffices: *England* (here the rule was not settled until the case of *Dwyer v. Collins*, above quoted); 1769, *Roe v. Harvey*, 4 Burr. 2484, 2487 (the only question decided dealt with the presumption from non-production; on the present question the opinions are obscure); 1816, *Doe v. Grey*, 1 Stark. 283 (notice required); 1832, *Cook v. Hearn*, 1 Moo. & Rob. 201, before three Judges (notice in court insufficient, though presumably the document was in court); 1834, *Bate v. Kinsey*, 1 Cr. M. & R. 38, 43 (the plaintiff's attorney had the deed in court, but claimed the attorney's privilege; *Gurney, B.*: "The fact of the instrument being in court makes no difference with regard to the necessity of a notice to produce"); 1842, *Parke, B.*, in *Lloyd v. Mostyn*, 2 Dowl. Pr. n. s. 476, 481 (left undecided); 1852, *Dwyer v. Collins*, 7 Exch. 639 (plea of gaining to an action on a bill of exchange; the

bill being in court in the plaintiff's hands, the defendant was not required to give notice; quoted *supra*); *United States*; 1847, *Brown v. Isbell*, 11 Ala. 1009, 1022 (notice not necessary, "perhaps"); 1884, *Littleton v. Clayton*, 77 id. 571, 573 (not necessary); 1888, *Crawford v. Hodge*, 81 Ga. 728, 730, 8 S. E. 208, *semble* (not necessary); 1846, *Ferguson v. Miles*, 8 Ill. 358, 364 (not necessary); 1884, *Bell v. R. Co.*, 64 Ia. 321, 322, 20 N. W. 456 (paper delivered at trial by opponent without notice; notice not necessary for proving missing portion); 1826, *Lamb v. Moberly*, 3 T. B. Mour. 179 (not necessary); 1829, *Dana v. Boyd*, 2 J. J. Marsh. 587, 592 (not necessary); 1857, *McGregor v. Whit*, 10 Gray 72, 73, 75, *semble* (not necessary); 1892, *Hanselman v. Doyle*, 90 Mich. 142, 144, 51 N. W. 195 (discretion of trial Court); 1867, *Howell v. Hnyck*, 2 Abb. App. 423 (action to foreclose a mortgage; plea, payment to the plaintiff's assignor; to prove the indorsements of payment on the mortgage, no notice was necessary, the

§ 1205. **Same: Rule of Notice Satisfied; (2) Implied Notice in Pleadings; New Trial; Trover, Forgery, etc.** It is clear that the proponent's notification of his need for a specific document may be made otherwise than by an express writing formally calling upon the opponent to produce. Where by necessary implication the opponent has become informed to that effect, there is a sufficient notification, such that the opponent's failure to produce will place the proponent at liberty to prove the contents otherwise.

The chief instance of such a notice by necessary implication occurs where by the *pleadings* of the proponent the cause of action makes it clear that he will need to prove, as a material part of his case, the contents of a specific document in the opponent's possession:

1811, *LeBlanc, J.*, in *How v. Hall*, 14 East 274, 277: "Where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice."

The principle is universally accepted; and a variety of cases — some of them more or less open to difference of opinion — illustrate its application.¹

papers being presumed to be in court in the plaintiff's possession); 1851, *Choteau v. Raitt*, 20 Oh. 132 (notice at trial "might be said to be reasonable"); 1845, *Reynolds v. Quattlehorn*, 2 Rich. 140, 144 (not necessary); 1892, *Bickley v. Bank*, 39 S. C. 281, 293, 17 S. E. 977 (not necessary); 1898, *Haupton v. Ray*, 52 id. 74, 29 S. E. 537 (not necessary); 1827, *Rhoades v. Selin*, 4 Wash. C. C. 715, 718 (not necessary); 1861, *Barker v. Barker*, 14 Wis. 131, 150 (not necessary); 1863, *Barton v. Kaue*, 17 id. 37, 45, *semble* (same).

¹ *England*: 1800, *Anderson v. May*, 2 B. & P. 237 (action by an attorney for services rendered; his bill had already been delivered to the defendant, though not by way of notice of the action, but in the ordinary way of a demand; no notice required); 1807, *Jolley v. Taylor*, 1 Camp. 143 (assumpsit upon a promise to carry three promissory notes; no notice required); 1817, *Wood v. Strickland*, 2 Meriv. 461 (notice not necessary for a Chancery hearing, where through the prior publication of the depositions the opponent knew that the document would be needed); 1827, *Colling v. Treweek*, 6 B. & C. 394, 398 ("where from the nature of the suit, the opposite party must know that he is charged with possession of the instrument"; here applied to an attorney's bill sued upon, the law requiring a delivery of it to the client one month before bringing suit); 1835, *Read v. Gamble*, 10 A. & E. 597 (the plaintiff sued on a check; plea, that it covered a gambling debt; the defendant held bound to give notice); 1839, *Shearn v. Burnard*, ib. 593, 596, *semble* (plea that a note sued on was given in payment of an accommodation note; notice to produce the latter note required); 1840, *Knight v. Waterford*, 4 Y. & C. 283, 292 (action for tithes; bond to a predecessor in title for a lease of tithes; whether notice was not necessary, left undecided); *Wood v. Strickland* doubted); *Canada*: 1859, *Bank of Montreal v. Snyder*, 18 U. C. Q. B. 492 (action on a note; notice required, the

plea not denying its genuineness, but alleging fraud; unsound); *United States*: 1886, *Nicholson v. Tarpey*, 70 Cal. 608, 610, 12 Pac. 778 (action on contract for sale of land, the defendant having possession of the only remaining duplicate original of the contract; notice not required); 1878, *Cole v. Cheovenda*, 4 Colo. 17, 21 (action for breach of contract; notice at the trial sufficient); 1803, *Ross v. Bruce*, 1 Day 100 (civil action for money paid on forged note; no notice needed); Ga. Code 1895, § 5254 (express notice not necessary "when the action is brought to recover the paper or set it aside"); 1887, *Columbus & W. R. Co. v. Tillman*, 79 Ga. 607, 610, 5 S. E. 135 (action on contract of carriage; notice required for bill of lading); 1886, *Spencer v. Boardman*, 118 Ill. 553, 9 N. E. 330 (petition to sell deceased's estate; notice of use of ante-nuptial contract, implied by the pleadings); 1862, *Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352, 361 (action on a policy; notice for notice of loss, not required); 1862, *Patterson v. Linder*, 14 Ia. 414 (bill to quiet title by vendor who had given bond for a deed; notice required for the bond); 1902, *State v. Dreany*, 65 Kan. 292, 69 Pac. 182 (conspiracy in restraint of trade; notice to produce the illegal agreement, held to be implied from the issue); 1893, *Dade v. Ins. Co.*, 54 Minn. 336, 56 N. W. 48 (action on fire policy; notice required of proofs of loss sent by plaintiff to defendant); 1860, *Griffin v. Sheffield*, 38 Miss. 359, 362, 389, 393 (defendant in ejectment had furnished plaintiff with a bill of particulars of title, including a copy of a title-bond; plaintiff allowed to use this copy without notice, on defendant's refusal to produce original); 1902, *Cook v. State*, 81 id. 146, 32 So. 312 (illegal sale of liquor; express notice required for a Federal liquor-license in defendant's possession; ruling unsound); 1837, *Hart v. Robinett*, 5 Mo. 11, 16 (action for not returning an execution; notice not necessary); 1880, *Cross v. Williams*, 72 id. 577, 580 (action by bond-surety, alleging the contract to be either lost or in defendant's

A few cases call for special mention: (a) In an action of *trover* for a document, there can be no doubt that on the present principle the plaintiff may prove the conversion of the document without having expressly notified the defendant to produce it, because the very nature of the action sufficiently notifies the defendant.² But, practically, the same result is also reached by another principle (§ 1242, *post*); for the plaintiff, in proving the conversion, does not need to prove the terms of the document, but only the existence and identity of it, and its taking by the defendant; so that the rule of production does not apply; and thus a number of rulings (*post*, § 1249) reach the same result upon this latter principle. There would be this difference between the two principles, that if under the former the defendant should produce under the implied notice, the plaintiff might still not be able to use it if it were illegally without stamp; while under the latter principle the document need not be either produced or accounted for and its lack of stamp would be immaterial.

(b) In a *criminal prosecution* in which the gist of the charge is an unlawful dealing with a document by the defendant, the charge is a sufficient notice to produce the document if in his possession:

1832, *Baldwin, J.*, in *U. S. v. Doebler*, 1 *Baldw.* 519, 524: "If the note he is charged with forging, passing, or delivering, is of the same kind with others which he has dis-

possession; notice not needed); 1852, *Neally v. Greenough*, 25 N. H. 325, 329 (action on a bill of exchange against the acceptor; notice not necessary); 1820, *Hardin v. Kretsinger*, 17 *John.* 293 (covenant for a sum of money in obligations promised in consideration of a conveyance; notice not required); 1867, *Howell v. Huyck*, 2 *Abb. App.* 423 (action to foreclose a mortgage; plea, payment to the plaintiff's assignor; to prove the plea, the defendant was allowed to testify that the mortgage, his vendor, had shown him the mortgage with the indorsements of payment thereon; held, that notice to produce the instrument need not have been given by the defendant; "the pleadings were notice to produce the papers; this was not notice, it may be said, to produce them for the purpose of showing indorsements on them; but a notice to produce them for any purpose, it seems to me, ought to be sufficient to admit parol proof of any fact which the production of the paper would show"); 1901, *Nichols & S. Co. v. Charlebois*, 10 N. D. 446, 88 N. W. 80 (breach of warranty of machinery; pleadings held to give sufficient notice to produce a notice of breach as required under the contract); 1816, *Alexander v. Coulter*, 2 S. & R. 494 (action on partnership agreement to keep fair and regular books, for sums collected by partner's administrator; notice required, for a specific book; "it is not enough that the paper is referred to in the declaration"); 1851, *Garrigues v. Harris*, 16 Pa. St. 344, 350 (ejectment for land held under a fraudulent deed; notice not required); 1831, *Pickering v. Meyers*, 2 *Bail.* 113 (assumpsit for wages; notice of written agreement held necessary); 1801, *Worth v. Norton*, 60 S. C. 293, 38 S. E. 605 (action on a note; defence, statute of limitations;

notice required for the defendant seeking to prove the date; ruling unsound); 1899, *Zipp v. Colchester R. Co.*, 12 S. D. 218, 80 N. W. 367 (action on contract; pleadings held to imply notice as to orders and letters from plaintiff to defendant); 1855, *Dean v. Border*, 15 *Tex.* 298 (action on two notes; plea, payment, with specification of items including "draft on J. A."; held, not sufficient as notice); 1855, *Hamilton v. Rice*, *ib.* 382, 385 (trespass to try title; answer, that a survey was made, but the field-notes were fraudulently obtained and kept by the plaintiff, etc.; held, sufficient notice); 1867, *Niagara F. Ins. Co. v. Whittaker*, 21 *Wis.* 335 (contract mentioned in pleadings; no notice necessary; here the pleading alleged a duplicate original).

1811, *How v. Hall*, 14 *East* 274 (*trover* for a bond; Lord Ellenborough, C. J.: "Is not the very nature of the action notice to the defendant to be prepared for the proof to be offered?"); 1835, *Dennan, L. C. J.*, in *Read v. Gamble*, 10 A. & E. 597 (notice not necessary); 1867, *R. v. Elworthy*, 10 *Cox Cr.* 579, 582 (*Kelly, C. B.*: "The ground of decision is this, that the defendant has notice by the action of the nature and contents of the document . . . and he could not be found guilty of the conversion without proof that the document had come into his possession"); 1852, *Tilly v. Fisher*, 10 U. C. Q. B. 32 (*trover* for notes; original need not be accounted for; *Draper, J.*, *diss.*); 1862, *Rose v. Lewis*, 10 *Mich.* 483, 484 (*trover* for a note; no notice required); 1820, *McCleau v. Hertzog*, 6 S. & R. 154 (*trover* for notes; no express notice required, a notice being implied); 1811, *Oswald v. King*, 2 *Brev.* 471 (*trover* for a deed; notice not necessary).

posed of or retained in his possession, he has notice in effect that, if practicable to procure it, evidence will be given of their counterfeit character, and of his having passed them as true. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is notice in form; notice in law is notice in effect; and either are sufficient. . . . Knowing that proof of all these facts is as competent to the prosecutor as the one specifically charged, no injustice is done him."

1865, *Elliott, C. J.*, in *McGinnis v. State*, 24 Ind. 500, 503 (after stating that production cannot be compelled): "The description of the instrument in the indictment must be such that it would always serve to notify the defendant of the nature of the charge against him, save him from surprise, and enable him to be prepared to produce the writing, when it was his interest to produce it. But when its production would be likely to work an injury to the defendant by aiding in his conviction, it could not be expected that he would produce it in response to the notice. It is therefore difficult to perceive what benefit could result, either to the State or to the defendant, from the giving of such notice; while to the defendant it is liable to work a positive injury, by producing an unfavorable impression against him in the minds of the jury upon his refusal to produce it after notice."

It seems settled, therefore, that on a charge of larceny or of forgery no express notice is necessary; and the principle would also extend to other charges; but the nature of the charge will determine the application of the principle.³ When, however, the writings to be offered are not the subjects of the very criminal charge — as when similar counterfeits are offered to evidence intent —, the present doctrine will not avail to dispense with notice; and the further question will then arise whether such documents need be pro-

³ *England*: 1830, *R. v. Haworth*, 4 C. & P. 254, 256 (forgery of a deed; the defendant had since destroyed it; notice not required); 1853, *R. v. Kitson*, 6 Cox Cr. 159 (arson with intent to defraud the insurer; notice to produce the policy required); 1867, *R. v. Elworthy*, 10 id. 579, 582 (perjury in stating that there was no draft of a certain statutory declaration; notice required; *Littledale, J.*: "The exception to the rule is when the other party is by the proceeding itself charged with the possession of the document. Here the indictment does not charge the defendant with the possession of the document, or give notice that it [is] meant to call on him to produce it in evidence"); *United States*: 1875, *People v. Hust*, 49 Cal. 653 (embezzlement; to prove agreement by which defendant took charge of the property, *semble*, notice necessary or other accounting for original); 1859, *Armitage v. State*, 13 Ind. 441 (indictment for possessing counterfeit notes with intent; notice required; the Court proceeding upon analogy to civil cases and upon the erroneous notion that notice was always required in civil cases); 1861, *Williams v. State*, 16 id. 461 (larceny of pocket-book with bank-notes; same ruling); 1865, *McGinnis v. State*, 24 id. 500 (larceny of treasury-note; distinguishing the case of forgery as requiring greater particularity, and not passing upon the soundness of *Armitage v. State*, it is held that for larceny of written instruments no notice is required to produce the writings that are the subject of the larceny; overruling *Williams v. State*; see quotation *supra*); 1859, *State v. Mayberry*, 48 Me. 218, 239 (conspiracy by false

pretences to obtain a promissory note and charge of having obtained possession of it; no notice required); 1889, *People v. Swetland*, 77 Mich. 53, 57, 43 N. W. 779 (forgery of mortgage-discharge; notice not necessary, provided defendant's possession is shown; as it was not here); 1893, *State v. Flanders*, 118 Mo. 227, 237, 23 S. W. 1086 (obtaining a warranty deed by false pretences; notice held necessary; no precedent cited); 1816, *People v. Holbrook*, 13 John. 90, 92 (larceny of bank-notes; notice not required, either here or in trover for such things); 1887, *State v. Wilkerson*, 98 N. C. 696, 700, 3 S. E. 683 (false pretences in obtaining an order for money; express notice not required); 1808, *Com. v. Messinger*, 1 Binn. 273, 274, 278, 282 (larceny of a bill; express notice unnecessary; also put upon the ground that the accused's possession is not to be presumed); 1832, *U. S. v. Doehler*, 1 Baldw. 519, 523 (forgery; a letter by defendant to an accomplice, asking for more of the forged notes; notice not necessary, because the defendant by implication had notice "that the passing of other similar notes will be brought into question"); 1903, *M'Knight v. U. S.*, — C. C. A. —, 122 Fed. 926 (no notice necessary for a document criminating and privileged).

For the further bearing of the privilege against self-crimination by production, see *post*, § 1209. For its bearing as making a notice improper, see *post*, § 2273. For fraudulent suppression, see *post*, § 1207. For stealing as equivalent to loss, see *ante*, § 1201.

duced or accounted for at all, being "collateral" and their precise terms not always material.⁴

(c) It would seem that at a *subsequent trial* of the same issue, no new notice need be given for a material document formerly produced by the opponent or formerly demanded by the proponent to be produced by the opponent; for the renewal of the issue is notice that what was needed then will be again needed now.⁵

§ 1206. **Same: Rule of Notice Satisfied; (3) Notice of Notice.** At some time early in the 1800s it came often to be urged, and sometimes judicially approved, that "notice to produce a notice" was not necessary before using a copy. This rule of thumb, obtaining a certain vogue, was then sought to be furnished with a reason based on convenience, namely, the necessity of stopping somewhere in the chain of notices.¹ Now this consideration applies in strictness to only one kind of notice, namely, the notice to produce. There, indeed, the chain would be endless if once begun; but it would not be so in the case of any other notice. This rule of thumb, so far as it is established, must be regarded as a distinct exception (*post*, § 1207) to the rule requiring a notice to produce. But beyond the above-named instance (notice of a *notice to produce*) it cannot be said to be established except in a few jurisdictions. In England, the rulings have been in great conflict, though the exception seems also to have included the cases of a notice of a *bill's dishonor* and a *landlord's notice to quit*.² In this country, the phrase that "notice to produce a notice is unnecessary" has often been used in this broad form. Nevertheless, apart from the above single instance (notice to produce a notice to produce),

⁴ Cases cited *post*, § 1249.

⁵ 1851, *R. v. Robinson*, 5 Cox Cr. 183 (notice served for the trial at a first session or term, sufficient where the trial was postponed to a later term); 1812, *M'Dowell v. Hall*, 2 Bibb 610, 612 (document used in former trial, then withdrawn from the file on Court order; notice at trial, sufficient on the facts). *Contra*: 1819, *Knight v. Martin*, Gow 103 (after a nonsuit, a new notice must be given for a second trial).

¹ 1826, *Gibson, J.*, in *Eisenhart v. Slaymaker*, 14 S. & R. 153, 156 ("Every written notice is, for the best of all reasons, to be proved by a duplicate original; for, if it were otherwise, the notice to produce the original could be proved only in the same way as the original itself; and thus a fresh necessity would be constantly arising *ad infinitum* to prove notice of the preceding notice; so the party would at every step be receding instead of advancing").

² 1793, *Shaw v. Markham*, Peake 165 (a letter notifying of the dishonor of a note; *Kenyon, L. C. J.*, required notice); 1796, *Hammond v. Plank*, *ib. note* (written demand in trover; *Lord Kenyon* did not require notice; no reason given); 1796, *Gotlieb v. Dauvers*, 1 Esp. 455 (notice to take away a crane improperly built; *Eyre, L. C. J.*, required no notice, but not on this ground; see *post*, § 1243); 1803, *Surtees v. Hubbard*, 4 id. 203 (notice of an assignment of a ship and freight; *Ellenborough, L. C. J.*, required no notice, but *semble* on other grounds);

1804, *Langdon v. Hulls*, 5 id. 156 (notice to a drawer of the acceptor's non-payment; notice to produce required); 1809, *Philpott v. Chase*, 2 Camp. 110 (attorney's bill; notice required, per *Lord Ellenborough*, though he conceded the contrary for the case of a notice to quit); 1811, *Ackland v. Pearce*, *ib.* 599, 601 (notice of a bill's dishonor; per *LeBlanc, J.*, no notice required); 1815, *Roberts v. Bradshaw*, 1 Stark. 28 (*Lord Ellenborough, C. J.*, required no notice for a letter telling of a bill's dishonor, because it "was in the nature of a notice"); 1817, *Grove v. Ware*, 2 id. 174 (notice to a surety of default by the principal; *Lord Ellenborough* held it "not properly a mere notice," and required notice to produce); 1822, *Kine v. Beaumont*, 3 B. & B. 283, by the *C. P.*, consulting the *K. B.* (notice not necessary for notice of dishonor of a bill); 1827, *Lanauze v. Palmer, M. & M.* 31 (notice of dishonor; notice required, because the bills were not those sued on); 1827, *Colling v. Treweek*, 6 B. & C. 394 (notice not necessary for a notice, "as, a notice to quit, or a notice of the dishonor of a bill of exchange"; here, an attorney's bill, delivered according to law one month beforehand, was held "substantially in the nature of a notice" of the amount claimed and of his intention to sue unless paid); 1835, *Swain v. Lewis*, 2 C. M. & R. 261, by all the Judges (notice not necessary for notice of dishonor; approving *Kine v. Beaumont*).

most Courts from time to time recognize that the case of a notice — notice to quit, notice of dishonor, notice of suit, and the like — is to be governed merely by the general principle expounded in the preceding section, namely, where the pleadings by implication give notice to produce the notice, no express notice to produce it is necessary; but otherwise it is required. The rulings, to be sure, are by no means harmonious, and often fail to disclose the principle relied upon.³ Certain other principles, however, sometimes applicable, have served to confuse the precedents on this point: (a) If a notice is made out in duplicate, and one part is served and the other retained, the latter may be used, as a *duplicate original*, without notice to produce the former; some rulings dispose of the matter on this principle (*post*, § 1234). (b) If at the same time an *oral notice* or demand was uttered and a written one also was served, the oral one may be proved without accounting for the written

³ *Ala.*: 1857, *Dumas v. Hunter*, 30 Ala. 73 (written demand and notice precedent to action for unlawful detainer; notice required, since the statute made the demand, etc., a prerequisite); 1879, *Watson v. State*, 63 id. 19, 21 (notice of notice — here, against trespassing — not required); 1884, *King v. Bolling*, 77 id. 594, 596 (treating *Dumas v. Hunter* as an exception to the general rule of *Watson v. State*); 1893, *Home Protection v. Whidden*, 103 id. 203, 15 So. 567, *semble* (letter notifying of a fire loss; notice required); *Ark.*: 1851, *Jones v. Robinson*, 11 Ark. 504, 511 (notice to indorser; notice required); *Cal.*: 1860, *Lombardo v. Ferguson*, 15 Cal. 372 (mining-claim notice posted by plaintiff; defendant, in offering copy, required to give notice to produce, or otherwise to account for it); C. C. P. 1872, § 1938 (notice not necessary "where the writing is itself a notice"); 1881, *Gethin v. Walker*, 59 id. 502, 506 (notice of rescission of contract; notice not required, under § 1938); *Del.*: 1848, *Jefferson v. Conoway*, 5 Harringt. 16 (written demand for goods; notice necessary, except for duplicate original); *Ga.*: 1871, *Frank v. Longstreet*, 44 Ga. 178, 187 (notice required for a notice of suit); 1888, *Crawford v. Hodges*, 81 id. 728, 8 S. E. 208 (notice required for notice to sue; but here not necessary because of the latter's loss); *Ida.*: Rev. St. 1887, § 5991 (like Cal. C. P. § 1938); *Ill.*: 1872, *Brown v. Booth*, 66 Ill. 419 (notice to surety; notice to produce notice, not necessary); 1873, *Williams v. Ins. Co.*, 68 id. 387, 390 (notice of assessment; notice to produce notice, not necessary); *Ida.*: 1886, *McLenon v. R. Co.*, 69 Ia. 320, 321, 28 N. W. 619 (notice of injury; no notice required); *Ky.*: 1828, *Taylor v. Bank*, 7 T. B. M. 576, 578 (notice for notice of dishonor, not required); *La.*: 1821, *Abat v. Rion*, 9 Mart. 465, 467 (action against indorser of note, alleging notice of protest; notice not required); *Mich.*: 1845, *Falkner v. Beers*, 2 Dong. 117, 119 (notice to quit; no notice required); 1885, *Loranger v. Jarline*, 56 Mich. 518, 23 N. W. 203 (notice by wife not to sell liquor to husband; notice not required); *Mo.*: 1835, *Hughes v. Hays*, 4 Mo. 209 (notice of appeal; notice not required); 1874, *Barr v. Armstrong*, 56 id. 577, 586 (notice to creditor not to sell

to wife; notice not required for any notice); *Mont.*: C. C. P. 1895, § 3229 (like Cal. C. C. P. § 1938); *Nebr.*: 1863, *Hawley v. Robinson*, 14 Nebr. 435, 437, 16 N. W. 459 (notice to quit; notice apparently not required; here the paper was destroyed); *N. H.*: 1823, *Leavitt v. Simms*, 3 N. H. 14, 15 (action on a note against the indorser; notice to produce the notice of non-payment, not required); *N. Y.*: 1803, *Peyton v. Hallett*, 1 Cal. 363, 365, 380 (notice of abandonment of a vessel proved orally; case obscure); 1805, *Tower v. Wilson*, 3 id. 174 (notice served, proved orally; no reason given); 1816, *Johnson v. Haight*, 13 Juhn. 470 (notice of dishonor of a note, proved by copy, on the principle that "a notice to produce a paper might be proved by parol"); *N. C.*: 1829, *Faribault v. Ely*, 2 Dev. 67 (notice of dishonor; no notice required, apparently per Hall, J., because it was sufficient to show the fact of posting, under the law of the case; per Toomer, J., also because the action implied a notice); 1893, *McMillan v. Baxley*, 112 N. C. 578, 586, 16 S. E. 845 (notice of sale; notice held not necessary, but on improper grounds); *Or.*: C. C. P. 1892, § 759 (like Cal. C. C. P. § 1938); *Pa.*: 1826, *Eisenhart v. Slaymaker*, 14 S. & R. 153, 156 (notice to produce any written notice unnecessary; see quotation *supra*); 1864, *Morrow v. Com.*, 48 Pa. 305, 308 ("notice to produce a notice is unnecessary"; here, to remove a fence); *U. S.*: 1813, *Underwood v. Huddleston*, 2 Cr. C. C. 76 (notice of note's non-payment; notice required); 1815, *Bank of Washington v. Knitz*, 1b. 110 (same); *Utah*: Rev. St. 1898, § 3401 (like Cal. C. C. P. § 1938); *Vt.*: 1863, *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536, 547 ("There are many cases where notices given during the progress of a cause — notices to produce papers and notices to quit — have been allowed to be proved by copies and in some instances by parole evidence, without proof of notice to produce the originals"; but this does not cover "notices essential to the cause of action," as here, a notice of assessment); 1894, *Waterman v. Davis*, 66 id. 83, 87, 28 Atl. 664 (notice of assessment; no notice required, for notices in general; though here a manifold copy was offered).

one, because the latter's terms are not involved (*post*, § 1243). (c) The fact of the *delivery* of a notice, irrespective of its terms, may for the same reason be proved without accounting for the writing (*post*, § 1248).

§ 1207. **Same: Exceptions to Rule of Notice; Opponent's Fraudulent Suppression; Recorded Deed; Waiver; Documents out of the Jurisdiction.** (1) On the principle of convenience considered in the preceding section, a direct exception may be made for a *notice to produce*; no notice of this need be given; further than this the exception cannot be properly extended (*ante*, § 1206).

(2) The *opponent's fraudulent suppression* of a document in his possession, or of a document collusively secreted by a third person (who thus virtually acts as the opponent's agent), should exempt from the requirement of notice; because this suppression amounts to a refusal to produce, and the only object of a notice (*ante*, § 1202) is to make it clear that the opponent's failure to produce amounts to a refusal. This exception is generally recognized.¹

(3) The opponent's *absence from the jurisdiction*, or the absence of the documents out of the jurisdiction, does not dispense with the necessity for notice, even though in a given instance the opponent might be known beforehand to be unlikely to respond by production.²

(4) That the documents are subject to the *privilege against self-crimination* is in itself no excuse; for the opponent might choose to produce without

¹ *England*: 1803, *Leeds v. Cook*, 4 Esp. 256 (the opponent had secreted a document fraudulently taken from a witness of the proponent summoned under a *duces tecum*; notice not required); 1831, *Doe v. Rice*, 7 Ill. 724 (loss by a stealing instigated by the defendant; notice not necessary); *United States*: Cal. C. C. P. 1872, § 1938 (notice not necessary "where it has been wrongfully obtained or withheld by the adverse party"); *Ida. Rev. St.* 1887, § 5991 (not necessary where the writing "has been wrongfully withheld or obtained by the adverse party"); 1857, *Seliman v. Cobb*, 4 Ia. 534, 537 (defendant, obtaining from the plaintiff in Court a note for inspection, handed it to the sheriff to levy on as the plaintiff's; copy allowed without notice); 1855, *Bell v. Hearne*, 10 La. An. 515, 517 (land-patent cancelled and delivered; destruction by opponent, sufficient); *Mont. C. C. P.* 1895, § 3229 (like Cal. C. C. P. § 1938); 1852, *Neally v. Greenough*, 25 N. H. 325, 330 (fraudulent possession by opponent; notice not necessary); 1824, *Enre v. Pittman*, 3 Hawks 364, 373 (stated per Hall, J., but not decided, that opponent's fraudulent suppression dispenses with notice); *Or. C. C. P.* 1892, § 759 (like Cal. C. C. P. § 1938); 1815, *Gray v. Pentland*, 2 S. & R. 23, 31 ("where the original is in the hands of the adverse party who has given it to a third person with a view of secreting it," *semble*, no notice necessary); 1831, *Bank v. Brown*, *Dudley* 62, 65, *semble* (destroyed in opponent's possession; no notice necessary); 1852, *Cheatham v. Riddle*, 8 Tex. 162, 166 (defendant's principal

had fraudulently absconded with plaintiff's title-document; neither notice nor further search required); *Ut. Rev. St.* 1898, § 3401 (like Cal. C. C. P. § 1938); 1898, *State v. Marsh*, 70 Vt. 288, 40 Atl. 836 (defendant gave a note to the jail-housekeeper, to deliver to a co-defendant, and it was delivered; the housekeeper allowed to state its contents; whether the prosecution had intentionally put the original out of its power, depends on trial Court's discretion).

² Compare the doctrine as to detention by a third person (*post*, §§ 1212, 1213) and as to loss (*ante*, § 1197).

³ 1879, *McAdam v. Spice Co.*, 64 Ga. 441 (rule applied even where the paper belonged to a party who was out of the State); 1880, *Phillips v. Lindsay*, 65 id. 139, 143 (same; but in such case notice to the local attorney suffices, of course); 1899, *Missouri K. & T. R. Co. v. Elliott*, 2 Ind. T. 407, 51 S. W. 1068 (documents kept by opponent without the jurisdiction; notice apparently required); 1860, *Carland v. Cunningham*, 37 Pa. 229 (opponent's absence from the jurisdiction does not dispense). That notice to the attorney suffices in such a case, see *post*, § 1208.

The following statute creates a special exception: *P. E. I. St.* 1889, § 58 (in an action against an absent debtor, copies of writings to him may be used without notice to produce, if it is proved that the originals were delivered to him or received by him or duly mailed to him in time to receive them before leaving the place of the address).

exercising the privilege, and until notice has been given it cannot be known whether he will do so.³

(5) Under statutory provisions allowing proof of a *recorded deed* to be made by copy when the original is "lost or out of the power" of the proponent (*post*, § 1225), the precise statutory conditions suffice to allow the use of a copy without notice, even though the opponent's possession is the fact which puts the original "out of the power" of the proponent.⁴

(6) An express *waiver* of notice, by agreement of counsel *pro lite*, or otherwise, suffices to exempt from notice; and there may be an implied waiver.⁵

(7) Where an agreement, or other transaction, turns out on the testimony to be in writing, and in the opponent's possession, the question may arise whether the party endeavoring to prove it may do so without having given notice to the opponent. This in truth involves the principle of the Parol Evidence (Integration) rule, for the answer depends upon the inquiry who has the *burden of showing the agreement to be in writing* (*post*, § 2447).

§ 1208. **Same: Procedure of Notice; Person, Time, and Tenor.** (1) As to the *person notified*, the question arises whether, when the document is in the actual custody of a third person as agent for the opponent, notice to the *agent only* suffices. Here it would seem that such a notice was insufficient, unless it appeared that the agent was a person having a duty to communicate the notice to the opponent, and this will usually not be the case except for one who is an agent for the purposes of the trial, *i. e.* an attorney; as to this particular class of agents, it is well settled that notice to the attorney suffices. But this situation is often not distinguished in the rulings from another, namely, the case of notice to an agent for the trial, *i. e.* an attorney, who is not in possession of the document; here it would seem that the proper person is notified, and that it is merely a question as to the sufficient time allowed by the notice for getting the document. The precedents on these two situations are not harmonious.¹ A notice to the *opponent only* is suffi-

³ 1834, *Bate v. Kinsey*, 1 Cr. M. & R. 38 (refusal to produce on ground of privilege does not render notice unnecessary). *Contra*: 1897, *State v. McCauley*, 17 Wash. 88, 49 Pac. 221 (the requirement of notice not to be adopted "as an invariable rule"; here checks were held by a defendant charged with using public moneys, and privilege could be claimed; notice held not necessary).

Compare the cases in which notice was *implied* from the nature of a criminal charge (*ante*, § 1205); they assume notice of some sort to be necessary. For the right to *prove the contents* of a privileged document, see *post*, § 1209.

⁴ 1866, *Bowman v. Wettig*, 39 Ill. 416, 421 (statutory mode of testifying that recorded deed is not in offeror's power; notice to grantee in possession of original is not required); 1857, *Gilbert v. Boyd*, 25 Mo. 27 (under the statute, no notice to an opponent in possession is needed).

⁵ 1883, *Duringer v. Moschino*, 93 Ind. 495,

499 (agreement by counsel that all letters material would be produced without notice; notice not needed); 1855, *Dwinell v. Larrabee*, 38 Me. 464, 466 (a voluntary offer to produce suffices); 1853, *Farmers' & M. Bank v. Loneragan*, 21 Mo. 46, 50 (the plaintiff was not allowed to prove its books by deposition; the defendant also was then not allowed to prove the plaintiff's books by deposition without notice, the plaintiff's attempt to prove by deposition not being a waiver); 1801, *Jackson v. Van Slyck*, 2 Caines 178 (the opponent's admission of a document's existence, on cross-examination, does not dispense with notice).

¹ *England*: 1773, *Attorney-General v. Le Merchant*, 2 T. R. 201, note ("the rule which has always been followed . . . is that notice be given to the attorney or agent of the adverse party"); 1789, *Cates v. Winter*, 3 id. 306 (same; notice to opponent himself not necessary); 1795, *Read v. Passer*, 1 Esp. 213, 216, *semble* (notice to agent, insufficient, on the

client, even though the document is not in his actual custody but is held for him by a third person or agent; for the party from whom production is expected must always be regarded as the appropriate person to notify.³

The person notifying may be any one acting on behalf of the proponent for purposes of trial.⁴

(2) The time of notice depends on no technical considerations nor fixed rules; the question is merely whether the time allowed was such that the opponent was fairly and truly able to obtain it, ready for production, if he had wished to:

1845, *Alderson, B.*, in *Lawrence v. Clark*, 14 M. & W. 250, 253: "All these cases depend on their particular circumstances; and the question in each case is whether the notice was given in reasonable time to enable the plaintiff to be prepared to produce the document at the time of the trial"; *Pallock, C. B.*: "What is sufficient in one case may not be so in another; and much therefore must be left to the discretion of the presiding judge, subject of course to correction by the Court."

The matter is therefore distinctly one for the determination of the trial Court, for it must depend entirely on the circumstances of each case. The numerous rulings on the subject ought not to be treated as precedents;

facts); 1816, *Doe v. Grey*, 1 Stark. 283 (to the wife of the defendant's attorney the night before, at her house, insufficient); 1829, *Affalo v. Fourdrinier, M. & M.* 334, note (notice to the attorney two days before, the documents being with the client at a distance, held insufficient); 1832, *Houseman v. Roberts*, 5 C. & P. 394 (should be served on the attorney); 1836, *Byrne v. Harvey*, 2 Moo. & Rob. 89 (notice to an attorney not in time to communicate with the client, held insufficient); 1849, *R. v. Hankins*, 3 Cox Cr. 434, 436 (notice to attorney, sufficient); *United States*: 1873, *Lathrop v. Mitchell*, 47 Ga. 610, 612 (notice to an agent, held insufficient on the facts); 1890, *Phillips v. Lindsey*, 65 id. 139, 143 (notice to attorney of an opponent out of the State, sufficient); *Miss. Annot. Code*, 1892, § 222 (any notice required to be served, to be as valid if served on an attorney as on the party); 1831, *McPheron v. Rathbone*, 7 Wend. 216 (notice to the opponent's attorney by subpoena, not sufficient as notice for documents in the party's own custody); 1837, *Mattocks v. Stearns*, 9 Vt. 326, 335 (opponent absconded from the State: notice to his attorney held sufficient; "the party cannot be required to follow him to the world's end").

³ 1825, *Taplin v. Atty.* 3 Bing. 164 (to a sheriff's attorney, for a document in the under-sheriff's hands, sufficient); 1897, *Morehead Bkg. Co. v. Walker*, 121 N. C. 115, 28 S. E. 253 (note in attorney's possession; notice to the client sufficient).

Distinguish the question already discussed *ante*, § 1200; there the inquiry is whether the custody of a third person is to be considered as the opponent's possession at all, irrespective of the proper method of notice.

⁴ 1834, *Seely v. Cole*, Wright 681 (notice by any one by authority of the offeror, sufficient).

⁵ Besides the following cases, compare the

rule for documents present in Court (*ante*, § 1200). *England*: 1803, *Sims v. Kitchen*, 5 Esp. 30 (notice at seven o'clock the evening before trial, to a servant of the attorney, held insufficient); 1829, *Tudal, C. J.*, in *Affalo v. Fourdrinier, M. & M.* 334, note ("There must be at least a possibility of getting the instruments in consequence of the notice"); 1830, *R. v. Haworth*, 4 C. & P. 254 (since the Assizes began, held insufficient; a reasonable time before the Assizes required); 1832, *Houseman v. Roberts*, 5 id. 394 (notice on Saturday, for Monday's trial, not sufficient); 1832, *Doe v. Spitty*, 3 B. & Ad. 182 (notice the day before the Assizes, insufficient on the facts); 1833, *Trist v. Johnson*, 1 Moo. & Rob. 259 (notice served on the attorney after Assizes begun, held insufficient); 1833, *K. v. Ellicombe*, ib. 260 (notice served on the defendant after Assizes begun, the defendant being in jail, held insufficient); 1836, *George v. Thompson*, 4 Dowl. Pr. 656 (notice to the attorney the day before the Assizes, insufficient; "it is peculiarly a question for the judge at the trial"); 1836, *Atkins v. Meredith*, ib. 658 (notice "on the evening previous to the trial is in general sufficient"; but here to the attorney for books in the client's hands, held insufficient); 1839, *Holt v. Miers*, 9 C. & P. 191, 195 (the night before, insufficient); 1839, *Sturge v. Buchanan*, 10 A. & E. 598, 603 ("in all cases depends on circumstances"); 1840, *Hughes v. Buid*, 8 Dowl. Pr. 315, 317 (a notice served on Sunday, the night before the trial, on the attorney, distant from his office, held insufficient); 1840, *Firkin v. Edwards*, 9 C. & P. 478 (sufficiently early, on the facts; *Williams, J.*: "The question is whether under all the circumstances reasonable notice has been given"); 1840, *Gibbons v. Powell*, ib. 634 (notice the night before to the attorney, held sufficient, the document being one which he and not the client

they were for the most part a wasteful expense of time for the appellate Judiciary.

Where the *opponent is out of the jurisdiction*, it would seem that the time of notice should not be affected by this fact, since, in general, for the purposes of a trial, a party must himself bear the risk of his absence from the scene, — especially as in the present instance the only function of a notice is to make it clear that the proponent is reasonably unable to obtain the document. Where only the *document* is out of the jurisdiction, however, the reasonableness of the time of notice should be affected by this circumstance; for the opponent, being otherwise ready for trial, might be equally disposed to produce the document if notified in time to obtain it.⁵ That the opponent

would have); 1841, *Foster v. Pointer*, ib. 718 (notice the day before, held sufficient where it appeared that the document was destroyed); 1842, *Lloyd v. Mostyn*, 2 Dowl. Pr. n. s. 476, 480 (Parke, B.: "[the principle is] that reasonable time to produce a document must be given"; here the defendant long knew that the document would be wanted, and a notice the day before trial was held sufficient); 1845, *Lawrence v. Clark*, 14 M. & W. 250 (notice in London the evening before a Middlesex trial, not sufficient); 1847, *Sturm v. Jeffree*, 2 C. & K. 442 (since the notice is "for general convenience and for the attainment of justice," notice during trial suffices if practically in ample time); 1849, *R. v. Hankins*, 3 Cox Cr. 434, 436 (the day before the trial, sufficient); 1852, *R. v. Hamp*, 6 id. 167, 169 (notice the day before the trial to the London agents of the country attorney, sufficient); 1853, *R. v. Kitson*, ib. 159 (notice the day before, at a residence thirty miles from court, insufficient); *Can.*: 1866, *Abel v. Light*, 6 All. N. Br. 423 (notice on the day before trial, held sufficient on the facts); *Ala.*: 1884, *Littleton v. Clayton*, 77 Ala. 571, 574 ("a reasonable time, — sufficiently long to enable a party to procure and produce it without due inconvenience"); *Cal.*: 1859, *Burke v. T. M. W. Co.*, 13 Cal. 403, 407 ("a question of discretion"); C. C. P. 1872, §§ 1855, 1938 ("reasonable notice"); 1898, *People v. Vasalo*, 120 id. 168, 52 Pac. 305 (opponent's refusal to produce within statutory time, whether that interval is needed or not; secondary proof allowed); *Conn.*: 1889, *State v. Swift*, 57 Conn. 508, 18 Atl. 664 (notice at trial, with readiness to give time for production; opponent not asking time nor producing; held sufficient); *Haw.*: 1876, *R. v. Lenehan*, 3 Haw. 714, 716 (the trial Court determines reasonableness); *Ida.*: Rev. St. 1887, §§ 5991, 5999 ("reasonable notice"); *Ill.*: 1842, *Cummings v. McKinney*, 5 Ill. 57 (discretion of the trial Court); 1861, *Warner v. Campbell*, 28 id. 282, 286 (two days before trial, sufficient on the facts); *Ia.*: 1859, *Greenough v. Sheiden*, 9 Ia. 503, 506 ("reasonable time"); 1898, *Brock v. Ins. Co*, 106 id. 30, 75 N. W. 693 (trial Court's discretion); *La.*: 1844, *Hills v. Jacobs*, 7 Rob. 406, 413 (notice sufficient on the facts); 1849, *Plympton v. Preston*, 4 La. An. 360 (notice at the trial, sufficient on the facts); *Me.*: 1829, *Emerson v. Fisk*, 6

Greenl. 200, 202, 206 (notice on the first day of the trial, the opponent's residence being a few rods away, held insufficient, under a rule of Court requiring notice before the trial); *Md.*: 1816, *Divers v. Fulton*, 8 G. & J. 202, 208 (notice to the attorney two days before trial, held sufficient on the facts; the notice must be "reasonable in point of time"); 1852, *Gienn v. Rogers*, 3 Md. 312, 320 ("no precise rule can be laid down"; here notice just before drawing the jury was held insufficient); *Mich.*: 1888, *Julius K. Optical Co. v. Treat*, 72 Mich. 599, 40 N. W. 912 (time unreasonable on the facts); *Miss.*: 1866, *Winona v. Huff*, 11 Miss. 119, 129 ("depends upon the circumstances in each case, and is a preliminary matter addressed to the judgment of the Court"); *Mont.*: C. C. P. § 3229 ("reasonable notice"); *Nev.*: Gen. St. 1885, § 3449 ("reasonable notice"); *Or.*: C. C. P. § 759 ("reasonable notice"); *S. C.*: 1901, *Worth v. Norton*, 60 S. C. 293, 38 S. E. 605 (two hours' notice for a document in another county, held insufficient); *Tenn.*: 1808, *Kimble v. Joslin*, 1 Overt. 379 ("reasonable notice"); 1872, *Burke v. Shelby*, 9 Heisk. 175, 177 (notice given in the plea, sufficient); *Utah*: Rev. St. 1898, §§ 3401, 3410 ("reasonable notice").

⁵ The rulings do not always make this distinction, and are not harmonious: *England*: 1824, *Drabble v. Donner*, Ry. & Mo. 47 (four days' notice to a person domiciled in Denmark, but present in London, the documents presumably being in Denmark, held sufficient); 1825, *Bryan v. Wagstaff*, 2 C. & P. 125, 127 (party abroad, notice given two months before; Abbott, C. J.: "I think that a person leaving the country and putting his case into the hands of his attorney must be taken to leave in his attorney's hands papers material to the cause; . . . if it were not so, a man might, as soon as notice of trial was given, set sail for the East Indies, and the other party must then delay proceeding with his cause till his return"); 1840, *Hughes v. Budd*, 8 Dowl. Pr. 315, 317 (a week's notice, served during opponent's absence in the North, sufficient); 1848, *Ehrenspurger v. Anderson*, 3 Exch. 148, 153, 154 (party from India notified while in London before the trial, intimated to be insufficient); *United States*: 1862, *Bushnell v. Colony*, 38 Ill. 204 (letter in New York; a day or two's notice, not sufficient); 1889, *Mortlock v. Williams*, 76 Mich. 568, 573,

is physically or legally *incapable of personal appearance* is of course immaterial as regards the time of notice.⁶

(3) As to the *tenor* and *form* of the notice, first, it should be in *writing*, — not so much because it is thereby more correctly or surely provable, as because it is intended to procure the document and thus is more likely to attain its purpose if filed with the other papers in the cause.⁷ Next, the *particularity of the description* of the document desired should depend on no formal tests; it is enough if the document desired is so described that it could be readily known by the opponent and with certainty distinguished from others:

1839, *Denman, L. C. J.*, in *Rogers v. Custance*, 2 Moo. & Rob. 170, 181, "said that the Court did not mean to lay down any general rule as to what the notice ought to contain; that much must depend on the particular circumstances of each case; but where enough was stated on the notice to leave no doubt that the party must have been aware the particular instrument would be called for, the notice must be considered sufficient to let in secondary evidence."⁸

§ 1209. **Same: (c) Failure to Produce; what constitutes Non-Production.** It has already been seen (*ante*, § 1199) that the present excuse for a proponent's non-production rests on the broad fact that he cannot obtain it from the opponent, — a fact involving three separate elements, namely, the opponent's possession, a demand or notice to produce, and his failure to produce.

43 N. W. 592 (notice for letters in another State, insufficient on the facts); 1892, *Pitt v. Emmons*, 92 id. 542, 544, 52 N. W. 1004 (notice on same day, possessor being in another State, insufficient); 1893, *Dade v. Ins. Co.*, 54 Minn. 336, 56 N. W. 48 (notice at trial for documents in another State, insufficient on the facts).

⁶ 1851, *R. v. Robinson*, 5 Cox Cr 183 (on the defendant in jail, sufficient; *Erie, J.*: "The argument [against it] . . . might be just as applicable to a case, where the notice was served on a person bed-ridden or incapable of moving").

⁷ It always is in writing, and is so assumed to be in the preceding cases (except when given at the trial, *ante*, § 1204); but the decision to that effect are rare: 1842, *Cummings v. McKinney*, 5 Ill. 57.

⁸ The rulings vary in their requirements, and should not be taken as precedents for the specific facts: *England*: 1816, *Harvey v. Morgan*, 2 Stark. 17, 19 (mistake in the title of the plaintiff assignees, held fatal); 1825, *Jones v. Edwards*, 1 McCl. & Y. 139 ("notice to produce letters and copies of letters, also all books relating to this cause," held insufficient); 1825, *France v. Lucy, Ry. & Mo.* 341 (to prove notice of dishonour, a general notice of all letters, papers, etc., held insufficient); 1837, *Jacob v. Lee*, 2 Moo. & Rob. 33 (a notice to produce "all and every letters written by the said plaintiff to the said defendant relating to the matters in dispute in this action," held sufficient); 1839, *Rogers v. Custance*, ib. 179 (a general notice to produce all books, extracts, etc., held sufficient on the facts; see quotation *supra*); 1841, *Morris v. Hauser*, ib. 392 (a general notice to produce all letters between the parties from 1837 to 1841,

held sufficient); 1845, *Lawrence v. Clark*, 14 M. & W. 250, 251 (notice wrongly entitled as to the Court; held sufficient; *Alderson, B.*: "Would the notice be bad if one of the names were spelled wrong? The question is whether the party has had such a notice as to justify the Court in admitting the secondary evidence"; disapproving *Harvey v. Morgan*); 1847, *Smyth v. Saudeman*, 2 Cox Cr. 239 (notice specifying three letters "and also all others, etc. in the general words usually employed"; held insufficient, *semble*, as to any other than the three specified); 1858, *Justice v. Eistob*, 1 F. & F. 256, 258 (description of receipts held sufficient); 1858, *Graham v. Oldis*, ib. 262 (description of agreement held sufficient); *United States*: 1859, *Burke v. T. M. W. Co.*, 12 Cal. 403, 408 ("Such description as will apprise a man of ordinary intelligence of the document desired is enough"); 1839, *State v. Lockwood*, 5 Blackf. 144 (terms of notice not sufficiently shown); 1840, *Bemis v. Charles*, 1 Metc. 440, 443 (notice sufficient where it was "impossible for the defendant to have doubted" what it referred to); 1895, *McDowell v. Ins. Co.*, 164 Mass. 444, 41 N. E. 665 (notice to produce all letters, etc., received by defendant from plaintiff since the time of the fire alleged in the declaration, sufficient); 1873, *Lockhart v. Camfield*, 48 Miss. 471 (title bond already once produced on notice; ambiguous notice to produce a "deed," sufficient); 1825, *Vaseo v. Miffin*, 4 Wash. C. C. 519 (notice to produce all letters relating to moneys received under an award; sufficient).

The "reasonable notice" of the Codes cited *supra*, par. 2, would apply also to the tenor of the notice.

With this third element, as completing the fact upon which the proponent's excuse rests, we are now concerned.

(1) (a) Inquiring, first, what situation amounts to non-production, in the above sense, it may be noted that if the opponent produces a document which the proponent claims *not* to be *the one desired*, the latter is not obliged to accept it as the one in issue, so as to be precluded from proving otherwise the contents of the desired document;¹ for the opponent's production of this one alone is virtually a failure to produce the one actually desired, and the proponent has thus established his excuse and may proceed to prove otherwise the terms of the true but non-apparent document.

(b) If the opponent refuses to produce because of a *privilege against self-incrimination*, is this refusal insufficient, for the purpose of establishing the proponent's excuse and allowing him to prove the terms otherwise? By no means; for it is still a refusal, though an allowable one, and the proponent's excuse is equally established. The permission to the proponent to proceed to establish the document's terms by other evidence is not a violation of the privilege, for the privilege (*post*, § 2264) is merely that the possessor himself shall not furnish criminating evidence, and not that others shall not through their own witnesses do so.² Whether an unfavorable inference or admission should be drawn as to the contents from the claim of privilege is a different question (*post*, §§ 2272, 2273).

(2) It may be asked, Why should the opponent's mere failure or refusal to produce, in a case where he is not protected by a privilege, suffice to establish the proponent's excuse, namely, his inability to obtain the original? Since such an inability is the root-notion which allows him to prove the document's terms otherwise (*ante*, § 1199), how can he claim to be unable since by a *bill of discovery*, or in more modern times by a statutory order for production, he could compel the production? It is perfectly settled that this extreme step is not required of him;³ and the reasons seem to be sound, namely, first, that the inconvenience of employing an equitable bill of discovery, or even a statutory order, for every document needed, would be such that for practical purposes the opponent's mere refusal on demand puts the proponent in the position of being unable to obtain the original, and secondly, because it does not fairly lie in the mouth of an opponent, refusing production without excuse and thus himself creating the dilemma, to insist

¹ 1859, *Hill v. Townsend*, 24 Tex. 575, 580 (party held not bound to accept document tendered by opponent, but allowed to go on and prove contents of document desired); 1898, *Helzer v. Helzer*, 187 Pa. 243, 41 Atl. 40 (plaintiff had offered evidence of loss of note, and defendant then produced a document alleged to be the note; plaintiff not required either to accept it as the original or to submit it to her witness for identification).

² *Accord*: 1773, *Attorney-General v. LeMerchant*, 2 T. R. 201, note ("But it is said that this [general rule] does not hold in criminal cases, because the consequence of it would be to compel a man to produce evidence against him-

self. . . . But the defendant, LeMerchant, is not compellable to produce those letters against himself; for he is liable to no punishment at all if he do not, but is left at his entire liberty either to do it or not; the only consequence must be that these copies (which must be sworn to be true copies) are read against him"); 1829, *R. v. Barker*, 3 C. & P. 591, 593; 1897, *State v. Boomer*, 103 Ia. 106, 72 N. W. 424.

For the *necessity of notice*, even where the privilege would protect from production, see *ante*, §§ 1205, 1207.

³ 1852, *McLain v. Winchester*, 17 Mo. 49, 54; 1816, *Alexander v. Coulter*, 2 S. & R. 494.

upon so strict a test for judging the proponent's claim of inability to obtain the document.

§ 1210. **Same: Consequences of Non-Production for the Opponent (Exclusion of Evidence; Default; Inferences).** (1) Where an opponent in possession refuses to produce on demand, he is afterwards *forbidden* to produce the document in order to contradict the other party's copy or evidence of its contents.¹ This is in one sense a proper penalty for unfair tactics; but the original refusal may also be regarded as a judicial admission, in advance (*post*, § 2588), of the correctness of the first party's evidence to this extent. (2) The same penalty (and sometimes even the more serious one of judgment for default) is provided by most of the statutes which entitle a party to *discovery and inspection* (*post*, § 1858) of the opponent's documents before trial.² But the two rules are independent. (3) The jury is entitled to make certain *inferences from the non-production* of documents on demand; but this is the consequence of an independent principle (*ante*, § 291).

§ 1211. (3) **Detention by Third Person; History.** Historically, this excuse for non-production was one of the earliest to be established. Under the doctrine of *profert* (*ante*, § 1177) it was well settled that *profert* was not necessary of an instrument belonging to a third person, for the reason that the proponent "hath not any means to obtain the deed";¹ though a modi-

¹ *England*: 1769, *Yates, J.*, in *Roe v. Harvey*, 4 Barr. 2484, 2489; 1834, *Doe v. Cockell*, 6 C. & P. 525, 528 (Alderson, B.): "You must either produce a document when it is called for or never"; 1835, *Lewis v. Hartley*, 7 Id. 405 (applied to a dog; defendant not allowed to produce it later, if not produced on notice by opponent); 1840, *Doe v. Hodgson*, 12 A. & E. 135 ("the party who refused to produce the writing could not afterwards be at liberty to give it in evidence"); *United States*: 1829, *Bank v. M'Williams*, 2 J. J. Marsh. 256, 259, *semble* (failure to produce precludes other evidence); 1827, *Bogart v. Brown*, 5 Pick. 18 (a defendant refusing to produce an original, not allowed to use a copy admitted by the plaintiff to be correct); 1873, *Doon v. Donaher*, 113 Mass. 151; 1881, *Gage v. Campbell*, 131 Id. 566 ("a party who has suppressed a written document, and refused to produce it upon notice, and so compelled the adverse party to resort to secondary evidence thereof, is not afterwards entitled to offer proof of its contents"); 1886, *McGinness v. School District*, 39 Minn. 499, 41 N. W. 103; 1854, *Munford v. Wilson*, 19 Mo. 669, 673 (where defendant set up the custody of a third person, without stating the paper to be beyond the defendant's control, a copy was taken for true); 1899, *Barnes v. Lynch*, 9 Okl. 11, 156, 59 Pac. 995 (rule applied against a plaintiff who had removed his books from the jurisdiction to prevent inspection by receiver); 1895, *Powell v. Pearlstone*, 43 S. C. 403, 21 S. E. 328. *Contra*: 1870, *Monlon v. Mason*, 21 Mich. 363, 370 (Campbell, C. J.: "It is not a rule calculated to further the eliciting of truth; it is simply an attempt to punish one party by allowing his adversary to recover what does not belong to him or

to defend unjustly against a proper claim"); 1879, *Tewksbury v. Schnlenberg*, 48 Wis. 577, 580, 4 N. W. 737.

² The statutes are collected *post*, § 1858; the following rulings illustrate their use: 1884, *Brown v. Farley*, 38 N. J. Eq. 186, 190 (defendant refusing to produce his deed for inspection and photographing, not allowed to give it in evidence, under express statute); 1897, *Flemming v. Lawless*, 56 Id. 138, 38 Atl. 864 (similar; the statute is "a mere declaration of a power which already existed in the Court").

¹ 1537, *Anon.*, *Dyer* 29 b (in trespass, defendant pleaded a lease for years from a lessee for life from the king by letters patent; and it was argued that the letters patent must be shown; to which three judges agreed; but three others were opposed; "for a sub-collector, an under-sheriff, and an incumbent do not shew the king's patents, because they do not belong to them, and they have no means to make their masters or grantors shew them"); 1568, *Estofte v. Vaughan*, *Dyer* 277 a (*cestui* in remainder not required to produce the deed, because it "does not belong to him but to the feoffees"); 1591, *Abbot of Strata Marcella's Case*, 9 Co. 24 a (defendant claimed a certain privilege under feoffment from D., who was grantee of the fee of the manor from the king, who had by statute confiscated it from an abbot, who had the privilege by charter; held, that the abbot's charter need not be shown in *profert*; the plaintiff conceded that *profert* was not necessary for the charter, "because the charter was made to a stranger"); 1602, *Dagg v. Penkevon*, Cro. Jac. 70 (similar to *Anon.*, *supra*; *profert* not required); 1609, *Huntingdon v. Mildmay*, ib. 217 (similar to *Estofte v. Vaughan*, *supra*); 1631, *Gray v.*

fication of this was also established, not excusing from production where the proponent claimed anything in the right of the grantee owning the deed.² This early form of the doctrine, however, does not serve to solve the majority of our modern cases, because since the rule of profert applied only to documents under seal, *i. e.* chiefly title-deeds (*ante*, § 1177), and since the third person owning them was privileged not to disclose his title-deeds (*post*, § 2211), the case presented was the clear one of a third person from whom production could not be compelled by any process of law (*post*, § 1213). But nowadays the greater number of documents are of a sort which would not be thus privileged under a subpoena *duces tecum*. In one respect, moreover, the rigor of the older rule no longer obtains; for the modification above-mentioned, by which non-production was not excused in a case of claim of right under the deed, left the proponent without the means of proving a document which it was legally impossible for him to obtain, — a result everywhere repudiated to-day, although certain analogous English rulings (*post*, § 1212) may be perhaps traced to the tradition of this older notion.

§ 1212. **Same: (a) Person within the Jurisdiction.** (1) If the person possessing the document is by reason of a *privilege* legally not compellable to produce it, this is clearly an excuse for non-production:

1848, *Pollock, C. B.*, in *Sayer v. Glossop*, 2 Exch. 409, 410: "As the person who has the legal custody of the register is not by law compellable to produce it, the party who stands in need of the evidence which that document affords is not to suffer from its absence at the trial. . . . If in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents as if its production were physically impossible."

The only argument to the contrary could be drawn from the possibility that the privilege would not be exercised, but this is at the most a contingency, and the ascertainment of the fact of such willingness might entail too much

Fielder, Cro. Car. 209 (debt on bond assigned by bankrupt-commissioners; profert of bond not required, "because he comes in by act in law, and hath no means to obtain the obligation"); 1636, *Stockman v. Hampton*, *ib.* 441 (justification for trespass under a license from a remainderman; plea held good, "without showing the deed; first, because the deed doth not belong to him. . . . and he hath not any means to obtain the deed; and it should be mischievous to those who claim under such a deed if they should lose their estates unless they might produce it"); *ante* 1767, *Buller, Nisi Prius*, 252 ("Where a person is an utter stranger to a deed, there in pleading he is not compelled to shew it").

This doctrine is, in the earlier cases, not always to be distinguished from that of collateralness (*post*, § 1232).

² 1611, *Dr. Leyfield's Case*, 10 Co. Rep. 88 a (justification in trespass as servant of a lessee for years from a lessee for life by letters patent from the queen; it was argued that "the fee remains in the lessor or donor to whom the deed belongs and to no other, and therefore he shall

not be compelled to shew the first deed"; but "the opinion of the whole Court was against the plaintiff, and the reason was because he is privy in the estate of the rent and claims by the first grant; . . . in many cases a man shall not plead a deed or release that doth not belong to him nor can have an action to recover, without shewing it; . . . so the lord by escheat shall not plead a release made to the disseisor by the disseisee without shewing it; neither shall he in remainder be received without shewing the deed; and yet it doth not belong to him, nor has he remedy to get it. . . . [But] there is another maxim in law, that where a man is stranger to a deed, and doth neither claim the thing comprised in the grant nor anything out of it, nor doth anything in the right of the grantee as bailiff or servant, there he shall plead the patent or deed without shewing it"); 1758, *Titley v. Foxall*, *Willes* 688 (justification of battery under process of a Court erected by letters patent; profert of letters not required, because the defendant was a stranger not claiming under them).

inconvenience. The orthodox doctrine is that where a privilege applies, other evidence of contents may be given.¹

(2) It is also often said that where the third person is hostile and *fraudulently* detains the document, this fact of itself suffices to excuse non-production,² though such an instance is perhaps often equally well disposed of by the doctrine of loss (*ante*, § 1194) or of the opponent's possession by the hands of an agent (*ante*, § 1200).

(3) Where neither of the above situations exists, and the case is an ordinary one of possession by a third person, it is clear that a *demand* at least must have been made; and the question as to which a difference of opinion exists is whether the compulsory process of law should also have been invoked by subpoena *duces tecum*. A number of Courts seem to lay down the fixed rule that a subpoena is necessary;³ direct decisions to the contrary are rare.⁴ The greater number of rulings give no definite solution, and seem to have been based on the circumstances of the case in hand.⁵ The truth is

¹ 1854, *Phelps v. Prew*, 3 E. & B. 430, 438 (here an attorney refused to produce his client's title-deed; held that the possibility that the client if called might have waived the privilege was not sufficient to prevent the offering of secondary evidence; here the client had given orders not to exhibit the deed; "an attorney may hold a deed for a great many persons," and it would be unreasonable to require their calling); 1861, *R. v. Leatham*, 3 E. & E. 658, 668 (per Hill, J., "a well-established rule of law," that production of a privileged document is excused); 1806, *Richards v. Stewart*, 2 Day 328, 334, 336, 338 (whether the privileged person must be subpoenaed; decision not given, but arguments set out); 1807, *Lynde v. Judd*, 3 id. 499 (production excused, if privileged person refuses to produce); 1808, *U. S. v. Porter*, ib. 283, 285 (attendance must be compelled); 1897, *State v. Durham*, 121 N. C. 546, 28 S. E. 26 (production excused of document in hands of wife claiming privilege).

² 1845, *Blevins v. Pope*, 7 Ala. 371, 375 (trover for a note, which the defendant had since given to the maker, who by collusion failed to produce it when requested; production not required); 1817, *Stockdale v. Escant*, 4 Mart. L.A. 564, 567 (opponent's vendor retaining claimant's bill of sale by collusion; production not required, though — *Martin, J.*, diss. — no subpoena had been issued); 1862, *Grimes v. Kimball*, 3 All. 518 ("If a party is deprived of the possession of written instruments which belong to him, by the fraudulent representations or devices of another person, who unjustly detains or secretly disposes of them so that they cannot be found or recovered," they may be proved as if lost); 1823, *Den v. McAllister*, 7 N. J. L. 46, 48, 55 (a deed affecting the opponent's title was shown to be somewhere in the hands of adversaries, not parties; and this was held sufficient); 1815, *Gray v. Pentland*, 2 S. & R. 23, 31 ("where it has been in the hands of a third person, who, in collusion with the adverse party or with a view of screening him, has put it out of the way," secondary proof is admissible).

³ *England*: 1795, *R. v. Castleton*, 6 T. R. 236 (where the third person had merely been asked when out of court and had replied that she could not find it); 1834, *Whitford v. Tutin*, 10 Bing. 395 (subpoena necessary); *United States*: 1835, *Carlton v. Litton*, 4 Blackf. 1 (subpoena necessary); 1839, *Rueker v. McNeely*, 5 id. 123 (same); 1850, *Beall v. Barclay*, 10 B. Mour. 261, 262 (mere possession by a person amenable to process, not sufficient); 1853, *Dickerson v. Talbot*, 14 id. 60, 63 (possession by a third person, with notice to produce, insufficient); 1827, *Gardere v. Fisk*, 6 Mart. n. s. 387, 390 (receipt given by offeror to opponent's predecessor; subpoena required); 1827, *Erwin v. Porter*, ib. 166, 167 (similar; subpoena required); 1845, *Chaplain v. Briscoe*, 5 Sm. & M. 198, 207 (mere possession by a third person insufficient, since the person may be compelled by subpoena to produce); 1806, *U. S. v. Long*, 1 Cr. C. C. 373, *semble* (third person must be summoned); 1822, *U. S. v. Lynn*, 2 id. 309 (same); 1872, *Dickinson v. Clarke*, 5 W. Va. 280, 282 (document in hands of one giving deposition but refusing to file the document; copy excluded).

⁴ 1832, *U. S. v. Reyburn*, 6 Pet. 352, 365 (privateer's commission belonging to C.; inability to find C., sufficient on the facts; subpoena not necessary).

⁵ 1793, *Smith v. Holebrook*, 2 Root 45 (counterfeit note taken and kept from plaintiff by revenue-officer; insufficient); Ga. Code 1895, § 5257 (where subpoena *d. t.* is employed, and party "is unable thereby to procure" the document, other evidence is allowable); 1879, *Boasworth v. Clark*, 62 Ga. 286, 288 (service of subpoena, sufficient in trial Court's discretion); 1859, *Greenough v. Sheldon*, 9 Ia. 503, 506 (witness subpoenaed and present with the document, but no demand made; evidence of contents excluded); 1875, *Hawkins v. Rice*, 40 id. 435 (assignment left by offeror with another clerk of Court, held not without offeror's control); 1899, *Ruthven v. Clarke*, 109 id. 25, 79 N. W. 454 (documents testified to in deposition of intervener's agent; originals required to be accounted

that, while for the purposes of a general rule, it is better to require the process of subpoena, yet in the discretion of the trial Court the failure to use a subpoena, provided a demand has been made, may not be treated as fatal, if in view of the nature of the document, the residence of the possessor and his relations to the case, the risk of collusion, and other circumstances, the service of a subpoena would have been an unnecessary effort. If the document is in court, a subpoena would of course be unnecessary.⁶ If after service of subpoena the possessor is recalcitrant and refuses to obey, the proponent should be excused from production.⁷

(4) Where the desired witness possessing the document is himself also a party to the cause, on the side of the proponent, his possession is of course no excuse for non-production.⁸

§ 1213. *Same: (b) Person without the Jurisdiction.* It has just been seen that the amenability of the possessor to legal process should not invariably and absolutely bar the proponent from proving the document's contents by other evidence. Conversely, the mere fact of the non-amenability of the possessor to legal process should not of itself excuse non-production. Legal process cannot avail to obtain a document held out of the jurisdiction; but the object may nevertheless be attained by a request. Four possible forms of effort exist, any one or more of which may be deemed proper by a Court before excusing for non-production. If the precise whereabouts of the document is unknown, search may be made; if the possessor be ascertained, he may be requested to appear with the document; or he may be requested to

for): 1824, *Eare v. Pittman*, 3 Hawks 364, 370 (a will traced to T.'s hands; held, that T. should have been subpoenaed *duces tecum* or inquiries should have been made of her, before the inference of collusion or suppression could be drawn; *Henderson, J., diss.*); 1833, *Clark v. Longworth*, Wright 89 (not clear); 1815, *Tilghman, C. J.*, in *Gray v. Pentland*, 2 S. & R. 23, 31 ("It will always be a question whether with proper exertions he might not have had it in his power"); S. C. St. 1870, C. C. P. 1902, c. 12, § 419 (if an "original pleading or paper" is "withheld by any person" the Court may authorize use of copy); 1851, *Williams v. Ward*, 23 Vt. 369, 376 (notification posted by selectmen; not presumed to be in power of party questioning village officer's acts); 1897, *Newell v. Clapp*, 97 Wis. 104, 72 N. W. 367 (no measures taken to obtain the document; production not dispensed with).

The rule for loss (*ante*, § 1194) sometimes verges close upon the present rule.

§ 1847, *Doe v. Clifford*, 2 C. & K. 448, 451 (the third person, being in court with the deed, declined to produce it, and a copy was admitted; otherwise, if the deed had not been there).

⁷ This is implied in the rulings cited *supra*, note 3.

The following rulings are therefore absurd, and would hardly be followed to-day: 1835, *Alderson, B.*, in *Jesus College v. Gibbs*, 1 Y. & C. 145, 156 ("You could not have proved it by secondary evidence unless the document had been in the possession of a party [*i. e.* person]

not bound to produce it. . . . [The third person refuses.] it is true, at his own peril; but you have no remedy except against him"); 1853, *R. v. Llanfaethly*, 2 E. & B. 940 (*Erle, J.*): "The law does not admit the disobedience of a person served with a subpoena *duces tecum* as a sufficient excuse for not giving primary evidence of the contents of a document, where the person served is punishable for his disobedience"; 1852, *Farley v. Graham*, 9 U. C. Q. B. 438 (document in possession of the witness in court, but illegally refused to be produced; copy not allowed; "the party might have sought his remedy against the witness").

The following statute seems not to be intended to lay down a rule contrary to that in the text: Pa. St. 1846, Pam. L. 483, § 3, P. & L. Dig. Evid. 7 (after subpoena *d. t.* requiring papers, and refusal to produce, followed by imprisonment and discharge, parol evidence of contents is admissible).

⁸ 1874, *Gimbel v. Hufford*, 46 Ind. 125, 129 (where the person so in possession was the plaintiff himself, production was required); 1878, *McMakin v. Weston*, 64 id. 270, 274 (party annexing a copy to his deposition; excluded); 1877, *Waterville v. Hughau*, 18 Kans. 473 (document in another county in the hands of one of the plaintiffs or his attorney; production required). Compare the case of the opponent's possession out of the jurisdiction (*post*, § 1213, note).

deliver the document for use at the trial; or his deposition may be taken with a copy furnished by him annexed to it. No one or more of these efforts could be required as a fixed rule, nor do the Courts seem to make any such fixed requirement. The rulings fall into three general groups. In the first group, the Courts require that an effort of some sort be made, its nature depending more or less on the circumstances of the case.¹ In the second group, the Courts, either by express decision or by failing to mention any requirement, excuse the non-production although no such effort has been made, the mere fact sufficing that the document is out of the jurisdiction.²

¹ *England*: 1855, *Boyle v. Wiseman*, 10 Exch. 647 (a document was in the hands of a person in France; the plaintiff's agent, in a libel-suit in which it was suggested that this document contained an admission of authorship, went to the holder and asked him for the letter, in order to bring it to England, not stating the purpose nor asking the holder whether he would bring it personally; the holder refused; held, that its non-availability was not shown); *Canada*: 1894, *Porter v. Hale*, N. Br., 23 Can. Snp. 265, 270 (document in possession of C. in Scotland; inquiries addressed to C. and to other persons, held insufficient on the facts); *United States*: 1876, *Londoner v. Stewart*, 3 Colo. 47, 50 (there must be some effort to obtain the original; good opinion by Hallett, C. J.); 1812, *Townsend v. Atwater*, 5 Day 298, 306 (mere absence from the jurisdiction, insufficient; "the Court must be satisfied that the paper cannot be produced"); 1895, *Waite v. High*, 96 Ia. 742, 65 N. W. 397 (the Court intimated that it must also appear impossible to secure the document); 1872, *Shaw v. Mason*, 10 Kans. 184, 189 (contract in third person's hands in Missouri; production necessary, if nothing further is shown by way of excuse); 1829, *Lewis v. Beatty*, 8 Mart. n. s. 287, 289 (deed in neighboring State; no attempt made to procure it; secondary evidence excluded); 1891, *Phillips v. U. S. Benef. Soc'y*, 120 Mich. 142, 79 N. W. 1 (document in Canada; attempt to take deposition required); 1868, *Wood v. Cullen*, 13 Minn. 394, 396 (mere possession by certain opponents out of the State, held not to "excuse from diligent effort to procure it"); 1838, *Halle v. Palmer*, 5 Mo. 403, 417 (sworn copy of marriage register and certificate in Louisiana, excluded because it did not appear that the law of Louisiana made them official records; apparently unsound); 1862, *Farrell v. Brennan*, 32 id. 328, 333 (letters addressed by F. to his father in Ireland; evidence of search or the like required); 1842, *Deaver v. Rice*, 2 Fred. 280 (a constable had moved to another State, leaving some of his papers with an agent, and the document desired was not among these; held insufficient for offering oral evidence of the contents); 1886, *Justice v. Luther*, 94 N. C. 793, 798 (the mere residence of the depository in another State is not sufficient); S. C. St. 1870, C. C. P. 1902, c. 12, § 419 (quoted *ante*, § 1212); 1853, *Turner v. Yates*, 16 How. 14, 26 (invoice in hands of London consignees; depositions "or some proper attempt made to obtain it," required); 1857, *Comstock v. Carnley*, 4 Blatchf.

58 (contract in third person's custody, in another State; copy not allowed, because the person could have been examined); 1865, *Blackburn v. Crawford*, 3 Wall. 175, 183, 191, *semble* (private marriage-register in France; testimony about it excluded, where no effort was shown to obtain it or to take a copy); 1866, *Dwyer v. Dnnbar*, 5 Id. 318 (letter described by a deponent as forwarded to S. in Mexico, an agent of the opponent; original required to be accounted for); 1853, *Diener v. Schley*, 5 Wis. 483, 525 (letter written to a person in Germany; loss must further be shown). The following ruling is unique, and of course unsound: 1838, *Steinkeller v. Newton*, 9 C. & P. 313 (in a foreign deposition, the witness alluded to the contents of a letter; held, that the inability to compel the witness to produce the letter did not suffice to admit his reference to it).

² *Eng.*: 1855, *Bruce v. Nicolopulo*, 11 Exch. 129, 134 (a printed placard posted on a wall in Turkey by the Russian commandant; copy received); 1889, *Burnaby v. Baillie*, L. R. 42 Ch. D. 283, 291 (French official marriage-register, not required to be produced); *Can.*: P. E. I. St. 1889, § 57 (on commissions for examinations taken out of the Province, the "books of account or books of original entries" may be proved by copies "given in evidence" or extracts certified by the commissioner); *Ala.*: 1831, *Scott v. Rivers*, 1 Stew. & P. 19, 22 (grantee in possession of deed, residing out of the State; copy receivable); 1878, *Snow v. Carr*, 61 Ala. 363, 368 (policies cancelled and returned to England; production not required); 1879, *Whilden v. Bank*, 64 id. 1, 13, 30 (telegram in custody of person out of the State; production not required); 1880, *Elliott v. Stocks*, 67 id. 290, 300 (power of attorney in another State; production not required); 1880, *Ware v. Morgan*, ib. 461, 466 (bill of exchange in another State; production not required); 1883, *Gordon v. Tweedy*, 74 id. 232, 236 (books of a railroad company in another State; production not required); 1883, *Martin v. Brown*, 75 id. 442, 447 (letters in a foreign country; production not required); 1884, *Pensacola R. Co. v. Schaffer*, 76 id. 233, 237 (original of telegram in adjacent State; production not required); 1892, *Alabama State L. Co. v. Kyle*, 99 id. 474, 479, 13 So. 43 (certificate of entry out of State; copy received); *Ark.*: 1876, *Bozeman v. Browning*, 31 Ark. 364, 371 (bond filed in a Court of another State; sufficient on the facts); 1902, *Ritter v. State*, 70 id. 472, 69 S. W. 262 (letters in possession of a

In the third group, the effort actually made is declared to be sufficient, without laying down any rule as to its necessity.³ The proper practice is to

third person, without the State; production not required); *Cal.*: 1856, *Gordon v. Searing*, 8 Cal. 49 (paper in hands of party out of the State, sufficient); 1893, *Zellerbach v. Allenberg*, 99 id. 57, 73, 33 Pac. 786 (letters mailed to a resident of Germany, presumed beyond the State, and thus "lost," under C. C. P. § 1963, subd. 24); C. C. P. § 1855, as amended in 1901 (copy allowable, if the original "is beyond the jurisdiction"; for the validity of these amendments, see *ante*, § 488); *Conn.*: 1853, *Shepard v. Giddings*, 22 Conn. 282 (mere fact of possession out of the jurisdiction, sufficient); *Ga.*: 1858, *Goodwyn v. Goodwyn*, 25 Ga. 303, 207 (execution on file out of the State; production not required); 1858, *Landay v. Thomas*, 26 id. 537, 544 (in possession of a third person without the State; not required); 1859, *White v. Clements*, 39 id. 232, 242 (paper beyond the jurisdiction and not in the power of proponent; not required); 1871, *Frank v. Longstreet*, 44 id. 178, 187 (notice served without the jurisdiction; ruling obscure); 1875, *Brown v. Gattis*, 55 id. 416, 419 (deed in another State; proponent not required to try and get it); 1880, *Schaefer v. R. Co.*, 66 id. 39, 45 (freight list, original out of the State; copy admitted); 1888, *Calhoun v. Calhoun*, 81 id. 91, 93, 6 S. E. 913 (deed beyond the jurisdiction, provable by copy); 1895, *Bowden v. Achor*, 95 id. 243, 22 S. E. 271 (document in another State; copy allowable); 1897, *Miller v. McKinnon*, 103 id. 553, 29 S. E. 467 (possession of third person beyond jurisdiction; production not required); *Ill.*: 1855, *Mitchell v. Jacobs*, 17 Ill. 235 (lease sent to California with a deposition; production not required); *Ind.*: 1866, *Thom v. Wilson*, 25 Ind. 370, 372 (paper owned by a witness living abroad; copy attached to deposition, sufficient); 1881, *Hall v. Bishop*, 78 id. 370, 371 ("under the control of a witness not within the jurisdiction"; copy allowed); *Ky.*: 1838, *Lemon v. Johnson*, 6 Dana 399 (removal from the State by the possessor, and his death abroad; sufficient on the facts); 1847, *Waller v. Cralle*, 8 B. Monr. 11, 14 (release in the hands of a non-resident; sufficient); *Mich.*: 1888, *Woods v. Burke*, 67 Mich. 674, 676, 35 N. W. 798 (out of the jurisdiction, sufficient); 1890, *Knickerbocker v. Wilcox*, 83 id. 201, 47 N. W. 123 (bond out of the State; production not required); *Minn.*: 1897, *Kleberg v. Schrader*, 69 Minn. 136, 72 N. W. 59 (contract in Germany; production not required); *Mo.*: 1845, *St. Louis P. Ins. Co. v. Cohen*, 9 Mo. 416, 439 (agreement in Wisconsin; production not required); 1848, *Robards v. McLenn*, 8 Ired. 522, 524 (the plaintiff's slave had a document which the defendant wished to prove; that the slave had escaped to another State was held sufficient, nor was the chance of finding it in his possession sufficient to require an attempt to get it); *N. H.*: 1836, *Burnham v. Wood*, 8 N. H. 334, 337 (corporation books in another jurisdiction; production excused); *N. J.*: 1903, *Hirsch v. Leatherbee L. Co.*, — N. J. L. —, 55 Atl. 645 (letter sent to a non-resident now deceased; copy admitted);

N. Y.: C. C. P. 1877, § 990 (foreign corporation's books may be proved by copy on ten days' notice of such intention; except by a corporation proving its own acts); *Oh.*: 1846, *Reed v. State*, 15 Oh. 217, 223 (a counterfeit bank-note out of the jurisdiction; production not required); *Pa.*: St. 1837, Pub. L. 110, p. 20, P. & L. Dig. Evid. 45 (certified copy of extract from certain foreign burial registers, receivable); 1886, *Otto v. Trump*, 115 Pa. 423, 429, 8 Atl. 786 (records in another State, not required to be produced); *R. I.*: Gen. L. 1896, c. 210, § 16 (will impounded in a court out of the State and not there probated, provable by certified copy); *S. D.*: 1896, *Hagaman v. Gillis*, 9 S. D. 61, 68 N. W. 192 (document out of the jurisdiction; provable without notice to holder to produce); *Tex.*: 1854, *Clifton v. Lilley*, 12 Tex. 130, 136 (the last custodian resided in another State; "it was not necessary to call on him by subpoena *d. t.* or otherwise"); 1868, *Veck v. Holt*, 71 id. 715, 717, 9 S. W. 743 (vendee out of the jurisdiction; proof of inaccessibility of bill of sale, or of demand, unnecessary); 1890, *Frost v. Wolf*, 77 id. 455, 459, 14 S. W. 440 (deed in a notary's office in Louisiana; production excused); 1902, *Missouri K. & T. R. Co. v. Dillworth*, 95 id. 327, 67 S. W. 88 (contents of a way-bill in Kansas, held provable by deposition, where it appeared that an effort to obtain the original would have been unavailing); *U. S.*: 1873, *Barton v. Driggs*, 20 Wall. 125, 134 (copy of a lost deposition of a witness beyond process, receivable, and a new taking of the deposition not necessary; documents in the possession of one "living in another State," provable, "without further showing," by secondary evidence); 17: 1856, *Hayward R. Co. v. Duncklee*, 30 Vt. 29, 39 (letter to third persons, one deceased, the other out of the State; production not required); 1900, *Blaisdell v. Davis*, 72 id. 295, 48 Atl. 14, *semble* (original out of the jurisdiction; copy sufficient); *Va.*: 1806, *Fitzhugh v. Love*, 6 Call 5, 10 (a Liverpool notary's copy of an inaccessible protest by a London notary, excluded; *semble*, the London notary's copy admissible).

³ 1884, *McDonald v. Murray*, 5 Ont. 559, 570, 575 (document refused to be given up by a foreign official; production excused, without showing that by the foreign law it was irremovable); 1838, *Mordecai v. Bell*, 8 Port. 529, 535 (possession by one out of the State, and demand for it, sufficient on the facts); 1839, *Swift v. Fitzhugh*, 9 id. 39, 53 (same; deposition of holder need not be taken); 1844, *Beall v. Dearing*, 7 Ala. 124, 126 (demand of non-resident, sufficient; taking deposition, here equivalent to a demand); 1849, *Doe v. Biggers*, 6 Ga. 184, 196 (not decided); 1880, *Fisher v. Greene*, 95 Ill. 94, 99 (power of attorney held in New York and refused to be given up by holder; copy allowed); 1895, *Bullis v. Easton*, 96 Ia. 513, 65 N. W. 395 (sufficient where the possessor refused to give up the original, but this is not stated to be essential); 1898, *Combs v. Breat-hitt Co.*, — Ky. —, 46 S. W. 505 (in another

leave the matter entirely in the hands of the trial Court; except that no effort need ever be required to obtain a foreign public or official document irremovable by the foreign law (*post*, § 1218). Whether, when the document is a public one in another jurisdiction, the proof of its contents should be by certified copy, involves a different principle (*post*, § 1273).

§ 1214. (4) **Physical Impossibility of Removal.** Production should not be required where the written characters exist on something so firmly fixed to the realty that its removal for production would be impracticable under the circumstances:

1842, *Parke, B.*, in *Jones v. Tarlton*, 1 Dowl. Pr. n. s. 625, 626: "The exceptions . . . [cover things] not easily removed, as in the case of things fixed in the ground or to the freehold; for the law does not expect a man to break up his freehold for the purpose of bringing a notice into court."

Something should no doubt depend upon whether the realty is in the possession of the proponent or of a third person; for in the latter case a slight degree of injury or disturbance would suffice to render removal impracticable. The trial Court's determination should suffice in each instance.¹

county, beyond process, and after "due effort to obtain"; production not required); 1855, *Montgomery v. Routh*, 10 La. An. 316 (notes refused to be given up by holder out of the State; copies admitted); 1871, *Binney v. Russell*, 109 Mass. 55 (deponent out of the Commonwealth refused to annex a document, but annexed a copy; copy admitted); 1893, *Thomson-Houston E. Co. v. Palmer*, 52 Minn. 174, 181, 53 N. W. 1137 (document held by deponent in Kansas, and refused to be given up; production excused); 1854, *Brown v. Wood*, 19 Mo. 475 (document in Wisconsin, notice to produce having been given; production excused); 1842, *Ralph v. Brown*, 3 W. & S. 395, 399 (deposition in the hands of one in another State who refused to give it up; production not required); 1875, *American Life Ins. Co. v. Rosenagle*, 77 Pa. 507, 513 (letters refused to be given up; question left undecided; here the holder was out of the jurisdiction); 1811, *Bruch v. Hurst*, 3 DeS. 273, 290 (deed placed in the hands of a third person who had left the State and refused to give it up; the offeror himself having given it to the third person, the case was treated as one of suppression, and production required); 1899, *Sayles v. Bradley & M. Co.*, 92 Tex. 406, 49 S. W. 209 (refusal of witness in another county, beyond the reach of subpoena, to attach paper to deposition; production not required); 1861, *Bonner v. Ins. Co.*, 13 Wis. 677, 687 (railroad shipping book out of jurisdiction; secondary proof allowed; whether railroad's refusal to furnish must be shown, undecided); 1879, *Wisconsin River L. Co. v. Walker*, 48 id. 614, 4 N. W. 803 (stock-book in Illinois, which possessor refused to deliver; secondary proof allowed). The circumstance that the possessor of the document is the opponent, and that therefore it might be obtained from abroad by legal process in the suit, is immaterial; the case falls rather under the rule of § 1199, *ante*: 1900, *Phillips v.*

U. S. Benevolent Soc'y, 125 Mich. 186, 84 N. W. . . . (insurance application filed at defendant's home office in Canada, provable by copy). *Contra*: 1903, *Central El. Co. v. Spragne El. Co.*, 57 C. C. A. 197, 120 Fed. 925 (minutes of the opponent corporation, in another State; the original or a certified copy required to be produced).

For the question whether the original must be sent to a deponent out of the jurisdiction, depositing to handwriting, see *ante*, § 1185.

¹ *Eng.*: 1809, *Colden v. Bolton*, 2 Camp. 108 (notice on a board inlaid in the wall of a coach-office; proved by an examined copy); 1833, *R. v. Fursey*, 6 C. & P. 81, 84 (notice affixed to a wall; copy admitted); 1834, *Doe v. Cole*, ib. 359 (tablet in a chancel; production not required); 1839, *Bartholomew v. Stephens*, 8 id. 728 (a notice painted on a board on a pole in a field; copy admitted); 1840, *Mortimer v. M'Callan*, 6 M. & W. 58, 63, 68 (handwriting on a wall; production not required); 1842, *R. v. Edge, Wills, Circ. Evid.*, 5th Am. ed., 212, *Maule, B.* (an inscription on a coffin-plate; "being removable, it ought to have been produced"); 1842, *Jones v. Tarlton*, 9 M. & W. 65, 1 Dowl. Pr. n. s. 625 (a notice in a carrier's office, painted on a board fastened by a string to a nail; production required); 1848, *Snyer v. Glossop*, 2 Exch. 409, 411 (per *Pollock, C. B.*, a writing pasted on a wall; per *Rolfe, B.*, words chalked on a wall; used as examples of non-availability); 1888, *Farnell Commission's Proceedings*, 12th day, *Times' Rep.* pt. 3, p. 159 (testimony being offered as to a notice posted up forbidding the payment of rent, it was ruled that "it is not necessary to produce the actual notices that were posted up"); *U. S.*: 1896, *Harper v. State*, 109 Ala. 28, 19 So. 857 (notices posted against trespassing; production not required); *Ga. Code* 1895, § 5170 (inscriptions on walls, monuments, and other fixed objects,"

§ 1215. (5) **Irremovable Judicial Records; General Principle (Records, Pleadings, Depositions, Wills, etc.; Statutory Rules).** The record of a court should not be taken away from its place of custody into another court. This irremovability is often expressly enacted by statute; but, whether it is so enacted or not, the principle has always been sanctioned by the courts on grounds of policy. The removal into another court as evidence would make it impossible for the time being for others to use the records; there would be a serious risk of loss; and there would be a constant additional wear and tear upon the document. For the record of a court without the jurisdiction there is the added consideration that there is no legal means of obtaining the document. For these reasons it is well settled that the record of another court may be proved without production:

Ante 1726, Chief Baron *Gilbert*, *Evidence*, 7: "Records, being the precedents of the demonstrations of justice, to which every man has a common right to have recourse, cannot be transferred from place to place to serve a private purpose; and therefore they have a common repository, from whence they ought not to be removed but by the authority of some other court; and this is in the treasury of Westminster. And this piece of law is plainly agreeable to all manner of reason and justice; for if one man might demand a record to serve his own occasions, by the same reason any other person might demand it; but both could not possibly possess it at the same time in different places, and therefore it must be kept in one certain place in common for them both. Besides, these records, by being dally removed, would be in great danger of being lost. And consequently it is on all hands convenient that these monuments of justice should be fixed in a certain place, and that they should not be transferred from thence but by public authority from superior justice. The copies of records must be allowed in evidence, for . . . the rule of evidence commands no farther than to produce the best that the nature of the thing is capable of; for to tie men up to the original that is fixed to a place, and cannot be had, is to totally discard their evidence. . . for then the rules of law and right would be the authors of injury, which is the highest absurdity."

1811, *Nott, J.*, in *Tobin v. Seay*, 2 Brev. 470 (receiving an office copy of an execution): "An exemplification is all that a party can obtain. It is the best evidence the nature of the case admits of; because the Courts would not compel the clerks of courts to attend with the originals upon a subpoena *duces tecum*."

1868, *Joynes, J.*, in *Bullard v. Thomas*, 19 Gratt. 14, 18: "The usual mode of proving the record of another court is by the production of a certified copy. But the copy is not produced in such cases because it is better evidence than the original; it is received only on the ground of convenience, as a substitute for the original record. The reception of a copy avoids the inconvenience of removing the original record from place to place."¹

(a) It follows that a writ, pleading, or the like, which appertains to the trial at bar in the same court and will become a part of the record in the suit, must be produced or accounted for like any other document.² Con-

provable by copy); 1859, *Stearns v. Doe*, 12 Gray 482, 486 (name and port painted on the stern of a vessel, described by a witness; present point not raised).

¹ Compare the analogous reasons for excusing the non-production of official documents in general, *post*, § 1218.

² 1807, *Bayley v. Wylie*, 6 Esp. 85 (a recital in a deposition of the commission authorizing it,

held inadmissible; the commission required); 1880, *Baucum v. George*, 65 Ala. 259, 266 (execution, etc.; loss required to be shown); 1854, *Ernst v. Napier*, 15 Ga. 306, 308 (execution in the Court below; production held necessary, being obtainable by application to that Court or by mandamus in case of refusal); 1897, *Foley v. Title Co.*, 166 Ill. 336, 46 N. E. 1110 (only the record allowable to prove rules of court; but it

versely, a document which is part of the record in *another court* need not be produced, even though it is in fact in the control of the opponent and thus available.³

(b) The question will often arise whether a document is in legal theory a part of the record or is merely an incidental document which can be withdrawn from the other Court. An *answer in Chancery*, it was settled, need not be produced, although in strictness the Chancery in England was the central custodian of records for all Courts and although the Chancellor's permission for temporary removal was by tradition obtainable.⁴ But an *affidavit*, it was thought, was not a part of the record and must be produced; though this would hardly be the ruling at the present day.⁵ A *will of land* probated in the Ecclesiastical Court did not become a part of the record there, because that Court had no jurisdiction to render judgment upon a will of land (*post*, § 1238), and therefore the will must be produced at common law like any other document;⁶ but statutes have everywhere changed this by creating courts with jurisdiction equally over wills of all kinds and by permitting the use of copies.⁷ A *deed* offered in the other court for purposes

is singular that a Court cannot take notice of its own rules; 1874, *Currey v. State*, 7 Baxt. 154, 155 (name as next case; here proof of loss was waived); 1880, *Epperson v. State*, 5 Lea 291, 294 (copy of minutes of indictment, usable on accounting for the original).

³ 1853, *Fouke v. Hay*, 1 Wis. 104, 108 (even where the opponent has the original in court); 1858, *Dupont v. Downing*, 6 Ia. 173, 176 (original not required, even where the opponent was the custodian). *Contra*: 1854, *Millard v. Hall*, 24 Ala. 209, 212, 223 (order of sale issued by clerk of another court; production required); 1855, *Lunsford v. Smith*, 12 Gratt. 534, 583 (execution in another court, not accounted for; copy excluded).

The orthodox rule applied to records of inferior courts: 1696, *Hoit, C. J.*, in *R. v. Hains*, Comb. 337: "We know that it is not usual for inferior courts to draw up their records, but only short notes; and copies of these short notes, being public things, are good evidence; otherwise of private things, for copies of rent-rolls are no evidence, but the original must be produced." The docket of a justice of the peace is now provided for almost universally by statute (*post*, note 11). Where a lost judicial record is restored by decree, the copy restored becomes the original, and the loss of the former need not be shown (*post*, § 1240).

⁴ 1809, *Salter v. Turner*, 2 Camp. 87; 1812, *Lady Dartmouth v. Roberts*, 16 East 334, 340 (answer in Chancery in a suit between other parties); 1813, *Hodgkinson v. Willis*, 3 Camp. 401 (answer in Chancery in another suit); 1817, *Hennell v. Lyon*, 1 B. & Ald. 182; 1825, *Ewer v. Ambrose*, 4 B. & C. 25; 1840, *Abinger, C. B.*, in *Mortimer v. McCallan*, 6 M. & W. 58, 68 ("formerly the actual production was required" but the inconvenience of getting the Lord Chancellor's consent on each occasion led to a change); 1830, *Winaus v. Dunham*, 5 Wend. 47 (original of a Chancery decree, etc., need not

be produced); 1817, *Gibson v. Com.*, 2 Va. Cas. 111, 120 (in a Superior Court, certified copy of judgment of General Court suffices).

⁵ 1726, *Gilbert, Evidence*, 56 ("the reason is, because the answer is an allegation in a court of judicature, . . . but a voluntary affidavit hath no relation to any court of justice, and . . . the affidavit itself must be produced as the best evidence"); 1767, *Bulter, Nisi Prius*, 239; 1825, *Graham, B.*, in *Rees v. Bowen*, 1 McCl. & Y. 383, 389 ("I think there is a marked difference between an affidavit and an answer or anything else which is properly called a record, in the instance of which an attested copy is perfectly sufficient. . . . Answers, or other records, where they are regular, are never permitted to be removed from the files; but nothing is more usual than for a judge, where a party has occasion to make use of an affidavit, to direct it to be taken off the file for the purpose"). *Contra*: 1827, *Higginfield v. Peake*, 1 M. & M. 109, *Littledale, J.*; 1847, *Garvin v. Carroll*, 10 Ir. L. R. 323, 330 ("It is a record of the Court," and need not be produced, except on a charge of perjury).

Depositions are usually provided for by the statutes governing them (*post*, §§ 1380-1383).

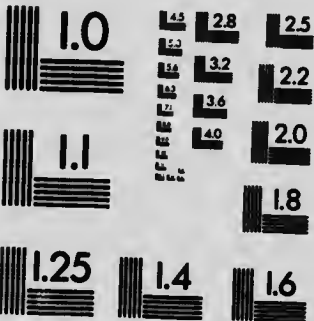
⁶ 1685, *Anon.*, *Skin*. 174 ("If they will not after proof deliver back the original, then this Court will intermeddle, and a proof of the will cannot be by copy"); 1697, *Hoe v. Nathorp*, 1 Ld. Raym. 154 (probated will of realty; copy excluded).

⁷ These statutes have been placed, to avoid repetition, under § 1681, *post*; they allow the use of a copy of the judgment of probate (under whatever name it goes); though in a few States they allow production of the original will to be required, e. g. on a suggestion of fraud. The following rulings were made under such statutes: 1893, *Newsom v. Holesapple*, 101 Ala. 682, 691 (original not required; applying the statute); 1890, *Purdy v. Hall*, 134 Ill. 298, 25 N. E. 645



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of proof was regarded as a part of the record, temporarily at least;⁸ the question depends largely on the nature of the other proceeding and of the document.⁹ Statutes often provide for the proof by copy of *sundry documents required to be filed* among court records.¹⁰

(c) In most jurisdictions *statutes* have expressly provided that the records of courts in general need not be produced. So far as these statutes brought within the rule certain judicial proceedings (such as those of justices of the peace), they may have served to make more certain or to amplify its operation. But for the most part these statutes merely declare, as to the present subject, that which was before never questioned; and their principal purpose was usually to amplify the rule (*post*, § 1681), concerning the exception to the Hearsay rule for certified copies by official custodians of documents.¹¹

§ 1216. **Same: Exception for Nul Tiel Record and Perjury.** (a) Where the plea of *nul tiel record* was interposed, it seems to have been originally the practice to require production even from another court; the production being obtained through Chancery by *certiorari*.¹ But afterwards it came to

(original must be accounted for); 1894, *Nicewander v. Nicewander*, 151 id. 156, 161, 37 N. E. 698 (same); 1824, *Franklin v. Crevon*, Harp. Eq. 243, 249 (certified copy of probated will, received, the Court records being burnt); 1856, *Wardlaw v. Hammond*, 9 Rich. 454 (the notice required by statute must be in writing); 1859, *Gondin v. Stagers*, 12 id. 307 (statutory notice held insufficient in tenor); 1860, *Sally v. Gunter*, 13 id. 72, 75 (certified copy of domestic probated will, established on a copy of will probated in another State, received); 1848, *Weatherhead v. Sewell*, 9 Humph. 272, 283 (will required to be produced, on suggestion of fraud, etc.); 1886, *Hickman v. Gillum*, 66 Tex. 314, 315, 1 S. W. 339 (original not required); 1889, *Rio Grande & E. P. R. Co. v. Bank*, 72 id. 467, 10 S. W. 563 (same); 1826, *Dickinson v. McCraw*, 4 Rand. 158, 160 (statute applied; copy sufficient).

⁸ *Ante* 1767, *Buller, Nisi Prius*, 253 (where a deed being pleaded "is tied up to one court, and is impossible to be removed, it shall be pleaded in another without shewing"); 1593, *Wymark's Case*, 5 Co. Rep. 75 ("If a deed be denied in one court, by which it remains there, this deed may be pleaded in another court without shewing it; for *lex non cogit ad impossibilia*").

⁹ 1817, *Handley v. Fitzhugh*, 1 A. K. Marsh. 24 (document unavailable because lodged in a court of law in another suit; whole record of that suit required to be read, to show the reason for non-production); 1849, *Davidson v. Davidson*, 10 B. Monr. 115 (award filed in another court of the State; original required); 1811, *Miles v. O'Hara*, 4 Binn. 108, 111 (judge's notes are not a record, and must be produced); 1802, *Fant v. McDaniel*, 1 Brev. 173 (malicious prosecution; original indictment need not be produced); 1836, *Mattocks v. Bellamy*, 8 Vt. 463, 467 (*habeas corpus* writ, in files of court, provable by copy).

The question is properly one of the nature of a record, not of any principle of evidence, and

the above cases are merely a few illustrations of the range of the controversy.

¹⁰ The following statutes include only those in which the document is treated as *not* a part of the record and is *required to be produced or accounted for*; many other statutes, providing for proof by copy without producing the original, are collected, to avoid repetition, *post*, § 1681. Conn. Gen. St. 1887, § 450 (bond filed in Probate Court; if lost, a certified copy is admissible). Miss. Annot. Code 1892, § 1794 (in action on a writing filed in a suit brought thereon in another court, a certified copy is admissible; but if execution is denied by plea, the clerk having custody must attend with the original); N. H. Pub. St. 1891, c. 226, § 9 (copy of recorded deposition in *perpetuum*, usable if the original is "lost or out of the possession and control" of the party); N. C. Code 1883, § 1342 (writings "recorded or filed as records in any court," provable by keeper's certified copy under seal, unless the Court orders production of the original); Okl. Stats. 1893, § 1587 (certified copy by clerk of district court of indictment, information, or bond filed, admissible when original is "lost, destroyed, or stolen, or for any other reason cannot be produced at the trial"); R. I. Gen. L. 1896, c. 220, § 19 (bond filed in Probate Court, provable by certified copy if lost); Tex. Rev. Civ. Stats. 1895, § 2314 (in a suit on an instrument filed in another domestic court, a certified copy is admissible; but on affidavit denying execution, the clerk shall attend on subpoena with the original).

¹¹ To avoid repetition the statutes are collected *post*, § 1681.

¹² 1726, *Gilbert, Evidence*, 26 ("It is regularly true that when the record is pleaded and appears in the allegations, it must be tried on the issue *nul tiel record*; but where the issue is upon fact, the record may be given in evidence [by copy] to support that fact. When the issue is *nul tiel record*, the record must be brought, *sub poena*

be settled that production of the record was here unnecessary, and was required only where the record in issue existed in the same court or in an inferior court.² The practice in this country seems to be to require production of a record in the same court,³ but not usually of a record in an inferior court,⁴ and of course not of a record in a foreign court.⁵

(b) On a charge of *perjury* in an answer in Chancery, it was customary to require the production of the answer;⁶ but this was rather because the *jurat* of the Master or other official did not in itself suffice to identify the accused as the signer, and the principle involved was in truth that of Authentication (*post*, § 2158).

§ 1217. **Same: Discriminations (Dockets, Certified Copies, etc.).** (1) The question will of course arise whether the *docket-book*, clerk's *minutes*, and such documents, may constitute the record instead of the original papers or the judgment-roll; this involves the nature of a judicial record, which is not a question of the law of evidence, but involves the "parol evidence" rule (*post*, § 2450). (2) A *sheriff's deed of sale* usually recites the judgment and execution upon which it is founded; whether those papers should be produced is a question involving in part the present principle, but involving also and chiefly, the admissibility under the Hearsay rule of the sheriff's official recitals (*post*, § 1664). (3) That the original record, if in fact available and in Court, may be used, is clear (*ante*, § 1186). (4) In using copies to prove the record, an exception to the Hearsay rule allows the use of *copies certified* out of Court by the legal custodian; the detailed rules of this exception are elsewhere dealt with (*post*, § 1681). (5) There are certain *preferences* accorded to particular kinds of copies; these involve another principle (*post*, §§ 1269-1273).¹

sigilli: but where the record is offered to a jury [as evidence], any of the forementioned copies are evidence"; Editor's Note: "So that the difference of the two cases is this: In the former the issue goes to the Court; for *nul tiel record* is an issue in which the record itself is the only proof; . . . but where the issue is on the fact, and the record is only inducement, . . . a copy may be given in evidence").

² 1742, *Woodcraft v. Kinaston*, 2 Atk. 317 (Lord Hardwicke, L. C.: "There is a great difference between the record itself and the tenor; for this is only a transcript or copy; indeed it must be literal, but still it is only a transcript." "If *nul tiel record* be pleaded, the Court cannot have the record but by *certiorari*, and then the tenor [*i. e.* a copy], if returned, is sufficient as evidence of the record, and will countervail the plea of *nul tiel record*; but when the record is to be proceeded upon [in a superior court], the record itself must be returned").

³ 1847, *Alexander v. Foreman*, 7 Ark. 252 (production required); 1850, *Adams v. State*, 11 Ark. 466, 473 (production required if in same court); 1796, *Burk v. Tregg*, 2 Wash. Va. 215 (same); 1805, *Anderson v. Dudley*, 5 Call 529 (same).

⁴ 1783, *Allin v. Hiscock*, 1 Root 88 (justice's

record; certified copies used; variance appearing, the original was required); 1825, *Vnll v. Smith*, 4 Cow. 71 (record of an inferior domestic Court may be proved by exemplification, and need not be brought by *certiorari*); 1808, *Ladd v. Blunt*, 4 Mass. 402 (Parsons, C. J.: "We never direct the record of the Court of Common Pleas to be sent us on the trial of *nul tiel record*, but receive copies of their records attested by the clerk"); 1851, *Dyer v. Lowell*, 33 Me. 260, 262 (on *certiorari* for quashing an order of partition; copy sufficient); 1852, *Willard v. Harvey*, 24 N. H. 344, 350 (certified copy sufficient).

⁵ 1820, *Baldwin v. Hale*, 17 John. 272 (foreign record, provable by examined copy; here of an U. S. Circuit Court); 1813, *Mills v. Duryee*, 7 Cr. 481, 484 (record in another State; exemplified copy sufficient); 1818, *Hampton v. McConnell*, 9 id. 234 (same).

⁶ 1812, *Lady Dartmouth v. Roberts*, 16 East 334; 1825, *Ewer v. Ambrose*, 4 B. & C. 25; 1847, *Gurvin v. Carroll*, 10 Ir. L. R. 323, 330.

¹ Whether, when a *lost judicial record* has been re-established by a decree, the loss has to be shown otherwise than as recited in the decree, is considered *post*, § 1660; for the conclusiveness of the re-established record, see *post*, § 1347.

§ 1218. (6) **Irremovable Official Documents; General Principle.** For reasons similar to those applicable to judicial records, documents belonging in any public office need not be produced, but may be otherwise proved. Their removal for production in evidence would delay and hinder the official use of the files, would make it impossible for other persons to consult the absent documents, would subject them to risk of loss, and would injure them by constant wear and tear. These reasons and the general principle have long been established:

1774, *Mansfield*, L. C. J., in *Jones v. Randall*, Cowp. 17: "A copy of [the Lords' journals] may certainly be read in evidence; for the inconvenience would be endless if the journals of the House of Lords were to be carried all over the kingdom."

1817, *Ellenborough*, L. C. J., in *Hennell v. Lyon*, 1 B. & Ald. 182, 184: "The admission of copies in evidence is founded upon a principle of great public convenience, in order that documents of great moment should not be ambulatory, and subject to the loss that would be incurred if they were removable. The same has been laid down in respect of proceedings in courts, not of record, copies whereof are admitted, though not strictly of a public nature"; *Abbott*, J.: "It is a general principle that copies are receivable in such cases without the originals, from the great inconvenience which would result if the documents were taken to different places. There would have been a danger of loss from such a practice, and besides, the documents might be wanted at different places at the same time."

1840, *Abinger*, L. C. B., in *Mortimer v. M'Callan*, 6 M. & W. 58, 69: "When the law is laid down that you cannot remove the document in which the writing is made, you are entitled to the next best evidence."

1814, *Pollock*, C. B., in *Doe v. Roberts*, 13 M. & W. 520, 530 (a statute required title-deeds, etc., to crown lands, to be deposited in a certain office): "When directed to be kept in any particular custody, and so deposited, they are provable by examined copies, not on the ground of their being books of a public nature such as that all the world may look at them, but on the ground of the great inconvenience of removing them."

1853, *Lipscomb*, J., in *Coons v. Renick*, 11 Tex. 134, 137 (holding a contract for military stores, filed with the quartermaster, to be a public document): "If Major Babbitt could be required to appear and produce the original in one of the courts, he would be equally liable to attend with his original contract all over the State, to the great hazard of a loss of the document, as well as to the great inconvenience of those interested in the contract from its being removed from the office of the quartermaster-general. It is impossible to foresee the extent of the inconvenience to the public service, if the rule should be laid down that the quartermaster could be called from his service, where his presence might be constantly necessary, to go with a document not his own but belonging to the government."¹

It was once a phrase much used that a copy is admissible where the original if produced would be evidence.² This was intended to be said of official documents; but it was not said as affording a test for the present purpose, nor could it do so; it was said with reference to the Hearsay excep-

¹ In *Sykes v. Beck*, — N. D. —, 96 N. W. 844 (1903), the utterly unfounded statement is made that "the right to make proof of official records and documents primarily by copy does not exist independent of statute." Perhaps the learned judge meant to say "by certified copy"; but even that is scarcely true (*post*, § 1677).

² *E.g.*: 1696, *Holt*, C. J., in *R. v. Hains*, Comb. 337 ("A copy of any original is evidence wherever the original is evidence"); 1697, *Hoe v. Northrop*, 1 Ld. Raym. 154 ("Resolved *per Curiam* that the immediate copy of an original is good evidence where the original itself is evidence").

tion for Official Statements (*post*, § 1630); and its meaning is that where the original document was admissible by exception as an official statement, there a copy of it would equally be admissible under the same exception to the Hearsay rule. So far as it has in later times been construed to mean that every official document admissible under the Hearsay exception may be proved by copy, it has been misunderstood;³ for the principle of non-production does not depend on admissibility (for example, a government commission's report may not be admissible) but on its presence in official custody and its irremovability.

The conceivable scope of the principle may include several sorts of documents. (1) Where by statute or regulation a document in official custody is expressly or impliedly *forbidden to be removed*, it is clear that the principle applies and production is dispensed with.⁴ (2) Where the document is one of the *working-documents* of the office, containing the official doings or being a paper made and consulted there officially in the course of office-duty, it is equally clear that it need not be produced. (3) Where the document is one made by a *private person* and *filed* in a public office, the principle does not apply if a statute or regulation does not expressly require it to be filed and kept there; if it does so require, then the principle applies; although the rulings lay down no clear distinction on the subject, and most of the instances are dealt with by a statute in general or specific terms. (4) Where the document is one made by a private person and required by law to be *recorded* in the public office but not to be kept there, the principle does not at common law apply; but in many instances a statute has provided for its application. (5) Where the document is made by a public officer and is delivered, after being recorded, to a private person (as, a government land-certificate), the principle does not apply; but by statute in many instances it has either been made to apply or the record has been constituted the basis of title, so that the record, as the original, being in official custody, need not be produced.

§ 1219. **Same: Specific Instances, at Common Law.** No definite and comprehensive test in applying the principle seems to have obtained acceptance at common law; and the rulings are varied and not entirely consistent. It may be noted that the practice as to producing *legislative journals* seems never to have been settled in England;¹ though in this country production is seldom required, and a statute often expressly thus provides.² The other

³ See, for example, the British statutes, *post*, § 1680.

⁴ For the question whether the original may be removed and produced, see *ante*, § 1186, *post*, §§ 2182, 2367.

¹ 1653, *Falconer's Trial*, 5 How. St. Tr. 323, 349 (journal produced); 1662, *Sir Henry Vane's Trial*, 6 id. 119, 150 (book produced); 1774, *Jones v. Randall*, Cowp. 17 (Lord Mansfield, C. J.: "A copy [of the Lords' journals] may certainly be read in evidence"); 1781, *R. v. Lord Gordon*, 2 Dougl. 590, 593 (Commons' journals; copies

received without objection); 1806, *Lord Melville's Trial*, 29 How. St. Tr. 685 (the printed journals rejected); 1840, *Abinger, C. B.*, in *Mortimer v. M'Callan*, 6 M. & W. 58, 67 (cites the preceding cases as not allowing copies, because "any one wishing to remove them could get the sanction of the Speaker to do so").

For the conclusiveness of the *certified enrolled statute*, see *post*, § 1350; for *judicial notice* of the journals, see *post*, § 2372; for *printed copies*, see *post*, § 1684.

² See these collected *post*, §§ 1680, 1684.

kinds of documents ruled upon have led to no special or enlightening controversy.³

³ *England*: 1720, *Brocas v. Mayor*, 1 Stra. 307 (election record of the City of London; copy allowed); 1721, *R. v. Gwyn*, ib. 401 (municipal corporate records; copy not allowed because the letter in question was not a corporate act); 1788, *R. v. King*, 2 T. R. 234 (assessment-books of the land-tax in London; copy allowed); 1811, *Eyre v. Palsgrave*, 2 Camp. 605 (license-books of the Privy Council, licenses recorded in the Secretary of State's office, provable by copy); 1812, *Walker v. Wingfield*, 18 Ves. 443, 444 (marriage-register, provable by copy, but intimating that the registers were so often ill-kept that production should be required); 1813, *Attorney-General v. Tomkins*, 1 Dow 404 (to prove a clearance, in a prosecution for clearing with an undue number of persons on board, a copy was offered of the entry signed by the master in the custom-house book of clearances; the original entry held, *semble*, under the particular circumstances, provable by a copy); 1834, *Alivon v. Furnival*, 1 Cr. M. & I. 277, 291 (a French document deposited with a notary, and by usage, though not by law, irremovable; held "in effect out of the power of the party"); 1840, *Abinger, C. B.*, in *Mortimer v. McCallan*, 6 M. & W. 58, 68 (custom-house books provable by copy); 1848, *Sayer v. Glossop*, 2 Exch. 409 (public marriage-register; production not required); 1860, *Reed v. Lamb*, 6 Jur. n. s. 828 (under statute; register of voters held to be of a "public nature"); 1873, *R. v. Weaver*, L. R. 2 C. C. R. 85 (official register of hirths, held provable by copy within the statute); *Canada*: 1837, *McLean v. McDonnell*, 1 U. C. Q. B. 13 (memorial upon a land-claim filed in the Governor-General's office; copy allowed); 1875, *Burpee v. Carvill*, 16 N. Br. 141 (public documents in Liverpool in the custom-house proved by examined copies); *United States*: some of the following cases were doubtless affected by statutes, and reference should be made to the statutes collected *post*, § 1680: *Alabama*: 1847, *Doe v. Eslava*, 11 Ala. 1028, 1037, 1041 (certain Spanish records, etc.; under statute, production not required); 1869, *Monts v. Stephens*, 43 id. 217, 222 (judge's certified copy of constable's bond; original not required, *semble*, if good as a statutory bond, but otherwise if valid only as a common-law bond); 1881, *Donegan v. Wade*, 70 id. 501, 506 (search required in Probate Office of written contestation-grounds, before oral evidence of contents); 1889, *Stanley v. State*, 88 id. 154, 156, 7 So. 273 (reports of fees by clerk of Court to Auditor, provable by certified copies); 1892, *Cofer v. Scroggins*, 94 id. 342, 345, 13 So. 115 (claim of exemption, filed in Probate Court; production not required); 1893, *Schwartz v. Baird*, 100 id. 154, 156, 13 So. 947 (husband's written consent to wife's engaging in business, filed in Probate Court; production not required); 1893, *Willingham v. State*, 104 id. 59, 16 So. 116 (certificate of incorporation recorded with Secretary of State; certified copy of record receivable, whether the certificate itself has been kept there or not);

Arkansas: 1892, *Dawson v. Barham*, 55 Ark. 286, 290, 18 S. W. 48 (swamp-land-office entries, provable by certified copy); 1895, *Woodruff v. State*, 61 Ark. 157, 171, 32 S. W. 102 (report of State board, original being lost, proved by extracts in the Senate journal); *California*: 1855, *Norris v. Russell*, 5 Cal. 250 (municipal ordinance; notice of tax sale; production required); 1857, *Hensley v. Tarpey*, 7 id. 288 (regulation of public office forbidding removal of papers, sufficient); 1857, *Hensley v. Tarpey*, ib. 288 (grant in Surveyor-General's office; production required); 1875, *Vance v. Kohlberg*, 50 id. 346, 349 (articles of consolidation filed by copy; certified copy sufficient without producing original); 1877, *People v. Hagar*, 52 id. 171, 173, 186 (certified copy of petition for reclamation, to the Board of Supervisors; original not required; same, for the register's notice thereof to the county-recorder); 1883, *People v. Williams*, 64 id. 87, 91 (certificates of U. S. census officer to contents, received, without producing original records); *Connecticut*: 1841, *Price v. Lyon*, 14 Conn. 279, 290 (certificates of membership lodged with clerk of ecclesiastical society; production not required); *Illinois*: 1884, *Louisville N. A. & C. R. Co. v. Shires*, 108 Ill. 617, 623 (ordinance of city in Indiana; production of original not required); *Indiana*: 1864, *Wells v. State*, 22 Ind. 241, 243 (books of county auditor; originals need not be produced); 1881, *Waynure v. State*, 80 id. 67, 69 (constable's bond; original not required); *Iowa*: 1871, *Bellows v. Todd*, 34 Ia. 18, 26 (letters on file in the land-office; copies sufficient); 1878, *Morrison v. Cond*, 49 id. 571, 573 (contract not required to be filed; statute not applicable); 1889, *Lyon v. Van Gorder*, 77 id. 600, 601, 42 N. W. 500 (assessment of damages received with town-clerk; original accounted for); 1899, *McPeck v. Tel. Co.*, 107 id. 356, 78 N. W. 63 (governor's proclamation of reward; original not required); *Kansas*: 1895, *Bowersock v. Adams*, 55 Kan. 681, 41 Pac. 971 (statements of personal property for taxation; production not required, under Code § 372, unless proponent had control); *Louisiana*: 1845, *White v. Kearney*, 9 Rob. 495, 499 (clearance and manifest of vessel at custom-house, not an official document); *Maine*: 1881, *State v. Wiggin*, 72 Me. 425 (internal revenue record-book provable by certified copy); 1898, *State v. Howard*, 91 id. 396, 40 Atl. 65 (records in U. S. tax-collector's office, provable by copy); *Michigan*: 1876, *Pierce v. Rehffuss*, 35 Mich. 53 (bill of sale lawfully filed with town-clerk, provable by certified copy); 1895, *People v. Clarke*, 105 id. 169, 62 N. W. 1117 (election returns; loss shown); 1898, *Deerfield Tp. v. Harper*, 115 id. 678, 74 N. W. 207 (return of highway-taxes filed with supervisor; production required); *Mississippi*: 1849, *Routh v. Bank*, 12 Sin. & M. 161, 185 (power of attorney authorized by Louisiana law to be kept on deposit by notary; certified copy admitted); 1855, *James v. Kirk*, 29 Miss. 206, 210 (same, bill of sale); *Missouri*: 1823, *Chouteau v. Chevalier*, 1 Mo. 343 (mar-

It may be noted that whether a document is an official one and need not be produced may be still a common-law question, even where a statute additionally applies; so that, if the statute is limited in its application, the original may still at common law not be required. Thus, the statutes covering the present subject have for their chief purpose (as noted in the ensuing section) to authorize custodians to give certified copies which shall be receivable in spite of the Hearsay rule, and so a statute authorizing the use of a certified copy of a given document will still leave in force the common-law principle on the present subject; so that the document may be proved by an examined copy without production.⁴

§ 1220. **Same: Specific Instances, under Statutes.** In a vast number of instances, statutes have expressly provided that specific documents in official custody may be proved without production, *i. e.* by copy. In many jurisdictions a general rule has by statute been enacted, making the same provision in general terms for official documents as a class. These statutes, however,

riage-contract deposited by Spanish custom among government archives, provable by copy); 1851, *Hurvey v. Choutenu*, 14 id. 587, 597 (will-codicil required by Louisiana law to be kept by notary, provable by copy); 1887, *State v. Pagels*, 92 id. 300, 310 (Illinois insane-hospital books not shown to be public); 1897, *Carter v. Hornback*, 139 id. 238, 40 S. W. 893 (a survey not official, and therefore not entitled to record; copy excluded); *New Hampshire*: 1843, *Woods v. Banks*, 14 N. H. 101, 109 (proprietary records need not be produced); 1850, *Forsaitli v. Clark*, 21 id. 409, 419 (proprietary charter recorded; production not required); 1857, *Willey v. Portsmouth*, 35 id. 303, 309 (towa records; production not required); 1858, *Ferguson v. Clifford*, 37 id. 86, 95 ("Books or records of this character [*i. e.* official registers or books kept by persons in public office], being themselves evidence, and being usually restricted to a particular custody, their contents may be proved by an immediate copy"); 1895, *State v. Collins*, 68 id. 299, 44 Atl. 495 (U. S. internal revenue collector's records, provable by copy); *New York*: 1831, *Jackson v. Leggett*, 7 Wend. 377 (original certificate of incorporation of a society must be produced); *Ohio*: 1840, *Sheldoa v. Coates*, 10 Oh. 278, 282 (tax records; original not required); *Pennsylvania*: 1823, *Kingston v. Lesley*, 10 S. & R. 343, 387 (copy of official list in land-office; original not required); 1832, *Olipphant v. Ferrant*, 1 Watts 57 (statute applied to admit copies of land-office blotters); 1851, *Strimpfer v. Roberts*, 18 Pa. 283, 297 (same); *North Carolina*: 1816, *Tell v. Roberts*, 3 Hayw. 138, *semble* (postmasters' valuations, in the hands of the postmaster-general; production not required); 1817, *Denton v. Fonte*, 4 id. 73 (enlistment contract of a soldier, kept at the Adjutant-General's and the Treasury; production not required); *Tennessee*: 1869, *Reeves v. State*, 7 Coldw. 96 (account for expenses of taking escaped prisoner, filed with Comptroller; production of original not required, as an official paper, in showing amount of money received by accountant; otherwise if

a charge of forgery or perjury was based on the paper); 1879, *Amis v. Marks*, 3 Lea 568, 569, *semble* (constable's bond offered by certified copy; original must be accounted for); *Texas*: 1853, *Coons v. Renick*, 11 Tex. 134, 136 (contract for military stores, filed in quartermaster's office; original not required); 1860, *Dikes v. Miller*, 25 id. (Suppl.) 281, 284, 290 (title-document filed in land-office, provable by copy, because irremovable though not lawfully filed); 1860, *Hightsmith v. State*, ib. 137, 139 (account of assessor, etc., not lawfully a record of the Comptroller's office, not provable by copy); *United States*: 1830, *Roakendorff v. Taylor*, 4 Pet. 349, 360 (official assessment list; original not required); 1896, *Re Hirsch*, 74 Fed. 928 (unlawful liquor-selling by C.; the application of C. for a Federal license to sell liquors being admissible to show intent, the fact that the document was on file in the records of the Federal deputy-collector of internal revenue, held not to excuse its production in court); 1879, *Corbett v. Gibson*, 16 Blatchf. 334 (documents in military headquarters of Department of the East, provable by copy); *Vermont*: 1862, *Briggs v. Taylor*, 35 Vt. 57, 59, 67 (recorded appointment of deputy-sheriff; original not required); 1887, *State v. Spaulding*, 60 id. 228, 233, 14 Atl. 769 (internal-revenue record-book, provable by copy); 1898, *State v. White*, 70 id. 225, 39 Atl. 1085 (records in U. S. tax-collector's office, provable by copy).

⁴ 1882, *Shutesbury v. Hadley*, 133 Mass. 242 (copy of a public marriage register sufficient, where the place of residence of parties was to be shown by the record, although a statute authorizing copies spoke only of using them to show the fact of marriage). *Contra*: 1889, *Martiu v. Hall*, 72 Ala. 587 (official bond filed; proof of original's loss, etc., required for the use of any but duly certified copy; this seems unsound). Compare the cases for recorded deeds (*post*, § 1225); and the rule as between different kinds of copies (*post*, §§ 1269, 1273).

usually do no more, as regards the present principle, than the Courts would otherwise have done under the common-law principle; the chief object of such statutes being usually to amplify the common-law exception to the Hearsay rule by which certified copies by official custodians may become admissible.¹

§ 1221. **Same: Exceptions at Common Law.** (1) There was no exception to the general principle at common law for a case where the official document happened to be *actually in court*; *i. e.* it could still be proved by copy.¹ (2) There was no exception for an issue of *non est factum*,² as there was (*ante*, § 1216) for *nul tiel record*.

§ 1222. **Same: Discriminations.** (1) Whether a *certified* or other copy by an official not testifying in court may be used, instead of an examined or sworn copy by a witness testifying on the stand, is a question of the exception to the Hearsay rule (*post*, § 1677). (2) Whether a certified or an examined copy is *preferred* to oral testimony is a question of Preferred Testimony (*post*, §§ 1267-1275). (3) Whether an official *land-title* record, or the like, should be produced, depends often on whether by the land-law the official record or the official certificate issued to the owner is regarded as the investitive and original document of title; this question being determined (*post*, § 1239), the principles of the present subject and of deed-registration (*post*, § 1224), then control the result. (4) Whether a public document is *forbidden* to be proved, either by original or by copy, because of a *privilege of official secrecy*, involves other principles (*post*, §§ 2182, 2367).

§ 1223. (7) **Private Books of Public Importance (Banks, Corporations, Title-Abstracts, Marriage-Registers, etc.).** Where private documents are in such general and constant use and importance that their liability to removal for production as evidence would cause not merely individual but general inconvenience, there is ground for applying the reasons of the preceding two rules of exemption and for allowing such documents to be proved without production. No such broad principle was established by the common law;¹

¹ To avoid repetition, such statutes are collected under that subject, *post*, § 1680, since by one and the same enactment they exempt from producing the original (applying the present principle) and also admit certified copies (applying the Hearsay exception). Sometimes the statute distinctly repudiates the application of the present principle, by requiring the original to be accounted for before copies can be used. A few classes of statutes, however, will be found under the following heads: (a) a few in which the document is treated as of the nature of a *judicial record* (*v. g.* a probate bond filed) have been mentioned *ante*, § 1215; (b) those providing for the proof of a *recorded conveyance* are specially dealt with *post*, § 1225; (c) those providing for *Government land-grants* are placed *post*, § 1239.

² 1798, *Marsh v. Colnett*, 2 Esp. 665 (to prove transfer of stock, a copy of the transfer taken from the Bank-books was received, though

the books themselves were in court; Lord Kenyon, C. J., said "they were public books, which public convenience required should not be removed from place to place; and, though the books were in court, he would not, for the sake of example, break in upon a rule founded on that principle of public convenience"). *Contra*: 1818, *Butler v. Carver*, 2 Stark. 434 (where the witness produces the document in court, a copy is not allowed).

³ 1843, *Treasurers v. Witsall*, 1 Speer 220, 221 (sheriff's bond; plea, *non est factum*; certified copy sufficient).

⁴ 1855, *Pollock, C. B.*, in *Boyle v. Wiseman*, 10 Exch. 647, 654, suggested that there might be a like rule, in the case of "documents which though of a private nature are meant to be made public, such as commercial instruments," etc., as for public documents in the strict sense, *e. g.* court records; but he gives no reason for his view.

but some instances were recognized in which the germ of such a principle is contained; and in a few other specific instances it has been recognized by statute:

1840, *Alderson, B.*, in *Mortimer v. McCallan*, 6 M. & W. 58, 67: "Then if they are not removable, on the ground of public inconvenience, that is upon the same footing in point of principle as in the case of that which is not removable by the physical nature of the thing itself. . . . The necessity of the case in the one instance, and in the other case the general public inconvenience which would follow from the books being removed, supplies the reason of the rule.

1878, *Campbell, C. J.*, in *People v. Hurst*, 41 Mich. 328, 331, 1 N. W. 1027: "Banks are subject to the performance of duties to the public which might be seriously interfered with if they were compelled to carry the books needed in their business into every court or tribunal where testimony is to be introduced concerning them. Books belonging in public offices cannot be removed from their legal custody without some strong necessity for their production. While bank-books are not public to the same extent, yet the business which the corporations are required to transact cannot be done unless the books are usually preserved where they belong. The blotter . . . must be in constant demand, and we see no reason why its contents may not be shown without production of the original, in ordinary cases, where no question of genuineness is likely to arise requiring a personal inspection."

Thus, at common law in England, the books of the *Bank of England* (legally a private institution) were not required to be produced;² and the same principle was applied to the books of the old *East India Company*,³ and occasionally to other documents.⁴ In this country, the principle has been applied to *banks* in a few instances at common law,⁵ and in other instances by statute.⁶ It has also been applied, by statute, to unofficial *marriage-*

² 1840, *Mortimer v. McCallan*, 6 M. & W. 58, 67 (writing in the books of the Bank of England; copy receivable, since "the removal of them would be so inconvenient"; "the public inconvenience" as a principle "has been adopted in a variety of cases, and has never been questioned since"). So now, by statute, to all *bankers' books*: St. 1879, c. 11, §§ 3, 6, *Bankers' Books Evidence Act* (banker's book-entry provable by copy, verified on the stand or by affidavit; unless Court orders production); 1892, *Parnell v. Wood*, Prob. 137 ("The Act was passed mainly for the relief of bankers, to avoid the serious inconvenience occasioned to them by their having to produce books which were in constant use in their business").

³ 1702, *Geery v. Hopkins*, 2 Ld. Raym. 851 (the cash-book of "the old East India Company," required to be produced); 1775, *Trial of Malarajah Sundocomar*, 20 How. St. Tr. 1037 (Council proceedings of the East India Company, provable by copy, because "the bringing the books and papers may subject them to the hazard of being lost and may impede the business"); 1771, *Wynne v. Middleton*, cited in 2 Dougl. 593 (*transfer-books* of the East India Company; Lord Mansfield, C. J., said "that the reason *ad inconvenienti*, for holding it not necessary to produce records, applied with still greater force to such public books as the trans-

fer-books of the E. I. Co.; for the utmost confusion would occur if they could be transported to any the most distant part of the kingdom whenever their contents should be thought material on the trial of a cause"); 1844, Parke, B., in *Doe v. Roberts*, 13 M. & W. 520, 532 (provable by copy).

⁴ 1724, *Downes v. Mooreman*, Bunbury 189, 191 (copy of an old contract in the Bodleian Library of Oxford; the University statutes prohibited the taking out of books; the copy allowed "upon the very particular circumstances of this case").

⁵ 1845, *Crawford v. Branch Bank*, 8 Ala. 79 (books of the State bank need not be produced); 1878, *People v. Hurst*, 41 Mich. 328 (see quotation *supra*).

⁶ Newf. St. 1897, c. 21 (*bankers' books*, provable by copy, on certain conditions); Mass. St. 1894, c. 317, § 49 (*domestic savings bank's books*, provable by affidavit copy of bank custodian); Pa. St. 1883, P. & L. Dig. Evid. 38-41 ("verified" copies of bank-book entries, receivable where bank is not a party, unless against affidavit of injustice); Wis. Stats. 1898, § 4189 b (*bank-books* provable, apart from special order, by copy sworn to by an officer of the bank on the stand or by affidavit; the original to be open to the inspection of the party).

registers,⁷ to *abstracts of title* privately owned but generally consulted,⁸ and to various specific kinds of privately-owned records in different occupations.⁹

In some jurisdictions a statute of questionable policy has applied the rule to *corporation-books*.¹⁰ This line of discrimination is both unsound and unfair. That a business is managed by corporate powers, or that it is extensive and wealthy, is no reason for distinction. It is just as inconvenient for the poor man or for a small commercial house to carry off his account-books into court; and he can even less afford to suffer it. These statutes miss the real point of the rule. It implies two circumstances, namely, the frequency of litigation involving such documents, and the consequent demand for them in court by litigant third persons or opponents. Such conditions exist for the books of a business of banking, of transportation (by rail or by express), of insurance, of communication (by telegraph or by telephone), and of a few others. But they have no relation to the corporate organization of the business, or to the relative size of it. They aim merely to protect a business which is liable to be called upon in an inordinate degree to make that contribution to justice which every citizen must make as a witness when needed (*post*, § 2192). If then any further concession can properly be made to personal convenience, by exempting from production the account-books of an ordinary business, it should be made without discrimination. There is already,

⁷ These statutes, which also make a certain kind of copy admissible, have been collected in one place, *post*, § 1681; the statutes for public registers are in § 1680. There is even a common-law ruling: 1814, *Stoeber v. Whitman*, 6 Binn. 416 (church-register allowed to be proved by sworn copy, as a "common-law proof").

⁸ These statutes are collected in one place, *post*, § 1705.

⁹ N. Sc. Rev. St. 1900, c. 99, § 204 (minutes of railway corporation's meetings, provable by secretary's certified copy); § 214 (so for by-laws, etc.); Ont. Rev. St. 1897, c. 207, § 40 (railroad by-laws and minutes of proceedings are provable by certified copy); Ind. Rev. St. 1897, § 4619 (camp-meeting corporation's records, provable by secretary's certified copy); §§ 5686, 5706 (records of telegraph and telephone companies, provable by attested copy, "when the interests of said corporation are concerned"); La. Rev. L. 1897, § 694 (books and records of railroad companies, provable by secretary's certified copy under corporate seal); Mich. Comp. L. 1897, § 6220 (by-laws of society for loaning and investing, provable by copy); § 7169 (same for printing and publishing association); § 8439 (same for corporation for treating disease); R. I. Gen. L. 1896, c. 244, § 45 (newspapers deposited with R. I. Historical Society, provable by certified copy); Wis. Stats. 1898, § 4182 *a* (certain insurance companies' books, not required to be produced, except by special order).

¹⁰ *Canada*: Dom. St. 1893, c. 31, § 12 (corporation documents or book-entries; cited *post*, § 1680); B. C. Rev. St. 1897, c. 71, § 13 (like Can. St. 1893, c. 31, § 12); Man St. 1902, c. 57, § 14 (like Can. St. 1893, c. 31, § 12);

N. Sc. Rev. St. 1900, c. 163, § 11 (like Can. St. 1893, c. 31, § 12); Ont. Rev. St. 1897, c. 73, § 26 (documents and books of "any corporation created by charter or statute in this province" are provable by certified copy); c. 191, § 66 (corporate by-law is provable by certified copy); Ga. Code 1895, § 5236 (domestic corporation's books, provable without production, by chief officer's certified copy); 1900, *Maynard v. Interstate B. & L. Assoc.*, 112 Ga. 443, 37 S. E. 741 (statute applied); Ill. Rev. St. 1874, c. 51, § 15 (papers and records of "any corporation or incorporated association," provable by certified copy of clerk, etc., under corporate seal, if any); Ind. Rev. St. 1897, § 479 ("acts and proceedings of corporations," provable by sworn copy); Me. Pub. St. 1883, c. 46, § 10 (corporation-books, *semble*, may be proved by copy); Mo. Rev. St. 1899, § 3101 (domestic corporation's records and papers on file, provable by certified copy); Nev. Gen. St. 1885, § 3449 (copy receivable "when the original is a record or other document in the custody of a public officer, or officer of a corporation"); Pa. St. 1897, May 23, Pub. L. 82, § 1 (quoted *post*, § 1519); 1900, *Page v. Knights & Ladies*, — *Tena.* —, 61 S. W. 1068 (corporation books of a benefit society; originals required, except that as between stockholders and the corporation a copy certified under seal by the secretary suffices, under Code § 5569).

One Court seems to have reached the result at common law: 1858, *Madison D. & P. R. Co. v. Whitesel*, 11 Ind. 55, 57 (record-books of corporations, not required to be produced); 1862, *Evans v. Turnpike Co.*, 18 id. 101, 103 (articles of association of turnpike company; original required); 1873, *King v. Ins. Co.*, 45 id. 43, 59 (like 11 id. 55, *supra*).

in Canada, a class of statutes which avoid that objectionable feature.¹¹ As a radical measure, the best enactment would be one which left the general principle, in its application in a given case, to the trial Court's discretion.

§ 1224. (8) **Recorded Conveyances; General Principle; Four Forms of Rule.** That a deed has been lawfully recorded of itself no reason why the ordinary rule of production should not apply where the deed's contents are to be proved. The deed, after being recorded, is returned to the grantee or other party entitled to its possession, and does not become a part of the official files so as to be affected by the principle of either of the two preceding exemptions (§§ 1218, 1223); so that, apart from other special considerations, the party offering to prove the deed's contents should either produce it or account for its absence by some one of the ordinary excuses for non-production. Such special considerations, however, in many jurisdictions, have long been acknowledged — at common law and apart from express statutory provisions — to apply to the case of a recorded conveyance.

In *England*, it is not entirely clear whether these considerations were ever recognized. There existed only limited provisions for the public recording of conveyances; one of these covered the old method of transfer by "bargain and sale";¹ the other consisted of a group of special statutes providing a recording system for specific districts, notably Middlesex and Yorkshire counties.² These statutes did not expressly provide that proof might be made without production of the original conveyances; and the precedents, being complicated by the consideration whether under the Hearsay rule the recorder's or register's certified copies were receivable (*post*, § 1650), do not indicate a final settlement of the principle; although there was apparently at one time a regular practice of not requiring production,³ and the tradition to

¹¹ B. C. Rev. St. 1897, c. 71, § 41 (commercial documents; like Ont. Rev. St. 1897, c. 73, § 51); Man. Rev. St. 1902, c. 57, §§ 26, 27 (substantially like Ont. Rev. St. 1897, c. 73, § 51, substituting three days for the counter-notice); Ont. Rev. St. 1897, c. 73, § 51 ("telegrams, letters, shipping-bills, bills of lading, delivery orders, receipts, accounts, and other written instruments used in business and other transactions" are provable by copy, on ten days' notice before trial to the opponent; unless the opponent, within four days after the time mentioned in the notice offering opportunity of inspection, gives notice of intention to dispute the correctness or genuineness of the copy and to "require proof of the original"); P. E. I. St. 1889, § 48 (like Ont. R. S. 1897, c. 73, § 51; but allowing only three days for the opponent to demand the original).

¹ See *post*, § 1650, for these statutes.

² See *post*, § 1650.

³ 1593, *Wymark's Case*, 5 Co. Rep. 75 ("Although a deed be enrolled in court, one cannot plead it in the same court without shewing it"; but otherwise of letters patent); 1613, *Read v. Hide*, 3 Co. Inst. 173, *semble* (deed-enrolled may be proved by exemplified copy of enrolment; see quotation *post*, § 1682); 1684,

Lady Ivy's Trial, 10 How. St. Tr. 555, 595 (deed enrolled, proved by examined copy); 1694, *Smart v. Williams*, Comb. 247 ("they held a sworn copy of a deed enrolled good evidence"); 1696, *Lynch v. Clarke*, 3 Salk. 154 (Holt, C. J.: "Wherever an original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof will be evidence; as, the copy of a bargain and sale or of a deed enrolled, of a church register, etc."); *ante* 1767, *Buller, Nisi Prius*, 252 (an enrolment of a patent in the same court need not be proffered, though a deed enrolled must be, for the Court will take notice of the former public act, though not of the latter public act; but "by 10 Anne, c. 18, where any bargain and sale enrolled is pleaded with a proferet, the party [offering it] to answer such proferet, may produce a copy of the enrolment"); 1797, *Molton v. Harris*, 2 Esp. 549 (deed in opponent's hands; no notice being given, the "memorial of the conveyance" was excluded); 1826, *Doe v. Kilner*, 2 C. & P. 289 (after proof of loss of deed registered in Middlesex, examined copies from the registry were admitted); 1838, *Collins v. Manle*, 8 C. & P. 502 (Middlesex registry; a deed being shown lost, an examined copy of the registry was

the same effect in the southeastern colonies is strongly corroborative of this practice.

In the *United States*, three kinds of results were evolved at common law a fourth kind was added by statutory invention; and statutes also in many jurisdictions followed one or another of the common-law methods:⁴

(a) By one of these views (originating in the southeastern States) the statutory system of public registration is thought to imply, in its policy, a general resort to the public record as a source of proof, and, for the sake of public convenience, a general dispensation from the necessity of preserving as a muniment of title a class of documents whose legal importance is comparatively little apart from the record. Thus, the registration system implies that the original deed need not be produced *nor accounted for in any way*:

1825, *Colcock, J.*, in *Peay v. Picket*, 3 McCord 318, 321: "From the earliest enactments of the British Parliament on this subject, to the present day, a period of about 280 years, it has been the established law of that country that a copy of a deed duly enrolled is as good evidence as the original itself; and I think I do not say too much when I assert that it was generally considered to be the law of this land from the first enactment on the same subject here, in 1731, to the decision of *Purvis v. Robinson*, a decision much to be regretted."

1831, *Story, J.*, in *Doe v. Winn*, 5 Pet. 233, 241: "We think it clear that by the common law, as held for a long period, an exemplification of a public grant under the Great Seal is admissible in evidence, as being record proof of as high a nature as the original. . . . There was in former times a technical distinction existing on this subject which deserves notice. As evidence, such exemplifications of letters patent seem to have been generally deemed admissible. But where, in pleading, a profert was made of letters patent, there, upon the principles of pleading, the original under the Great Seal was required to be produced, for a profert could not be made of any copy or exemplification. It was to cure this difficulty that the statutes of 3 Edw. VI, c. 4, and 13 Eliz. c. 6, were passed, by which patentees and all claiming under them were enabled to make title in pleading by showing forth an exemplification of the letters patent as if the original were pleaded and set forth. These statutes, being passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law. A similar effect was given by the statute of 10 Anne, c. 18, to copies of deeds of bargain and sale, enrolled under the statute of Henry VIII, when offered by way of profert in pleading; and since that period a copy of the enrolment of a bargain and sale is held as good evidence as the original itself. Such, then, being the rule of evidence of the common law in regard to exemplifications under the Great Seal of public grants, the application of it to the case now at bar will be at once perceived, since by the laws of Georgia all public grants are required to be recorded in the proper State department."

(b) By another view, chiefly represented in New England and in the States

received); 1828, *Rowe v. Brenton*, 8 B. & C. 737, 735 (lease of land in duchy of Cornwall, the fee of which was alternately in the Duke and in the Crown; the enrolled record was clearly sufficient for a Crown lease, "because the Crown can only grant by matter of record"; the lease here was by a clause required to be enrolled; held, that the original need not be produced; *Bayley, B.*: "There is a regular office and an auditor for managing these matters, whose duty it is to enrol authentic documents only"); 1844, *Doe v. Roberts*, 13 M. & W. 520, 530 (enrolled

leases of Crown lands in Wales, held provable by examined copies, on the ground that "the original documents . . . are kept among the muniments of the Crown" and could not be removed).

Compare the English precedents as to certified copies (*post*, § 1650).

⁴ The earliest statutes appear to have been those of New Jersey in 1713, of Pennsylvania in 1715, and of South Carolina in 1731. Compare the history of the doctrine of certified copies (*post*, § 1651).

about the Ohio River (and appearing about the same time in all), the result was based on the change of custom naturally introduced into the practice for title-deeds by the registration system. The continuous handing down of prior title-deeds to each successive grantee becomes no longer necessary, and each grantee keeps his own deed and receives no prior ones. Thus, the only person who may fairly be supposed to possess a deed is the grantee; and hence it is only deeds in which the grantee is either the proponent or the opponent in the trial that can be assumed to be in either party's possession, since the prior ones are in prior grantees' hands and are likely to be no longer in existence as not being of importance:

1828, *Per Curiam*, in *Eaton v. Campbell*, 7 Pick. 10: "In England, on the conveyance of land, all the title-deeds are delivered to the purchaser, and it is reasonable to require him to produce the original deed given to a prior grantee. . . . [But] here the grantee takes only the immediate deed to himself, relying on the covenants of his grantor; he has no right to the possession of all the title-deeds of the estate; and to require him to produce all the original deeds for 20 years or more, and to bring in the subscribing witnesses, would be unreasonable and oppressive."

1854, *Shaw, C. J.*, in *Com v. Emery*, 2 Gray 80: "In all cases original deeds should be required if they can be had; but as this would be burdensome and expensive, if not impossible in many cases, some relaxation of this rule was necessary for practical purposes. . . . Our system of conveyancing, modified by the registry law, is that each grantee retains the deed made immediately to himself, to enable him to make good his warranties. Succeeding grantees do not, as a matter of course, take possession of deeds made to preceding parties so as to be able to prove a chain of title by a series of original deeds. Every grantee, therefore, is the keeper of his own deed, and of his own deed only. . . . When, then, he has occasion to prove any fact by such deed, he cannot use a copy, because it would be offering inferior evidence, when in theory of law a superior is in his possession or power; it is only on proof of the loss of the original, in such case, that any secondary evidence can be received. . . . [So also even where the opponent is the grantee of the deed, *i. e.*] where such original is in theory of law in possession of the adverse party, because upon notice the adverse party is bound to produce it," or allow secondary evidence.

1856, *Storrs, J.*, in *Bolton v. Cummings*, 25 Conn. 410, 421: "In view of this practice [for every grantee to retain his own title-deeds], which would oftentimes render it extremely inconvenient to produce remote original title-deeds of lands, and of the provisions of our registry-system, which require those deeds to be recorded and upon official copies of the records of which reliance may safely be placed as to the contents of those deeds, our Courts have departed from the common-law rule in regard to the admission of secondary evidence of their contents, and held that where a conveyance of real estate which is required to be recorded is to a person not a party to the suit, it is competent, and sufficient in the first instance, to prove the contents of it by a copy certified by the recording officer, without laying a foundation for such proof by first accounting for the non-production of the original."

In strictness, it will be noted, this reasoning would exempt from producing only the prior title-deeds in the proponent's chain of title. The case of a collateral and accessible grantee — for example, in an action for rent against a tenant evicted by superior title, the deed of the grantee-evictor, desired to be proved by the tenant — is not covered; but in most of those jurisdictions the principle was extended to it; so that the rule became, not only that he was

exempted from producing all prior deeds in his own chain of title, but from producing any deeds whatever not presumably in possession of a party to the suit.

(c) By a third view (obtaining perhaps in the greater number of jurisdictions until statutes intervened), neither the policy of the registry system nor the practices it encouraged were regarded as justifying any exemption from the ordinary rule that the deed must be produced or accounted for. The recorded deed must be *accounted for like any other* :

1795, *Waties, J.*, in *Purvis v. Robinson*, 1 Bay 493, 494: "If, by recording a deed, the necessity of producing it was dispensed with, then the proof of its validity would rest on the *ex parte* oath of one of the subscribing witnesses before any justice of the peace and without any examination. It would be very easy by this means to conceal, under the fair dress of a record, the foulest features of fraud manifest on the face of the original, and to give even to a forged deed all the effects of a valid one."

(d) The fourth type of rule (entirely statutory) exhibits a number of minor varieties; but its substance is that the proponent may proceed without production if he first proves (often by affidavit) that the deed in question is "*not within his possession or control*." This rule falls short of the strict one last mentioned, in that the deed might be in the opponent's possession or in a third person's possession, and yet the proponent need make no effort to obtain it. The rule differs, too, from the second one above mentioned, in that for a non-grantee as proponent it is stricter, since he must at least make some proof that he has not control, while by the second rule this appears from the nature of the deed as alleged. The rule is, however, easier (than the second rule) for a grantee as proponent, since the proof that it is not in his "*possession or control*" may fall short of the proof by ordinary common-law rules that would be required of the grantee-proponent under the second rule. Furthermore, it is easier in that it does not require steps to be taken for production where the deed is in the opponent's possession (except by some statutes requiring prior notice). By one variety of this fourth form, the proponent is to show that the deed is "*lost or out of his power*." By another variety, he is to give notice a certain time beforehand that he intends to use a copy. Statutory enactments other than those taking the fourth form, or some variety of it, have usually adopted the first, *i. e.* in allowing unconditionally the use of a copy of the record without producing or accounting for the original.

§ 1225. *Same: Statutes and Decisions.*¹ The law is in some jurisdictions the result solely of judicial decision; in others, of one or more statutes super-

¹ The limitations of the following collections of decisions and statutes are above-noted in the text; these same statutes, however, are also to be consulted elsewhere in their bearings on other principles, particularly the *kind of officer certifying copies* and the mode of certifying by seal, etc. (*post*, § 1651), and the necessity of *notice to the opponent* before using copies (*post*, § 1859): ENGLAND: the decisions have been collected *ante*, § 1224; the statutes are placed *post*, § 1650.

CANADA: *Dominion*: Rev. St. 1886, c. 51, §§ 38 ff. (registry of title; applicable to the Dominion Territories); St. 1893, c. 31, § 18 (similar to Ont. R. S. 1897, c. 73, § 32).

British Columbia: Rev. St. 1897, c. 111, § 48 (registrar's certified copy of any recorded instrument, except a will, may be used "in the absence of the original when the absence of such original is duly accounted for, and if produced by a party not having the control of the original");

imposed upon early decisions; and in others, of statutes from the beginning. For an accurate understanding of the present validity of the earlier rulings,

c. 71, § 19 (like Can. St. 1893, c. 31, § 18); St. 1899, c. 62, § 158 (similar to Man. St. 1902, c. 148, § 161); St. 1902, c. 22, § 2 (instrument kept or registered in a land office or registry of a county or the Supreme Court; certified copy shall be evidence "of the original"); 1899, *Pavie v. Snow*, 7 Br. C. 81 (instruments recorded under c. 135, § 94, are admissible under § 98, without proof of loss of original).
Manitoba: Rev. St. 1902, c. 148, § 161, Real Property Act (a certificate of land title, or any instrument deposited or registered in such office, is provable by certified copy "as if the original within such office was produced"); c. 150, § 51, Registry Act (certified copy of a registered instrument, except crown grants, orders in council, mechanics' lien claims, and notices, etc., under a mortgage power of sale, shall be "prima facie evidence of the contents and execution of the original," "in case of loss, destruction, or obliteration, or partial destruction or obliteration of the original"; compare the statutes cited *post*, § 1651); c. 11, § 19 (bill of sale or mortgage of chattels; clerk's certified copy to be evidence of registration only); c. 57, § 17 (Quebec notarial instruments; like Can. St. 1893, c. 31, § 18).
New Brunswick: Consol. St. 1877, c. 46, § 10 (Crown grants before the erection of the Province are provable "as hereinbefore provided"; compare *post*, § 1680); St. 1888, c. 8 (deed or will registered in the sheriff-court books of Scotland is provable by certified copy, etc.); St. 1894, c. 20, § 34 (filed notice of sale under mortgage power of sale; certified copy admissible, on notice as *infra*, lb. § 60, and an affidavit that the original is on file or that it is "not in the possession of the person offering the same, his agent or attorney, and that he does not know where the same is to be found"); § 59 (duly registered instruments, other than wills, may be proved, "in the absence of the original instrument," by the registrar's certified copy, on affidavit "that such original is not under the control of the party, and that he does not know where the same may be found," and on six days' written notice to the opponent with a copy of the copy and affidavit); § 60 (when the offering party "resides out of the province, or at the time of the making of the affidavit is without the province," his agent or attorney may make affidavit that the party is non-resident and that the affiant "has not the possession of the original instrument and does not know where the same is or may be found, and that he has reason to believe that such person has not the original instrument in his possession and does not know where the same is or may be found," and that he has not left to evade making affidavit, and, on six days' notice and service of a copy of the affidavit, a certified copy may be used); § 62 (no certified copy of any registered instrument shall be received unless the original, or a duplicate original, "is in the possession of the adverse party, and not in the possession of the party offering such evidence, and that due notice shall

have been given to produce the same"); St. 1897, c. 11 (instruments filed under the Bills of Sale Act of 1893 are provable by the registrar's certified copy, on affidavit that "such originals or a duplicate thereof are not under the control of the party," and after six days' notice to the opponent and service of a copy of the copy and the affidavit); 1883, *McCormack v. McBride*, 23 N. Br. 12 (three deeds; an affidavit that they were not under his control, etc., excluded; the affidavit should have said that neither was; *Wetmore, J., diss.*); 1886, *Doe v. Kennedy*, 26 id. 83, 88, 94 (the affidavit need not be of the party himself; *Wetmore, J., diss.*).

Newfoundland: Consol. St. 1892, c. 57, § 25 (a "deed or document" duly registered may be proved by certified copy, if the original is "proved to be lost").

Nova Scotia: Rev. St. 1900, c. 163, § 20 (crown grants provable, without production of the original, by certain certified copies); § 21 ("any deed, or any document from the books of registry" is provable by certified or examined copy, if it appears "by the affidavit of the party, his agent, or solicitor, that such original is not in the possession or under the control of the party, and that he is unable to procure the same"); § 24 ("every bill of sale or other document, filed in any registry of deeds, may be proved" by producing a certified copy); § 27 (Quebec notarial instruments; substantially like Can. St. 1893, c. 31, § 18, omitting the proviso).

Northwest Territories (see also *Dominion, supra*): Consol. Ord. 1898, c. 43, § 30, c. 44, § 9 (mortgages and sales of chattels are provable by certified copy "as if the original instrument was produced").

Ontario: Rev. St. 1897, c. 73, § 32 ("notarial act or instrument" in Quebec, filed, enrolled, or enregistered, is provable by notarial copy; compare the further quotation *post*, § 1651); § 46 ("any registered instrument or memorial" is provable by certified copy); § 47 ("in any action where it would be necessary to produce and prove an original instrument which has been registered in order to establish such instrument and the contents thereof," the foregoing certified copy may be used, on notice ten days before trial; unless the opponent within four days after receipt of notice gives notice that he "disputes the validity of the original instrument"); § 50 (for "any instrument affecting land, which may be deposited, filed, kept, or registered, in the office of the master or local master of registered titles," a certified copy under the master's seal of office "shall be *prima facie* evidence of such instrument and of the contents thereof"; and the original shall not be required to be produced unless by order of the judge, giving the special reasons); c. 134, § 2 (in completing contracts for the sale of land, "registered memorials of discharged mortgages" shall suffice without producing the originals, unless the former are shown inaccrurate; and "the vendor shall not be bound to produce the mortgages unless they appear to be in his

a complete historical exposition of the course of legislation in each State would be necessary; but that is here impossible.

possession or power"; for other instruments, registered memorials twenty years old suffice, unless shown inaccurate, "if the memorials purport to be executed by the grantor, or in other cases, if possession has been consistent with the registered title"; the vendor "shall not be bound to produce the original instruments unless they appear to be in his possession or power; and the memorials shall be presumed to contain all the material contents of the instruments to which they relate"; c. 148, § 24 (chattel mortgage or sale filed; certified copy shall be received, but only to prove the fact of filing).

Prince Edward Island: St. 1889, § 42 (certified copy of a "deed or mortgage duly registered" is admissible if the Court is satisfied by the party's affidavit that the original "is not under his control, and that he does not know where the same may be found"); § 43 (seven days' notice must be given, with service of copies of the deed-copy and affidavit); § 44 (public lands commissioner's duplicate deed, provable on the same terms as in §§ 42, 43); § 45 (registered plan, provable like a deed); § 46 (Surrogate's registered license to sell real estate is provable by certified copy); § 49 (filed bill of sale or mortgage of chattels is provable by certified copy).

UNITED STATES: *Alabama*: Code 1897, §§ 992, 995 (conveyances, etc., duly acknowledged or proved and recorded; "if it appears to the Court that the original conveyance has been lost or destroyed or that the party offering the transcript has not the custody or control thereof," a certified transcript is to be received); § 1018 (same for conditional sales of personalty); § 1544 (recorded declaration of notice of adverse possession, provable by certified copy); St. 1899, Feb. 1, No. 241 (certified transcript of conveyance duly recorded heretofore or within 12 months must be received, "if it appears to the Court that the original conveyance has been lost or destroyed or that the party offering the transcript has not the custody or control thereof"); 1831, *Sommerville v. Stephenson*, 3 Stew. 271, 277 (deed from opponent to offeror; production required, under the statute, which merely declared the common law); 1832, *Mitchell v. Mitchell*, 3 Stew. & P. 81, 84 (grantee offering; loss must be shown); 1839, *Swift v. Fitzhugh*, 9 Port. 39, 52, 57 (wife claiming under marriage settlement; original must be accounted for); 1844, *Beall v. Dearing*, 7 Ala. 124, 127 (purchaser at sheriff's sale; unrecorded deed to debtor, presumed not in purchaser's possession, on the facts); 1847, *Thompson v. Ives*, 11 id. 239, 243, *semble* (both parties claiming as vendee under execution against same person; neither party presumed to be in possession of deeds to debtor or his predecessor so that a copy could be used on notice to opponent); 1849, *Potier v. Barclay*, 15 id. 439, 441, 452 (dower; deed to plaintiff's husband; production by her required); 1855, *Hussey v. Roquemore*, 27 id. 281, 290 (grantee presumed to have possession; if he is a party, notice is necessary; here, not under the statute); 1859,

Shorter v. Sheppard, 33 id. 648, 653 (deed to plaintiff's grantor-debtor, presumed to have been carried off by him when fleeing the country); 1866, *White v. Hutchings*, 40 id. 253, 258 (deed to offeror's predecessor in title, more than 30 years before; presumed not in offeror's control); 1872, *Jones v. Walker*, 47 id. 175, 183 (deed to claimant's grantor; production not required); 1875, *Heudon v. White*, 52 id. 597, 600 (purchaser at execution; deed to debtor presumed not in his possession); 1883, *Huckabee v. Shepherd*, 75 id. 342, 344 (grantee offering; required to show the original unavailable); 1884, *Beard v. Ryan*, 78 id. 37, 43 (deeds to his grantor and predecessors, not presumed to be in offeror's possession); 1888, *Allison v. Little*, 85 id. 512, 516, 5 So. 221 (similar to *White v. Hutchings*); 1890, *Florence L. M. & M. Co. v. Warren*, 91 id. 533, 537, 9 So. 384 (creditor proving tax-deed to his debtor as grantee; presumption that it remained with grantee, so as to relieve creditor from "the duty of accounting for the original"); 1891, *Jones v. Hagler*, 95 id. 529, 532, 10 So. 345 (offeror of deed to his grantor; original not required, but after testimony that he had never had its control); 1895, *Farrow v. R. Co.*, 109 id. 448, 453, 20 So. 303 (deed in chain of title and in offeror's possession; production required); 1895, *King v. Scheuer*, 105 id. 558, 16 So. 923 (original must be accounted for); 1896, *Farrow v. R. Co.*, 109 id. 448, 20 So. 303 (statute applied, and original required to be accounted for); 1900, *Burgess v. Blake*, 128 id. 105, 28 So. 963 (following *Farrow v. R. Co.*); 1902, *Hammond v. Blue*, 132 id. 337, 31 So. 357 (proponent must show not only his non-possession but also his non-control of the original).

Alaska: Civ. C. 1900, §§ 99, 106, 108 (like Or. Annot. C. 1892, §§ 3028, 3035, 3037).

Arizona: Rev. St. 1887, § 1873 ("every instrument of writing" lawfully recorded after lawful proof or acknowledgment, is provable by certified copy of record, "whenever any party to a suit shall file among the papers of the cause an affidavit stating that any instrument of writing, recorded as aforesaid, has been lost or that he cannot procure the original"); § 3144 (in ejectment, proof of a "common source" of title may be made by certified copies of "the deed or other title-papers showing a claim of title to the defendant," if filed three days before trial, with notice to opponent).

Arkansas: Stats. 1894, § 722 (recorder's certified transcript of a duly recorded deed, admissible, if the original appears to be "lost or not within the power and control of the party wishing to use the same"); § 726 (duly recorded deeds of administrator, executor, guardian, commissioner in chancery, and sheriff; the original "or a certified copy thereof," admissible); 1856, *McNeill v. Arnold*, 17 Ark. 154, 169, *semble* (production not required); 1856, *Tranmell v. Thurmond*, ib. 206, 215 (production required, under territorial statute not expressly dispensing); 1860, *Bright v. Pennywit*, 21 id.

The data here to be considered include statutes and decisions affecting the production of recorded conveyances. They are therefore limited in the fol-

130, 133, 136 (deed to opponent; under the statute, offeror must show original not within his power or control; whether notice to produce must here also be given, undecided); 1885, *Calloway v. Gibbins*, 45 id. 81, 85 (unrecorded deed to offeror's predecessor; search held sufficient).

California: C. C. P. 1872, § 1855 (the original of a writing must be produced, except "4. when the original has been recorded and a certified copy of the record is made evidence by this code or other statute"); § 1893 (certified copy of a "public writing," admissible "in like cases and with like effect as the original writing"); § 1951, as amended March 24, 1874 (certified copy of duly recorded instrument affecting realty "may also be read in evidence with the like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy"); § 1951, as amended March 1, 1889 (so as to read: "be read in evidence with the like effect as the original instrument without further proof"); Civ. C. § 1207 (certain old defectively recorded instruments affecting realty, provable by certified copy); 1855, *Ord v. McKee*, 5 Cal. 515 (mortgage; original required; but whether the copy rejected was certified from a record does not appear); 1856, *Macy v. Goodwin*, 6 id. 579 (deed; a statute receiving a copy with like effect "as the originals could be if produced" does not dispense with production of the original); 1857, *Gordon v. Searing*, 8 id. 49 (deed; production required; here the plaintiff claimed under the grantee); 1859, *Fallon v. Dougherty*, 12 id. 104 (offeror of deed to predecessor; production required; search without showing his own lack of possession, insufficient); 1859, *Skinner v. Flohr*, 13 id. 638 (offeror not connected with deed as grantee may account for non-production by declaring it not within his control; under statute); 1862, *Pierce v. Wallace*, 18 id. 165, 170 (offeror of deed to predecessor; loss required to be shown by search among grantor's papers, etc.); 1862, *Lawrence v. Fulton*, 19 id. 683, 689 (offeror of deed to his grantor made affidavit of non-possession, but by other testimony made it probable that his grantor had it; held insufficient to exempt); 1864, *Hicks v. Coleman*, 25 id. 122, 129 (grantee offering deed; proof that it was lost or not in his control, held sufficient, under the statute); 1864, *Landers v. Bolton*, 26 id. 393, 413 (power of attorney, sufficiently shown "not under the control of the party"); 1864, *Hurlbutt v. Butenop*, 27 id. 50, 54 (offeror of deed to predecessor; that he had "never had control of the original deed and it was not then in his power or control," sufficient; proof of loss or search unnecessary); 1865, *McMinn v. O'Connor*, 1h. 238, 243 (offeror of deed to grantor; under statutes of 1851 and 1860, original need not be shown out of offeror's control, or otherwise accounted for); 1866, *Roberts v. Unger*, 30 id. 676, 680 (offeror's grantor's claim and affidavit, under Possessory Act; certified

copy received, on evidence of non-possession and search); 1866, *Reading v. Mullen*, 31 id. 104, 106 (married woman's recorded declaration as sole trader; production required); 1869, *Garwood v. Hastings*, 38 id. 216, 222 (certified copies receivable, on proof of "loss or inability of the party to produce the original"); 1869, *Mayo v. Mazeaux*, 1b. 442, 449 (must be shown not under party's control); 1874, *Canfield v. Thompson*, 49 id. 210, 212 (certified copy of recorded deed, offered by successor of grantee, held "primary," under C. C. P. § 1893, *i.e. semble*, original need not be accounted for); 1875, *Vance v. Kohlberg*, 50 id. 346, 348 (certified copy of U. S. patent recorded in the county; original not required); 1877, *People v. Hagar*, 52 id. 171, 186 (certified copy of private writing, original not required; here corporate by-laws); 1881, *Gethin v. Walker*, 58 id. 502, 506 (certified copy of deed to offeror; production not required); 1886, *Brown v. Githin*, 70 id. 14, 11 Pac. 500 (comparison of C. C. P. §§ 1855, 1893, 1951; settled that a certified copy of a recorded deed, or the record of the deed, is receivable only after a showing that the original is not in the "possession or control" of the offeror, according to § 1951; *Canfield v. Thompson* cited as referring to transactions before the adoption of § 1951; intervening cases not cited); 1889, *Murriner v. Dennison*, 78 id. 202, 214, 20 Pac. 386 (preceding case approved); 1894, *Green v. Green*, 103 id. 108, 110, 37 Pac. 188 (original required to be accounted for).

Colorado: Annot. Stats. 1891, § 444 (recorded instrument not duly proved or acknowledged; certified copy may be "proved or acknowledged" with same effect as original, but "such certified copy so proved" is not admissible for any person "except upon satisfactory proof that the original thereof has been lost or destroyed, or is beyond his power to produce"); § 447 (duly recorded instrument in writing, provable by the record or a transcript, "upon affidavit of the [party] desiring to use the same that the original thereof is not in his possession or power to produce"); § 838 (recorder's certified copy of "all papers filed" and of records, admissible); St. 1894, p. 53, § 6 (certified copy of certificate of sale by trustee under trust deed, admissible); 1874, *Sullivan v. Hense*, 2 Colo. 424, 432 (statute construed as to the affidavits necessary); 1889, *Coleman v. Davis*, 13 id. 98, 21 Pac. 1018 (proof of loss is not necessary; the statutory requirement suffices).

Columbia (District): Comp. St. 1894, c. 20, § 33 ("deed, will, or other instrument of writing," recorded under law of place of execution, provable by certified copy); c. 70, § 17, so also c. 58, § 26 (lawfully recorded will, provable by attested copy); Code 1901, § 1071 (duly recorded deed or other instrument is provable by certified copy).

Connecticut: Gen. St. 1887, § 3895 (certified copy of recorded tax-collector's deed, admissible); 1808, *Talcott v. Goodwin*, 3 Day 264 (production not required of deeds to predecessor-grantees; but required of grantees themselves,

lowing respects: (1) They do not include an enumeration of the various specific kinds of conveyances authorized to be recorded — chattel mortgages,

and here of the grantee's assignee in bankruptcy); 1814, *Cunningham v. Tracy*, 1 Conn. 252 (production by ordinary grantee of deeds to predecessor, not required, the custom having been for the grantee not to take his deed; but production required of deeds to the party himself, or, as here, to the ancestor of one claiming by inheritance); 1815, *Phelps v. Foot*, ib. 387, 390 (production by indorser of deed to maker of note, not required, as being "not in his power"); 1842, *Clark v. Mix*, 15 id. 152, 161, 174 (deed of personalty in probate records; production not required); 1847, *Kelsey v. Hanmer*, 18 id. 311, 318 (like *Cunningham v. Tracy*); 1856, *Bolton v. Cummings*, 25 id. 410, 421 (general rule as above; but also declaring production necessary for a deed to the opponent; see quotation ante, § 1224); 1902, *Cunningham v. Cunningham*, 75 id. 64, 52 Atl. 318 (certified copy of deed to defendant, admitted for plaintiff, there being no specific objection as to the non-production of the original).

Delaware: Rev. St. 1893, c. 35, § 10 (county deed-recorder's record, or certified copy, of any instrument authorized by law to be recorded, admissible); c. 83, § 14 ("the said record or an office copy thereof shall be sufficient evidence").

Florida: Rev. St. 1892, § 1111 ("deed, conveyance, paper, or instrument of writing," lawfully recorded in a public office of this State or a copy, provable by certified copy; but this shall not prevent the Court from requiring the original to be produced or accounted for, "if the same shall be deemed necessary or proper for the attainment of justice").

Georgia: Code 1895, § 5211 (record in public office, provable by certified copy); § 5212 (such copies to be secondary only, for "such documents as by law properly remain in the possession of the party"); § 5219 ("if the original of any paper properly registered is lost or destroyed," it is provable by certified copy); § 3630 (on loss or destruction of original of duly recorded deed, copy from registry admissible); § 5673, Court Rule 42 (party's oath stating "his belief of the loss or destruction of the original and that it is not in his possession, power, or custody," sufficient); 1851, *Beverly v. Burke*, 9 Ga. 440, 445 ("copy-deed" to be "treated as the original"); 1851, *Ratteree v. Nelson*, 10 id. 439, 441 (by rule of Court, the original must be sworn to as lost or destroyed and out of the party's power); 1854, *Marshall v. Morris*, 16 id. 368, 372 (original to be accounted for); 1858, *Morgan v. Jones*, 24 id. 155, 161 (same); 1858, *Churchill v. Corker*, 25 id. 479, 490 *semble* (same for a probated will); 1859, *Sutton v. McLond*, 26 id. 637, 641 (original required); 1859, *Brooking v. Dearmond*, 27 id. 58, 61 (same); 1874, *Hadley v. Bean*, 53 id. 685, 688 (must show loss or destruction or failure to obtain; here also notice to opponent required); 1897, *Woods v. State*, 101 id. 528, 28 S. E. 970 (original must be accounted for); 1898, *Hayden v. Mitchell*, 103 id. 431, 30 S. E. 287 (certified copy of marriage-contract, admis-

sible after accounting for original); 1900, *Smith v. Coker*, 110 id. 650, 36 S. E. 105 (statute not satisfied on the facts); 1903, *Cox v. McDonald*, — id. —, 45 S. E. 401 (Rule 42 of the superior courts, providing that the party's oath of loss, etc., shall be "a sufficient foundation" for a copy applies only to instruments "between the parties litigant," being in derogation of the common-law practice; Rule 42 and Code § 3630 compared).

Hawaii: Civil Laws 1897, § 1849 ("the record of an instrument duly recorded, or a transcript thereof duly certified," may be read "with the like force and effect as the original instrument").

Idaho: Rev. St. 1887, § 5998 (like Cal. C. C. P. § 1951); § 5999 (writing itself must be produced, except when it is recorded and a certified copy is made evidence by statute).

Illinois: Rev. St. 1874, c. 30, § 35 ("If it shall appear to the satisfaction of the Court that the original deed so acknowledged or proved and recorded, is lost, or not in the power of the party wishing to use it," a certified copy is admissible); § 36 ("Whenever upon the trial of any cause at law or in equity in this State, any party to said cause, or his agent or attorney in his behalf, shall, orally in court, or by affidavit to be filed in said cause, testify and state under oath that the original" of any instrument affecting land, duly recorded, "is lost or not in the power of the party wishing to use it on the trial of said cause, and that to the best of his knowledge said original deed was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof in place of the original," the record or recorder's certified copy is admissible); c. 95, § 5 (chattel mortgages, duly recorded, provable like conveyances of land); c. 109, §§ 2, 11 (so for plats of subdivisions recorded); St. 1897, May 1, § 39 (certified copy of an original certificate of registered title, admissible); § 58 ("in the event of a duplicate certificate of title being lost, mislaid, or destroyed," the registrar may issue a certified copy of the original in his office, and "such certified copy shall stand in the place of and have like effect" as the missing duplicate certificate); 1849, *Irving v. Brownell*, 11 Ill. 402, 415 ("not in the power"; statute applied); 1851, *Newsom v. Luster*, 13 id. 175, 180 (under statute of 1845, party's affidavit is not necessary; any kind of evidence suffices, in Court's discretion); 1858, *Booth v. Cook*, 20 id. 130 (an affidavit in general terms that it is "not in his power" to produce is insufficient; diligent inquiry and reasonable efforts to produce must be shown in detail); 1858, *Roberts v. Haskell*, ib. 59 (same); 1859, *Hanson v. Armstrong*, 22 id. 442, 445 ("not in the power"; statute applied); 1861, *Dickinson v. Breeden*, 25 id. 186 (grantee's residence appearing, his deposition should be taken as to loss, etc.); 1863, *Pardee v. Lindley*, 31 id. 174 (affidavit; statute applied); 1864, *Prettyman v. Watson*, 34 id. 175 (statute of 1861 applied); 1866, *Lowman v.*

deeds of realty, powers of attorney, sheriffs' deeds, and the like. (2) The line of distinction between documents of the present class — conveyances —

Wettig, 39 id. 416, 421 (statute applied); 1866, Deininger v. McCounel, 41 id. 227, 232 (affidavit; statute applied); 1869, Newman v. Cobleigh, 52 id. 387 (under the statute, a showing of search made is not necessary); 1873, Richley v. Farrell, 69 id. 264 (burnt records; loss of deeds sufficiently shown); 1874, Dowden v. Wilson, 71 id. 485, 487 (principle applied to note and mortgage on foreclosure); 1880, Hardin v. Forsythe, 99 id. 312, 324, 328 (proof of contents of deed not accounted for, excluded); 1898, Scott v. Bassett, 174 id. 390, 51 N. E. 577 ("not in the power," applied); 1899, 1900, Scott v. Bassett, 174 id. 390, 51 N. E. 577, 57 id. 835 (sufficiency of party's affidavit); 1902, Glos v. Cary, 194 id. 214, 62 N. E. 555 (affidavit held sufficient); 1902, Scott v. Bassett, lb. 602, 62 N. E. 914 (collective affidavit held deficient).

Indiana: Rev. St. 1897, § 471 (record of "deeds and other instruments," provable by keeper's attested copy under seal); § 3435 (certain deeds executed more than 20 years before date of Act [Feb. 28, 1857] and recorded in wrong county, provable by certified copy); § 7660 (recorded apprentice's indenture, provable by certified copy); § 3439 (same for recorded power of attorney to convey land); §§ 5750, 5756, 5768 (same for deeds re-recorded on change of county boundaries or creation of new county); § 8396 (same for certain re-recorded deeds); 1838, Bowser v. Warren, 4 Blackf. 522, 527 (original required only "if the deed is made to the party who relies upon it, or may be presumed from its character to be in his keeping"); 1839, Rucker v. McNeely, 5 id. 123 (grantee offering record; admitted after proof of deed's loss); 1839, Dixon v. Doe, lb. 107 (non-grantee offering record of deed; admitted without accounting for original); 1840, Doe v. Holmes, lb. 319 (same); 1842, Foresman v. Marsh, 6 id. 285 (general principle repeated); 1843, Daniels v. Stone, lb. 450 (same); 1850, Pierson v. Doe, 2 Ind. 123 (deeds of plaintiff's title; copies allowed); 1860, Lyon v. Perry, 14 id. 515 (original not required); 1860, Morehouse v. Potter, 15 id. 477 (record-copy of mortgage; expressly decided that under the statute it is immaterial whether the original is or is not in the hands of the offeror); 1865, Winship v. Clendenning, 24 id. 439, 243 (same); 1872, Bowers v. Van Winkle, 41 id. 432, 435 (original not required); 1874, Patterson v. Dallas, 46 id. 48 (same); 1876, Abshire v. State, 53 id. 64, 65 (same); 1888, State v. Davis, 117 id. 307, 30 N. E. 159, *semble* (unrecorded deed; original required); 1891, Adams v. Buhler, 131 id. 66, 30 N. E. 883 (mechanic's lien notice recorded in the wrong book; original required).

Iowa: Code 1897, § 4630 ("any instrument" recorded in public office by authority of law is provable by the record or duly authenticated copy, "whenever, by the party's own oath or otherwise, the original is shown to be lost, or not belonging to the party wishing to use the same, nor within his control"); 1867, Williams v. Heath, 22 Ia. 519 (original to be accounted for; the fact that the deed is to another than the offeror does not of itself suffice); 1868, Ackley v. Sexton, 24 id. 320 (statute applied); 1871, Byington v. Oaks, 32 id. 488 (same); 1873, Scarf v. Patterson, 37 id. 503, 513 (same); 1876, McNichols v. Wilson, 42 id. 385, 393 (possession by offeror's brother, within control of Court, but not subpoenaed or requested to produce; copy allowed); 1876, Ingle v. Jones, 43 id. 286, 290 (offeror not in control, on the facts); 1879, Olleman v. Kilgore, 52 id. 38, 2 N. W. 612 (offeror not in control, on the facts); 1881, Bixby v. Carskaddon, 55 id. 533, 537, 8 N. W. 354 (deeds executed to third persons; Court may presume them not in offeror's control); 1884, Jaffray v. Thompson, 65 Ia. 323, 325, 21 N. W. 659 (excluding copy of mortgage not accounted for); 1886, Laird v. Kilbourne, 70 id. 83, 85, 30 N. W. 9 (deed shown unavailable on the facts); 1886, State v. P'enny, lb. 190, 30 N. W. 561 (chattel mortgage to prosecuting witness; that he did not have possession, insufficient); 1890, Collins v. Nalleau, 79 id. 626, 629, 43 N. W. 284, 44 N. W. 904 (re-record in another county from certified copy; original instrument need not be accounted for); 1890, Krenger v. Walker, 80 id. 733, 735, 45 N. W. 771 (deeds sufficiently accounted for); 1891, Ica's Assignment, 82 id. 231, 234, 48 N. W. 78 (mortgage sufficiently accounted for); 1891, Kenosha Stove Co. v. Shedd, lb. 540, 545, 48 N. W. 933 (conveyances not in offeror's control; copies sufficient); 1894, McCollister v. Yard, 90 id. 621, 633, 59 N. W. 447 (deed of adoption; not shown unavailable on the facts); 1898, Independent School Dist. v. Hewitt, 105 id. 663, 75 N. W. 497 (statute applied; original to be accounted for); 1900, Hall v. Carlell, 111 id. 206, 82 N. W. 503 (original sufficiently shown not in party's control).

Kansas: Gen. St. 1897, c. 97, § 2 (record of "any instrument authorized to be recorded," admissible if "the original is not in the possession or under the control of the party desiring to use the same"); § 3 (same for certified copy of any paper lawfully filed or recorded in public office); 1876, Williams v. Hill, 16 Kans. 23 (statutory showing sufficient, as being less than the common-law requirement); 1890, Stratton v. Hawks, 43 id. 538, 23 Pac. 591 (the proof of the original's not being in possession or under control is sufficient if "to the satisfaction of the Court"); 1891, McLean v. Webster, 45 id. 644, 26 Pac. 10 (deed to adverse parties, presumed not in the possession or control of the proponent); 1893, Ehy v. Winters, 51 id. 777, 783, 33 Pac. 471 (delivery to opponent, sufficient to exempt); 1901, Neosho V. I. Co. v. Hannum, 63 id. 621, 66 Pac. 631 (statute applied).

Kentucky: Stats. 1899, § 519 ("certified copies of all instruments legally recorded shall be *prima facie* evidence"); § 1638 (instrument duly registered out of the U. S., provable by the keeper's attested copy); 1814, Gholson v. Lefevre, Litt. Sel. C. 191 (original not required of Virginia grant, under statute); 1814, Wells

and those of the classes already dealt with (§§ 1215-1222) — *official documents and judicial records* — is sometimes obscure; certain provisions under

v. Wilson, 3 Bibb 264, 265 (copy admissible from one not a party to the deed; other cases left undetermined); 1615, *Tebbs v. White*, 4 id. 42 (copy admissible in all cases; here offered by the vendee of the grantee); 1820, *Hood v. Mathers*, 2 A. K. Marsh. 553, 558 (original not required); 1621, *Brooks v. Clay*, 3 id. 545, 548, *semble* (same); 1832, *Griffith v. Huston*, 7 J. J. Marsh. 385, 386 (copy offered by grantee; original required); 1838, *King v. Mims*, 7 Dana 267, 269 (Virginia deed; original not required); 1857, *Dickerson v. Talbot*, 14 B. Monr. 60, 67 (original required; but here the deed had not been legally recorded).

Louisiana: In the statutes of this State, it is somewhat difficult, for those not familiar with the theory of the French law and its phraseology, to discriminate between the provisions bearing on the present principle and those dealing with the rules of certified copies to prove the original's execution; the statutes have therefore been set out once only, under the latter head, *post*, § 1651; compare also the cases on notarial acts, *post*, § 1240. (1) The following seem to apply Civ. C. § 2258: 1827, *Coleman v. Breand*, 6 Mart. n. s. 407, 408 (production required; here of a Tennessee deed); 1829, *Lewis v. Beatty*, 8 id. 287, 289 (same; Georgia deed); 1839, *Johnston v. Cox*, 13 La. 536, 537 (statute applied); 1843, *Wells v. McMaster*, 5 Rob. La. 154, *semble*; original required); 1851, *Winston v. Prevost*, 6 La. An. 164 (deed; loss not sufficiently shown); 1854, *Hall v. Acklen*, 9 id. 219, 221 (warrant; loss sufficiently shown); 1857, *Psacs v. Head*, 12 id. 582 (instrument sufficiently shown to be lost); 1858, *Lawrence v. Burris*, 13 id. 611 (deed; loss not sufficiently shown); 1878, *Sharkey v. Bankston*, 30 id. 891 (judgment; loss sufficiently shown). (2) The following apply Civ. C. § 2253: 1847, *Sexton v. McGill*, 2 La. An. 190, 195 (original to be accounted for); 1848, *Lacey v. Newport*, 3 id. 227 (statute applied); 1853, *Beebe v. McNeill*, 8 id. 130 (§ 2259 does not apply to destroyed instruments); 1859, *Andrew v. Keenan*, 14 id. 705 (statute applied; Civ. C. § 2279); 1877, *Ticknor v. C'houn*, 29 id. 277 (same). (3) The following apply Civ. C. § 2263: 1893, *Chambers v. Hauey*, 45 La. An. 447, 450, 12 So. 621 (on the theory of a copy of a copy, production required). (4) The following require the production of an original not being a "public act": 1848, *Leggo v. N. O. C. & B. Co.*, 3 La. An. 138; 1856, *Bovkin v. Wright*, 11 id. 531, 533; 1857, *Knight v. Knight*, 12 id. 396; 1884, *Hotard v. R. Co.*, 36 id. 450, 451.

Maine: Pub. St. 1883, c. 82, § 110 (in actions affecting realty, attested copies of a recorded deed are admissible, when the offeror is not grantee nor heir nor "justifies as servant" thereof); 1831, *Woodman v. Coolbroth*, 7 Greenl. 181, 185 (grantee rule, as in Massachusetts; even though the original was in fact in the possession of the offeror of the office-copy, production not required of non-grantee); 1833, *Knox v. Sil- loway*, 1 Fairf. 201, 216 (approving the preced-

ing case); 1834, *Kent v. Waid*, 2 id. 459 (same; but this, *semble*, is allowable under Court Rule 34, only "in actions touching the realty," "when the party offering such office-copy in evidence is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs"; not applicable, therefore, to a recorded power of attorney in an action for services rendered to an alleged agent of the defendant); 1901, *Egan v. Horrigan*, 96 Ms. 46, 51 Atl. 246 (grantee rule applied).

Maryland: Pub. Gen. L. 1886, Art. 35, § 38 (any instrument required, by law of State or country where executed, to be registered, and lawfully registered, is provable by the keeper's certified copy); § 51 (land-office commissioner's certified copy of extract of deed transmitted by court clerk, admissible if the original deed and record are lost or destroyed); 1800, *Gittings v. Hall*, 1 H. & J. 14, 18 (copy of a deed not requiring enrolment, not receivables without express proof of loss, etc.); 1804, *Cheney v. Watkins*, ib. 527, 532 (same).

Massachusetts: Pub. St. 1682, c. 82, § 7, Rev. L. 1902, c. 78, § 4 (cemetery conveyances recorded by the corporation, provable by certified copy like registered deeds); Rev. L. 1902, c. 128, § 46 (the owner's duplicate certificate of registered title, and a certified copy of the original certificate on file, is admissible); § 104 ("if a duplicate certificate is lost or destroyed, or cannot be produced by a grantee, heir, devisee, assignee, or other person who applies for the entry of a new certificate to him or for the registration of any instrument," a new duplicate may be issued, which shall "thereafter be regarded as the original duplicate for all the purposes of this chapter"); 1828, *Eaton v. Campbell*, 7 Pick. 10 (grantee need not produce originals of deeds prior to that made to himself; see quotation *ante*, § 1224); 1829, *Poignaud v. Smith*, 8 id. 272, 277 (mortgage belonging to an assignee; original to be accounted for); 1832, *Burghardt v. Turner*, 12 id. 534, 538 (rule of *Eaton v. Campbell* applicable to a deed made to a common ancestor, there being no reason to attribute possession of it to one party rather than the other); 1833, *Scanlan v. Wright*, 13 id. 523, 527 (rule applicable even where the prior grantee is within the jurisdiction; production is required only where the person proving the deed is himself the grantee or some one who must be presumed to have the deed); 1834, *Ward v. Fuller*, 15 id. 185, 187 (general principle as above); 1853, *Blanchard v. Young*, 11 Cush. 341, 345 (same; applied, in an issue of a conveyance in fraud of the defendant's creditors, to the defendant's deeds to third persons); 1854, *Com. v. Emery*, 2 Gray 80 (charge of being a common seller; to prove the defendant's ownership of the premises, the district attorney offered a registrar's copy of a deed to the defendant; excluded, the original being obtainable by notifying the opponent; quoted *ante*, § 1224); 1854, *Bourn v. Boston*, ib. 494 (following *Com. v. Emery*; to prove the plaintiff a resident of

those heads might by another interpretation belong equally or better under the present subject. (3) The proof of Government grants or patents of land

Boston, copies of deeds in which the plaintiff was grantee, offered by the defendant, were excluded); 1856, *Hierce v. Gray*, 7 *Id.* 67 (rule applied to mortgages of personally recorded); 1863, *Barnard v. Crosby*, 6 *All.* 327, 331 (same); 1863, *Thacher v. Philney*, 7 *All.* 146, 148 (rule applied to admit a copy of a deed to the defendant's grantor, offered by the plaintiff); 1870, *Sammel v. Borrowdale*, 104 *Mass.* 207, 209 (rule applied); 1870, *Stockwell v. Silloway*, 105 *Id.* 517 (same); 1878, *Draper v. Hatfield*, 124 *Id.* 53, 56 (copies of deeds to the opponent, excluded, because no notice had been given).

Michigan: *Comp. L.* 1897, §§ 8964, 8965, 8990, 8995, 8996, 9006, 9040, 9043, 9046, 9047, 9050, 9052, 1271 ("conveyances and other instruments" lawfully recorded are provable by the register's certified copy); 1863, *Brown v. Cady*, 10 *Mich.* 535, 538 (record not admissible unless lawfully recorded); 1889, *People v. Sweetland*, 77 *Id.* 53, 56, 43 *N. W.* 779 (forgery of a discharge of mortgage; record not admissible till original accounted for, "when the question of the forgery of the original instrument is in issue either in a criminal or civil suit").

Minnesota: *Gen. St.* 1894, § 5759 (instrument authorized to be recorded and duly acknowledged or proved, provable by record or register's certified copy); §§ 4153, 4151 (certified copy, by clerk or other proper officer, of chattel mortgage or conditional sale, admissible like the original or copy on file); 1866, *Winona v. Huff*, 11 *Minn.* 119, 127 (map of dedication recorded; loss of record and of original map required to be shown); 1885, *Gaston v. Merriam*, 33 *Id.* 271, 275, 22 *N. W.* 614 (loss of original sufficiently shown).

Mississippi: *Annot. Code* 1892, § 1777 (copies of record of "all instruments of writing which by the laws of any foreign country may be admitted to record upon acknowledgment or proof thereof," duly certified, admissible; but if execution is disputed on oath, "the original shall be produced or its absence accounted for before such copy shall be read in evidence"); § 1778 (same for instrument "required or permitted to be" recorded in U. S. State or Territory or District of Columbia); § 1779 (same for instrument "required or permitted to be" recorded in this State); 1844, *Haydon v. Moore*, 1 *Sm. & M.* 605 (original statute, requiring production of deed, applied); 1845, *Chaplain v. Briscoe*, 5 *Id.* 198 (same); 1846, *Harmon v. James*, 7 *Id.* 111, 118 (same), here a statute of 1844, abolishing the necessity of production, as above, became applicable in the later cases; 1848, *Thomas v. Bank*, 9 *Sm. & M.* 201 (original of a document not required to be recorded must be produced); 1860, *Davis v. Rhodes*, 39 *Miss.* 152, 156 (same, for document not recorded according to law).

Missouri: *Rev. St.* 1899, § 933 (duly recorded instruments "conveying or affecting real estate," provable by certified copy when "it shall be shown to the Court by the oath or affidavit of the party wishing to use the same, or of any one knowing the fact, that such instrument is lost

or not within the power of the party wishing to use the same"); § 941 (duly recorded instruments dealing with military-bounty lands in this State, executed out of the State but in the U. S., provable by certified copy "upon proof of the loss or destruction of the original instrument"); § 3115 (certain recorded deeds, made admissible by lapse of time, etc., under State. § 3147, *infra*, provable by certified copy when the original "has been lost or destroyed or is not in the power of the party who wishes to use it"); § 3116 (so also for transcripts of certain ancient deeds, where the original "has been lost or destroyed"); § 3147 (certain ancient documents recorded 30 years before March 28, 1874, provable by certified copy if it appears "by oath or affidavit of the party wishing to use the same, or of any one knowing the fact, that such instrument is lost or not within the power of the party wishing to use the same"); § 3128 (any "bond, contract, or other instrument," for which provision for recording has been made, provable by certified copy when the original is "lost or not within the control of the party wishing to use the same"); § 3142 (certified copy of duly recorded marriage contract, admissible, when the original "is lost or is not in the power of the party wishing to use it"); §§ 3107, 3109 (conveyances, grants, records, etc., under French or Spanish government, deposited with recorder of land-titles or county recorder, provable by his certified copy "with like effect as the original"); § 3110 (when it appears that the original of such documents, after deposit and record, "cannot be found therein, or has been lost or destroyed, or that neither the original nor a duly certified copy thereof can be obtained by the parties wishing to use it, a copy of the record of such original, duly certified by the officer having charge of such record, shall be received"); § 3115 (where certain instruments not so recorded as ordinarily to be admissible are made admissible by lapse of time, etc., a certified copy is admissible if the original "has been lost or destroyed, or is not in the power of the party who wishes to use it"); § 3116 (where deed has been recorded more than 20 years, though not duly acknowledged, etc., and has been later duly proved and read on trial, then after loss or destruction of original, a copy, preserved in bill of exceptions contained in transcript filed in certain courts, is admissible when certified under seal of clerk of proper court); § 5074 (certified copy of recorded contract of boatman's hire, admissible); § 8957 (county recorder's certified copy of recorded plat, admissible); 1851, *Walker v. Newhouse*, 14 *Mo.* 373, 377 (deed to a third person; "in most cases," perhaps, efforts to procure would be required; here not, on the facts); 1851, *Bosworth v. Bryan*, *ib.* 575, 577 (deed to offeror's predecessor; copy allowed on proof of loss); 1858, *Barton v. Murrain*, 27 *Id.* 235, 238 (ordinarily, if original is presumed to be in a third person's hands, not even the preliminary oath is necessary; if the deed deals with military-

is controlled by the present general principle, if it is applicable; but whether it is applicable depends upon the theory of substantive law as to which docu-

bounty land and is otherwise insufficiently recorded, then loss must be shown); 1867, *Attwell v. Lynch*, 39 id. 519 (original not accounted for; copy excluded); 1867, *Boyce v. Mooney*, 40 id. 104 (deed to trustees-plaintiffs under a marriage-contract; original not presumed out of their power); 1870, *Christy v. Kavanagh*, 45 id. 375 (loss not sufficiently shown on the facts; trial Court's discretion should control); 1872, *Strain v. Murphy*, 49 id. 337, 340 (original sufficiently accounted for); 1872, *Crispen v. Hannavan*, 50 id. 415, 418 (military-bounty land; loss or destruction must be shown); 1874, *Totten v. James*, 55 id. 494, 498 (transfer of military-bounty land made in conformity to home law; original must be shown lost or destroyed); 1875, *Tully v. Canfield*, 80 id. 99 (overruling the preceding case; original need not be shown lost or destroyed; except for transfers made in another State according to its law); 1877, *Sims v. Gray*, 66 id. 613, 615 (administrator's deed in offeror's control; certified copy excluded); 1880, *Crispen v. Hannavan*, 72 id. 548, 554 (certified copies of deeds defectively acknowledged but recorded 30 years; original must be shown lost or destroyed, by implication of the statute); 1882, *Hoogher v. Neece*, 75 id. 383, 385 (deed properly acknowledged out of the State but in conformity to home law; sufficient to show original not within offeror's power); 1885, *Addis v. Graham*, 88 id. 197, 202 (deed shown lost); 1887, *Dollard v. Parks*, 92 id. 178, 186, 5 S. W. 3 (deed shown lost); 1887, *Hammond v. Johnston*, 93 id. 198, 207, 6 S. W. 83 (under Stats. § 2395, the original of a recorded sheriff's deed need not be accounted for); 1893, *Frank v. Reuter*, 116 id. 517, 521, 22 S. W. 813 (deed must be accounted for); 1893, *Hunt v. Selleck*, 118 id. 588, 593, 24 S. W. 213 (same); 1898, *Cazier v. Hinchey*, 143 id. 203, 44 S. W. 1052, *semble* (widow proving husband's chain of title; loss not to be shown); 1901, *Stout v. Rigney*, 46 C. C. A. 459, 107 Fed. 545, 551 (certified copy of deed to military-bounty land taken in Illinois according to Missouri law, admitted; following *Tully v. Canfield*, *supra*, proof that the original was not in the party's power sufficient under Rev. St., § 933, without proof of loss or destruction); 1903, *Orchard v. Collier*, 171 Mo. 390, 71 S. W. 677 (original not shown on the facts to be lost or out of the party's power).

Montana: C. C. P. 1895, § 3131 (like Cal. C. C. P. § 1855); § 3241 (like Cal. C. C. P. § 1951, as amended by St. 1889, adding, for the class of instruments, "and every instrument authorized by law to be filed or recorded in the county clerk's office"); 1882, *McKinstry v. Clark*, 4 Mont. 370, 371 (mining location; certified copy admitted without requiring loss to be shown); 1886, *Garfield M. & M. Co. v. Hanmer*, 6 id. 52, 64, 8 Pac. 153 (certified copy of recorded mining declaration and of deed, admissible without accounting for original); 1889, *Flick v. Gold Hill & L. M. M. Co.*, 8 id. 298, 304, 20 Pac. 807 (principle of preceding cases approved); 1894, *Manhattan M. Co. v. Swete-*

land, 14 id. 269, 36 Pac. 84 (originals required; repudiating the two earlier rulings above; compare the California rulings *supra*).

Nebraska: Comp. St. 1899, § 4105 (record of deed or certified copy, admissible "whenever, by the party's oath or otherwise, the original is known to be lost, or not belonging to the party wishing to use the same, nor within his control"); 1880, *Delaney v. Errickson*, 10 Nehr. 492, 500, 6 N. W. 800 (deed to offeror's grantor; presumed not in his possession, and need not be accounted for); 1888, *Fremont E. & M. V. R. Co. v. Marley*, 25 id. 138, 145, 40 N. W. 948 (use of record-copies to establish title is in discretion of trial Court); 1889, *Hall v. Aitkin*, ib. 380, 363, 41 N. W. 192 (mortgage filed; production not required); 1889, *Back v. Gage*, 27 id. 360, 41 N. W. 192 (deeds not to the offeror; statute presumed satisfied by proof to the Court below); 1892, *Rupert v. Penner*, 35 id. 587, 591, 53 N. W. 598 (in trial Court's discretion to require production of original deeds, in ejectment suits).

Nevada: Gen. St. 1885, § 3449 (original need not be produced "when the original has been recorded, and a certified copy of the record is made evidence by statute"); § 2598 ("conveyance, or other instrument conveying or affecting real estate," only recorded, provable by certified copy whenever "it shall be shown to the Court that such conveyance or instrument is lost, or not within the power of the party wishing to use the same").

New Hampshire: Pub. St. 1891, c. 27, § 18; c. 43, § 44 (duplicate certified copies of mutilated records may be used as originals without showing loss of the latter); c. 224, § 23 (certified copy by proper officer of any document required by law to be recorded in a public office, admissible "where the originals would be evidence"); 1831, *Sontherin v. Mendum*, 5 N. H. 420, 428 (grantee rule, following *Eaton v. Campbell*, Mass.; applied to powers of attorney); 1840, *Pollard v. Melvin*, 10 id. 554 (original dispensed with "only in a chain of title, where due proof has first been made of the execution of the last conveyance"; rule not applicable to third person's title); 1840, *Loomis v. Bedel*, 11 id. 74, 86 (same); 1843, *Homer v. Cilley*, 14 id. 85, 98 (same); 1844, *Lyford v. Thurston*, 16 id. 399, 404 (same; the rule held to cover copies of deeds in the chain of the opponent's as well as of the proponent's title); 1845, *Andrews v. Davison*, 17 id. 413, 415 (same; applicable not only in a real action, but in a suit upon a deed-covenant; in short, "in all cases where the conveyance is not immediately to himself, but is in privity with the title conveyed by the deed"); 1844, *Clough v. Bowman*, 44 id. 504, 513 (rule held to admit an office-copy of a recorded deed not in the chain of title, but referred to by one of such deeds for a description); 1850, *Forsyth v. Clark*, 21 id. 409, 422, 424 (general principle affirmed); 1859, *Farrar v. Fessenden*, 39 id. 268, 276 (newspaper notice of foreclosure; "an examined copy of any instrument thus recorded"

ment constitutes the grant, i. e. the patent delivered to the grantee or the official record retained; the question thus raised — namely, the question

is admissible "without proof of the original"); 1861, *Wendell v. Abbott*, 43 id. 68, 73 (grantee rule; general principle affirmed); 1879, *Smith v. Cushman*, 59 id. 37 (general principle of grantee rule affirmed).

New Jersey: Gen. St. 1896, "Conveyances," §§ 15, 29, 31 (deeds duly recorded within 10 years from date, provable by certified copy without production, unless opponent gives 10 days' notice before trial, and then proof must be made that "the original hath been lost, or unintentionally destroyed, or that after having made diligent search and inquiry such party hath been unable to find said original"; the Court to determine "according to the circumstances and situations of the parties, whether such diligent search and inquiry has been made"); § 90 (deed recorded not within 10 years, provable by record or certified copy, if the original is "destroyed or lost or taken out of the office" where it was kept by law); "Evidence," § 58 (document recorded in foreign State, provable by exemplified copy of record, if so provable in that State); 1826, *Fox v. Lambson*, 8 N. J. L. 275, 280 ("the record or registry of a deed or other instrument is but a copy and presupposes an original"; here requiring the original of a manumission certificate to be accounted for); 1895, *Chase v. Caryl*, 57 id. 545, 51 Atl. 1024 (mortgage recorded in New York under statute making certified copy evidence, provable in New Jersey by certified copy).

New Mexico: Comp. L. 1297, § 3985 ("all writings conveying or affecting real estate," when duly registered, are provable by certified copy when it is "proved to the Court that said writing is lost, or that it is not in the hands of the party wishing to use it"); § 2381 (duly recorded chattel mortgage or affidavit, provable by recorder's certified copy when "it is shown to the Court by the oath or affidavit of the party wishing to use the same, . . . or either of them, or of any one knowing the fact, that such mortgage or affidavit is lost or not in the possession of the party wishing to use the same, or either of them").

New York: C. C. P. 1877, § 935 (duly recorded conveyance, provable by certified copy); § 936 (same for any instrument, except bill, note, or will); § 945 (sale, etc., of vessel recorded in U. S. customs' office, after due proof, provable by certified copy); §§ 946, 947 (conveyance of realty in another U. S. State or Territory, provable by custodian's certified copy under seal, if recorded and authenticated according to the law of such State, etc., and if "original cannot be produced"); § 957 (certified copies must state that the original has been compared, and the whole correctly transcribed); Laws 1837, c. 150, § 27 (recorded mortgage with State loan-commissioners, provable, if lost, by attested copy); Laws 1844, c. 326, § 2 (similar, for re-recorded copy); 1829, *Jackson v. Rice*, 3 Wend. 180, 183 (original need not be accounted for); 1837, *Van Cortlandt v. Tozer*, 17 id. 338, 340 (same).

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North Carolina: Code 1883, § 1251 (instrument required or allowed to be registered may be proved by registry or certified copy, "although the party offering the same shall be entitled to the possession of the original and shall not account for the non-production thereof," unless by Court order made "upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original"; see also §§ 1253, 1263, 1337); § 1344 (deed by inhabitant of other State or Territory, of domestic property, provable by copy duly certified, if original "cannot be obtained for registration" in the proper county); 1796, *Park v. Cochran*, 1 Hayw. 410 (an office copy of a deed to the plaintiff, excluded, unless he accounted for the original); 1834, *Smith v. Wilson*, 1 Dev. & B. 40 (grantee offering a copy; original required; here a statute of 1848 intervened to excuse production conditionally); 1852, *Burnett v. Thompson*, 13 Fred. 379 (the registration of leases for years not being required, a copy from the registry does not dispense with the production of the original); 1854, *Bohanan v. Shelton*, 1 Jones L. 370 (statute applied to a bond to make title); 1893, *Mitchell v. Bridger*, 113 N. C. 63, 71, 18 S. E. 91 (contract to offeror's predecessor; original not required); 1902, *Ratliff v. Ratliff*, 131 id. 425, 42 S. E. 887 (statute applied).

North Dakota: Rev. C. 1895, § 5696 ("every instrument conveying or affecting real property," provable by record or certified copy of record, "on proof by affidavit or otherwise that the original is not in the possession or under the control of the party producing such record or copy"); § 3597 ("the proof, recording, and deposit [of instruments under Code §§ 3585, 3579, 3581, and 3582] do not entitle the instrument, or the record thereof, or the transcript of the record, to be read in evidence"); St. 1901, c. 145 (amending so that the record or a certified copy of "all instruments entitled to record" may be "read in evidence without further proof"); 1901, *American Mfg. Co. v. Mouse River L. S. Co.*, 10 N. D. 290, 86 N. W. 965 (statute applied).

Ohio: Rev. St. 1898, §§ 4132 (2), 4143, 4156 (recorder's certified copy of a recorded power of attorney, "deed or other instrument of writing," and chattel mortgage, admissible); § 3322 (recorder's certified copy of grant of way or easement to railroad, admissible); 1833, *Burnett v. Brush*, 6 Oh. 32 (under the original recording act of 1820, the original was not required to be produced except where it was a deed from the offeror's immediate grantor; under the absolute terms of the act of 1831, held, that even this exception disappeared); 1839, *Livingston v. McDonald*, 9 id. 168 *semble* (same); 1875, *Kilbourne v. Fry*, 26 Oh. St. 153, 161, *semble* (original must be accounted for).

Oklahoma: Stats. 1893, § 1621 ("all deeds, agreements, writings, and powers of attorney," duly recorded, provable by record or certified

which document is the legal original — is the chief matter of controversy and complicates most of the cases, and is dealt with elsewhere (*post*, § 1239).

transcript, "upon affidavit or proof of the party desiring to use the same that the original thereof is not in his possession or power to produce"); § 4262 ("all papers authenticated or required to be filed or recorded in any public office," provable by certified copy "when such original is not in the possession or under the control of the party desiring to use the same"); § 4278 (records of public officers, admissible; "and when any such record is of a paper, document, or instrument authorized to be recorded, and the original thereof is not in the possession or under the control of the party desiring to use the same, such record shall have the same effect as the original"); § 6130 (proof, recording, and deposit at registry do not entitle the record or a transcript to be read in evidence); St. 1897, c. 8, § 25 (all instruments affecting real estate and duly recorded are provable by certified copy, "in all cases where copies or other instruments might lawfully be used in evidence," and when not requiring record, by copy verified by oath or affidavit).

Oregon: C. C. P. 1892, § 3028 (record or certified transcript of duly recorded conveyance, admissible "with like force and effect as the original conveyance"); § 691, par. 4 (like Cal. C. C. P. § 1835, par. 4); St. 1903, p. 17 (for deeds of land, duly executed in a foreign country and recorded here, the county clerk's certified copy shall "have the same effect as the original").

Pennsylvania: St. 1715, P. & L. Digest, Deeds 88 (certified copies under seal of deeds duly recorded, receivable "as the original deeds themselves"); St. 1870, ib. 68 (same for land in more than one county); St. 1841, ib. 92 (certain old unrecorded deeds, *semble*, to be similarly provable if recorded before a certain time); St. 1828, ib. Evid. 30 (deeds duly recorded in land-office, though not in proper county, provable by exemplification); St. 1893, ib. Deeds 77 (exemplified copy admissible, for sheriffs' deeds recorded with the Court of Common Pleas); St. 1853, ib. Deeds 162, 163 (mortgage of coal-mining rights; certified copy of recorded instrument, when original is lost, receivable conditionally); St. 1887, ib. Deeds 178 (certified copies of recorded mortgages, etc., of iron ore and other specified personalty receivable); St. 1834, ib. Evid. 10 (record or exemplifications of papers lawfully recorded, receivable); St. 1846, ib. Deeds 76 (record or certified copies of duly recorded Commonwealth patents, sheriffs', coroners', marshals', and treasurers' deeds, and deeds under decree of Court, receivable); St. 1849, ib. Evid. 17 (same for deeds of county commissioners); St. 1849, ib. Evid. 18, Deeds 117 (same for assignments of mortgages and attorney-powers authorizing satisfaction of mortgages); St. 1828, St. 1866, St. 1850, ib. Evid. 19, Deeds 80-82 (duly recorded written discharges of "any legacy or recognizance charged upon lands" in the State; copies under recorder's seal, receivable; also other specified releases to executors, etc.); St. 1885, ib. Evid. 25 (letters of attorney relating to personalty,

duly recorded; exemplification receivable); St. 1854, 1864, ib. Deeds 79 (letters of attorney relating to personalty, duly made abroad before a U. S. officer or a notary, and here recorded, receivable, as also an exemplification, when the original is lost; also affidavits before a proper officer, duly certified, in another domestic State); 1810, *Carkhuff v. Anderson*, 3 Bin. 4, 7, 9 (copy allowable, under a statute by which the original deed was kept in the recording office); 1811, *Vickroy v. McKnight*, 4 Id. 304, 306 (here the deed was not properly proved for registry by the required two witnesses; "if a deed is recorded without the authority of law, a copy of the record is no evidence"); 1857, *Curry v. Raymond*, 28 Pa. 144, 149 (mortgage; production not required).

South Carolina: St. 1731, Quit Rents, § 30 (record of all grants in auditor-general's office and "all grants and deeds duly proved before a justice of the peace according to the usual method, and recorded," and also attested copies thereof, "shall be deemed to be as good evidence in the law and of the same force and effect as the original would have been if produced"); St. 1803, Gen. St. 1892, c. 86, § 2224, R. S. 1893, § 3360, Code 1902, § 3895 (certified copy of grant of land from this State or the State of North Carolina, receivable on oath that "the original grant is lost, destroyed, or out of his, her, or their power to produce," and that the offeror has not "destroyed, mislaid, or in any way willingly previous to that time "put it so out of his power with the intent to produce an office-copy"); St. 1843, ib. § 3225, R. S. 1893, § 3361, Code 1902, § 3896 (certified copy of recorded deed, receivable, "subject to the same rules" as in the preceding section, and on ten days' notice); 1795, *Purvis v. Robinson*, 1 Bay 493 (under the early statute above quoted, held that the loss of the original must still be shown; see a careful criticism by the reporter in a note to *Peay v. Pickett*, *post*, and the quotations *ante*, § 1224); 1803, *Turner v. Moore*, 1 Brev. 236 (slight evidence of loss sufficient); 1807, *Rosmond v. M'Ilwain*, 2 Id. 132 (copy of a grant alone, received under the statute, without copy of the plat annexed; *Trzevant, J.*, diss., because at common law production would have been necessary, and the statute was not strictly followed); 1821, *Dingle v. Bowman*, 1 McC. 177 (loss of the original must be shown); 1821, *Turnipseed v. Hawkins*, ib. 272, 278 (certified copy of deed, *semble*, receivable without accounting for the original; but here its loss was shown); 1823, *M'Mullen v. Brown*, Harp. 76 (loss of the original must be shown; but here lapse of time was allowed to suffice); 1825, *Bird v. Smith*, 3 McC. 300 (object of the statute of 1803, relating to North Carolina grants, was to substitute the party's oath for ordinary proof of loss); 1825, *Peay v. Pickett*, ib. 318 (original required to be accounted for, following the rule in *Purvis v. Robinson*; see quotation *ante*, § 1224); 1843, *Hinds v. Evans*, 2 Speer 17 (copy rejected because search for original was

§ 1226. Same: **Sundry Consequences of the Principle of not Producing Recorded Deeds.** (1) *If the form of proof (usually a certified copy) ex-*

not sufficient); 1843, *Birchfield v. Bonham*, 1b. 62 (search for recorded deed held sufficient to admit copy); 1843, *State v. Hill*, 1b. 180, 160 (same); 1845, *McLeod v. Rogers*, 3 Rich. 19, 22 ("the copy was evidence only on proof of the loss of the original; . . . *Dingle v. Bowman* seems to have been lost sight of"; noting the conflict of rulings); 1846, *Darby v. Huffman*, 1b. 532 (before using an office-copy, the loss alone, and not also the existence, of the original, need be proved).

South Dakota: Stats. 1899, § 6359 ("every instrument in writing, which is acknowledged or proved, and duly recorded," is provable by certified copy "whenever, by the party's own oath, or otherwise, the original is shown to be lost, or not belonging to the party wishing to use the same, and not within his control").

Tennessee: Code 1896, § 3704 (certified copy of acknowledgment of release of lien, receivable); § 3711 (copy of registered copy of deed of lands in different counties, receivable); § 3748 ("Any of said instruments [i.e. deeds, etc.] so proved or acknowledged and certified and registered shall be received as evidence"); extended to old or mutilated records re-copied, §§ 3778, 3786, 3793, 5575; 1806, *King v. Hall*, 1 Overt. 209 (grantee by warranty-deed need not produce prior deeds, which the grantor is supposed to keep); 1809, *Cook v. Hunter*, 2 Id. 115 (same); 1812, *McClellan v. Dunlap*, 1b. 183 (certified copy of mesne conveyance, received on affidavit that the original was beyond control; an alleged original was in Court, but, by hypothesis being altered, could not be regarded as the original in question); 1813, *Smith v. Martin*, 1b. 208 (proof is needed that the original mesne conveyance is out of the control of the offeror, but "not the same necessity for strictness as with other sorts of copies"; here, an affidavit of the offeror or his agent was held sufficient); 1814, *Jackson v. Dillon*, 1b. 261, 263 ("the law will always give an easy ear to the reception of affidavits respecting the loss or non-production of original papers which are required to be registered and have actually been registered agreeably to law"); 1817, *Lannum v. Brooks*, 4 Hayw. 121 (deed to the defendant; copy offered by plaintiff; production not required, because the plaintiff is presumed not to have possession; nor is notice to the defendant necessary); 1823, *Norset v. Nelson*, Peck 188 (production required of deed offered by grantee himself or his heir); 1827, *Anderson v. Walker*, M & Y. 201 (production dispensed with "only in those cases where the warrantor, not a defendant, was supposed to keep his title by him"; but here both grantor and grantee were joined as defendants, and the grantee therefore was obliged to account for a mesne deed to the grantor); 1844, *Sanders v. Harris*, 5 Humph. 345 (copy of recorded bill of sale to grantee, mother of plaintiff, excluded, because the original was in his power); 1832, *M'iver v. Robertson*, 3 Yerg. 84, 89 (under the original St 1809, c. 14, § 8, the offeror of a registered deed-copy

must show the original not to be in his power, by express statutory provision); 1869, *Walker v. Walker*, 6 Coldw. 571, 573, *sans le* (wife proving deed to deceased husband; production unnecessary, without order); 1874, *Sampson v. Marr*, 7 Baxt. 486, 492 (certified copy of deed to ancestor of plaintiff, the heir; production of original required, as the plaintiff was presumed to have possession).

Texas: Rev. Civ. Stats. 1895, § 2311 ("all conveyances and other instruments of writing between private individuals, which were filed in the office of any alcalde or judge in Texas previous to the first Monday in February, 1837," are provable by certified copy); § 2312 ("Every instrument of writing" lawfully proved or acknowledged and recorded with clerk of county court, is provable by certified copy "whenever any party to the suit shall file among the papers of the cause an affidavit" stating that any such instrument "has been lost or that he cannot procure the original"); § 4667 (all instruments permitted by law to be registered, and recorded before Feb. 9, 1860, provable by certified copy as if the proof or acknowledgment were in accordance with existing laws, provided it was made before certain specified officers); § 5286 (in trespass to try title, "proof of a common source may be made by the plaintiff by certified copies of the deeds showing a claim of title, etc.," if filed with the papers three days before trial and notice given "as in other cases"); in the following cases, where nothing is specially noted, the ruling concerns the statutory terms in regard to an affidavit of loss or lack of control; 1853, *Styles v. Gray*, 10 Tex. 503, 505 (statute applied to the record-book); 1853, *Crayton v. Munger*, 11 Id. 234 (statute strictly applied, as to the affidavit); 1856, *Graham v. Henry*, 17 Id. 164, 168; 1856, *Fulton v. Bayne*, 18 Id. 50, 56 (as to the notice); 1857, *Butler v. Dunagan*, 19 Id. 559, 566 (as to the affidavit); 1858, *Bateman v. Bateman*, 21 Tex. 432 (a ruling against sufficiency of proof of loss by affidavit does not preclude an additional affidavit at a later trial); 1864, *Winters v. Laird*, 27 Id. 618 (statute does not apply to judicial records; here, a pro-rated will; no notice necessary); 1867, *Hooper v. Hall*, 30 Id. 154, 158 (affidavit held insufficient on the facts); 1871, *Ury v. Houston*, 38 Id. 260, 288; 1882, *Hines v. Thoru*, 57 Id. 98, 103; 1882, *Dotson v. Moss*, 58 Id. 152, 154; 1883, *Vandergriff v. Piercy*, 59 Id. 371; 1885, *Kauffman v. Shellworth*, 64 Id. 179; 1885, *Ross v. Korurmpf*, 1b. 390, 394; 1888, *Nye v. Gribble*, 70 Id. 458, 462, 8 S. W. 608; 1888, *Bordaton v. Morris*, 71 Id. 697, 699, 10 S. W. 331 (common-law rule applied to recorded chattel-mortgages); 1890, *Hill v. Taylor*, 77 Id. 295, 299, 14 S. W. 366; 1890, *Foot v. Silliman*, 1b. 288, 271, 13 S. W. 1032; 1898, *Oxshier v. Watt*, 91 Id. 402, 44 S. W. 87 (recorded mortgage; original not required).

United States: 1826, *Brooks v. Marbury*, 11 Wheat. 78, 82 (statute requiring record but not exempting from production of original; production required; decision by a majority of the

prossly provided for by a statute is not or cannot be employed, the proceeding is not under the statute and the statutory exemption does not obtain; so

Court); 1826, *Pelts v. Clarke*, 2 Cr. C. C. 703 (original need not be accounted for); 1830, *Boall v. Dick*, 4 Id. 12 (same); 1831, *Doe v. Winn*, 5 Pet 233, 241 (see quotation *ante*, § 1224; exemplification under the State seal of Georgia of a land-patent there recorded; production not required; *Johnson, J.*, diss.); 1854, *Dick v. Balch*, 8 Id. 30, 33 (production of original not necessary, where record is required, even though the statute does not make the copy evidence; here, the law of Maryland); 1855, *Owings v. Hull*, 9 Id. 607, 225 (bill of sale required by Louisiana law to be kept by notary; production not required); 1860, *Gregg v. Forsyth*, 24 How. 179, 180 (original shown but; copy allowed); 1901, *Stout v. Higney*, 46 C. C. A. 459, 107 Fed. 343 (Missouri military-bounty land; see *Mo.*, *supra*); the following rulings deal with the assignment of a patent of invention, and are to be compared with the citations under § 1837, *post*: 1844, *Brooks v. Jenkins*, 3 McL. 432, 436 (original not required, except the one under which party claims); 1848, *Parker v. Howorth*, 4 Id. 370 (original of first assignment not required); 1860, *Lee v. Blandy*, 1 Bond 361 (original of assignment to offeror, not required); 1893, *Paine v. Trask*, 5 U. S. App. 283, 286, 5 C. C. A. 497, 56 Fed. 233 (whether the original of a patent-assignment recorded must be accounted for; undecided); 1894, *New York v. R. Co.*, 28 Id. 7, 9 C. C. A. 318, 60 Fed. 1016 (original required).

Utah: Rev. St. 1898, § 3409 (substantially like Cal. C. P. § 1951); § 3410, par. 4 (like lb. § 1855); § 136 (certified copy of filed chattel-mortgage admissible "if such original be out of the control of the person wishing to use it"); 1892, *Wilson v. Wright*, 8 Utah 215, 30 Pac. 734 (defendant a party to the deed; production required, though another person had the custody).

Vermont: St. 1797, Stats. 1894, § 2216 (attested copy of deed recorded by county clerk, receivable "if the records of a town in which such deed or other conveyance is recorded are destroyed"); § 2222 (certified copy of recorded power of attorney authorising deed, receivable "when the original cannot be produced"); § 2929 (sheriffs' commissions and accused's recognizances, recorded with county clerk, provable by certified copy in case of loss or destruction); 1827, *Williams v. Wetherbee*, 2 Alk. 529, 536 (mesne conveyances to plaintiff's grantor or predecessor; originals not presumed to be in plaintiff's possession, and therefore production not required; citing the statutes above as to county clerks' copies and powers of attorney copies; "these expressions do not necessarily imply that such copies may be read without proof that the originals are out of the parties' power; but the course has been, ever since the Act passed, to admit regular copies of such deeds as do not belong to the party wishing to use them"); 1830, *Booge v. Parsons*, 2 Vt. 456, 459 (same principle; here a record of deed to plaintiff's testator himself was received after proof of loss); 1834, *Braintree v. Battles*, 6 Id. 393, 399, *semble*

(ch. not deposited in public office; loss of original required to be shown); 1850, *Williams v. Bass*, 22 Id. 353, 353 (record of a deed "to a third person, and not to the party," suffices); 1861, *Pratt v. Battles*, 34 Id. 391, 397 ("a party may prove the various links in his chain of title" without producing the originals, "except the deed to himself . . . because it is supposed to be in his custody"; whether or not, on a *prima facie* case of fraud or forgery, production would be required, undecided).

Virginia: Code 1867, § 2333 (copies of deeds imperfectly recorded under certain early statutes receivable); § 3376 (no certified copy of deed, will, account, or other original paper required to be recorded in a Court is to be used as evidence in place of a destroyed original or record, until such copy has been admitted to record in substitution); 1797, *Maxwell v. Light*, 1 Call 117, 121, *semble* (original of recorded deed must be shown unavailable); 1804, *Hford v. Dishman*, 5 Id. 278, 284 (a copy, "by long-established usage in this country," is admissible without accounting for the original); 1815, *Rowlett v. Daniel*, 4 Munf. 473, 482 (certified copy of recorded deed to offeror's predecessor in title, dated 1765, received without accounting for original); 1821, *Baker v. Preston*, Gilmer 235, 264, *semble* (certified copy of recorded deed, admissible without accounting for the original; but at pp. 286, 294, it is not clear whether this was the point decided); 1824, *Ben v. Potts*, 2 Rand. 539, 543, *semble* (search required in the recording-office, etc.; but here it turned out that the deed was not lawfully recorded); 1835, *Petermans v. Laws*, 8 Leigh 523, 529 ("It is not necessary to consider whether *Baker v. Preston* settles the law" exempting from production of a locally recorded original; here, an original recorded in another State must be accounted for, unless the law there dispenses with it); 1845, *Pollard v. Lively*, 2 Gratt. 216, 218, *semble* (certified copy receivable, "on account of the inconvenience which would be occasioned by the necessity of producing the original"); 1847, *Pollard v. Lively*, 4 Id. 75, 80, *semble* (certified copy receivable; but there are intimations of a modified requirement of production).

Washington: Codes & Stats. 1897, § 6046 ("any deed, conveyance, bond, mortgage, or other writing," lawfully recorded or filed, is provable by certified copy); § 4532 (certified copy of instrument duly acknowledged abroad and recorded here, admissible "to the same extent and with like effect").

West Virginia: Code 1891, c. 130, § 4 (certain recorded deeds of Virginia, provable by copy); c. 73, §§ 7-11 *a* (*semble*, a duly recorded deed, provable by certified copy; but the contents of a recorded deed not properly acknowledged or proved for record are thus provable only in case of loss of the original).

Wisconsin: Stats. 1898, § 4156 (the record in the proper registry of every conveyance or land-patent lawfully recorded is admissible without further proof; "whenever any presumptive

that the original must be accounted for according to ordinary common-law doctrines.¹ For the same reason, the original must be accounted for by common-law methods if it is in fact recorded but not lawfully recorded.² (2) Conversely, if proof is proposed to be made by common-law modes and not a statutory certified copy, any statutory requirements — for example, an affidavit or a notice of using a certified copy —, which may be more rigorous, need not be followed.³ (3) The statutory rule of some States (*post*, §§ 1651, 2132) exempting from *proof of execution*, where the opponent has failed by plea or affidavit to put the execution in issue, does not exempt from production of the original to show the contents, if under the rule for proving recorded deeds such production is required.⁴ (4) The statutory *affidavit* often required is merely a means of proving loss or other excuse for non-production; the affidavit does not suffice to supply the contents, which must otherwise be duly proved.⁵ (5) Where the proponent is under the present principle exempted from producing the original and uses a copy, the *opponent also* has the advantage of the exemption.⁶ (6) Where the original is offered, a certified copy also may be offered so far as it may throw light on the disputed contents of the original.⁷ (7) If the conveyance is recorded in another jurisdiction and according to its laws, then production should not be required if it is dispensed with by the law of that jurisdiction.⁸

§ 1227. **Same: Other Principles Discriminated (Certified Copies, Affidavits, Abstracts).** (1) The principle of Authentication (*post*, §§ 1648, 2130) requires that the execution of the recorded original be somehow proved; and an important question (for the settlement of which the foregoing statutes

effect as evidence is given by law to such patent, conveyance, or instrument," such record and certified copies "shall have the like effect"); § 4713 a (certified copy of conveyance, admissible in criminal cases); 1881, *Johnson v. Ashland L. Co.*, 52 Wis. 458, 463, 9 N. W. 464 (whether the original must be accounted for, not clear).

Wyoming: Rev. St. 1887, § 20 (record or certified copy of a duly recorded instrument concerning any interest in land in this Territory, admissible "upon the affidavit of the party desiring to use the same, that the original thereof is not in his possession or power to produce").

¹ 1858, *Brogan v. Savage*, 5 Sneed 689, 692 (where the certified copy was inadmissible). Compare the different result reached *ante*, § 1219, in the case of official documents.

But this consequence would not be proper in a jurisdiction (*ante*, § 1224) where the rule had been reached without the aid of express statutes.

² 1853, *Dickerson v. Talbot*, 14 B. Monr. 60, 67; 1860, *Gittings v. Hall*, 1 H. & J. 14, 18; 1863, *Brown v. Cady*, 10 Mich. 535, 538; 1848, *Thomas v. Bank*, 9 Sm. & M. 201; 1860, *Davis v. Rhodes*, 39 Miss. 152, 156; 1860, *Crispen v. Hannavan*, 72 Mo. 548, 554; 1811, *Vickroy v. McKnight*, 4 Binn. 204, 208. *Contra*: 1863, *McMinn v. O'Connor*, 27 Cal. 238, 244 (certified copy of deed recorded but not properly proved

for record; proof of execution required, but not production of original).

³ 1859, *Loftin v. Nally*, 24 Tex. 565, 572; 1886, *Blanton v. Ray*, 66 id. 61, 7 S. W. 264; 1888, *Pennington v. Schwartz*, 70 id. 211, 8 S. W. 32.

⁴ 1865, *Younge v. Galibean*, 3 Wall. 636 (Texas statute).

⁵ 1873, *Bonnds v. Bounds*, 11 Heisk. 318, 323 (where a statutory affidavit suffices to prove loss of the original, the contents must still be proved by testimony on the stand). For this affidavit, as originally an exception to the party's disqualification, see *ante*, § 1196.

⁶ 1870, *Samuel v. Borrowdale*, 104 Mass. 207, 210 (where one party produced the copy, and the other was then allowed to testify that he had never signed such a deed, without producing the original).

⁷ 1869, *Walker v. Walker*, 6 Coldw. 571, 573 (where the original has an alteration, the registry copy may be looked to as an official statement of original's contents at time of registration). Compare a similar case *ante*, § 1190, and the cases cited *ante*, § 797, concerning photographic copies of handwriting.

⁸ 1852, *Smith v. McWaters*, 7 La. An. 145, 147; 1879, *State v. Barrow*, 31 id. 691, 692; 1893, *Chase v. Caryl*, 57 N. J. L. 545, 31 Atl. 1024; and other cases cited *ante*, § 1225, *passim*. *Contra*: 1875, *Tully v. Caulfield*, 60 Mo. 99, cited *ante*, § 1225.

were chiefly intended) is whether under the Hearsay rule a *custodian's certified copy* of the recorded deed is admissible to prove the execution. This question is wholly independent of the rule of production; for example, if the rule of production be satisfied, as by showing the loss of the original, it is still to be determined whether a certified copy is proper evidence of the original's execution. This question is dealt with elsewhere (*post*, §§ 1651, 1682); and the distinctions between that and the present principle are there examined. (2) By most statutes touching the present subject, the proof of loss or lack of possession (if that is required) may be made by *affidavit*; this involves the creation of an exception to the Hearsay rule, for that rule forbids the use of affidavits; in that aspect, the subject of affidavits is elsewhere dealt with (*post*, § 1710).¹ (3) In some jurisdictions, a statute expressly provides for the use of *abstracts of burnt records*. These statutes add nothing to the present principle, since the non-production of a burnt original is always excused; but they involve the rule about a copy of a copy (*post*, § 1275), the rule about Completeness (*post*, § 2105), and the Hearsay exception for commercial documents (*post*, § 1705); under those heads the subject is further examined. So, also, the propriety of using a copy of a recorded conveyance, where the statutory provision for recording requires only an *abstract* to be recorded, involves the rule of Completeness (*post*, § 2105).

§ 1228. (9) **Appointments to Office.** There has been much difference of practice in regard to requiring the production of the written appointment to office, in proving a person to be an officer. The contents of the document would ordinarily be provable by production only, and it is upon the ground of the present principle that the rulings to that effect have proceeded.¹ But the best practice seems to have excused production, and to have done so for the specific reason either of the general inconvenience that such a rule would entail in actions for or against officers, or of the "collateral" nature (*post*, § 1252) of the issue.² There seems thus to be recognized this additional class of cases of exemption. But the usual sufficient proof, in the Courts where production is not required, is held to be the facts of acting as officer and of having a reputation as officer, or, in another form, of notoriously acting as officer; and the doctrine can more conveniently be considered under this presumption (*post*, § 2535).³

§ 1229. (10) **Illegible Documents.** Where a document, though still in existence, has become illegible, through tearing, rubbing, fading, or otherwise, it is for all practical purposes lost, and its contents may be proved by other evidence; though production may in discretion be required, in order to prove its legible part, if any, or to make certain that the document is really

¹ See also § 1196, *ante*.

² 1820, Holroyd, J., in *Brewster v. Sewell*, 3 B. & Ald. 296, 302.

³ 1606, Bellamy's Case, 6 Co. Rep. 38 ("If the king's fermor brings a *quominus* in the Exchequer, he ought to alledge that he is the king's fermor to enable him to sue there; but

he need not show it to the Court, for that is meer collateral to the action").

³ For related doctrines, see also the following places: § 2168 (official character of the person signing or sealing a document, presumed); § 1625 (reputation, as evidence of incorporation); § 2576 (judicial notice of an officer).

illegible.¹ Upon this principle also is justified the use of photographic enlargements of handwriting.²

§ 1230. (11) **Voluminous Documents (Accounts, Records, Copyright Infringements, Absence of Record)**. Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements — as, the net balance resulting from a year's vouchers of a treasurer or a year's accounts in a bank-ledger —, it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper. Most Courts require, as a condition, that the mass thus summarily testified to shall, if the occasion seems to require it, be placed at hand in court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or that the material for cross-examination may be available :

1854, *Bigelow, J., in Boston & W. R. Co. v. Dana*, 1 Gray 83, 89, 104 (embezzlement; schedules showing the sales of tickets for certain periods were admitted): "It appears to us that questions of this sort must necessarily be left very much to the discretion of the judge who presides at the trial. It would doubtless be inexpedient in most cases to permit *ex parte* statements of facts or figures to be prepared and submitted to the jury. It should only be done where books and documents are multifarious and voluminous and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements. . . . In a trial embracing so many details and occupying so great a length of time as the case at bar, during which a great mass of books and documents were put in evidence, it was the only mode of attaining to an intelligible view of the cause before the jury."

The most commonly recognized application of this principle is that by which the state of *pecuniary accounts* or other business transactions is allowed to be shown by a witness' schedule or summary.¹ So, also, in trying an issue

¹ 1862, *Dunning v. Rankin*, 19 Cal. 640 (mining-claim notice on a tree, the notice now torn and illegible; production not required); 1883, *Duffin v. People*, 107 Ill. 113, 120 (signature faded and illegible; secondary evidence allowed); 1858, *Little v. Downing*, 37 N. H. 355, 365 (the ink had faded; "the record, being illegible, was lost for all practical purposes").

² Cases cited *ante*, § 797, *post*, §§ 2010, 2019. ¹ *Eng.*: 1817, *Meyer v. Sefton*, 2 Stark. 274, 276 (value of a bankrupt's property; one who had examined his accounts allowed to testify, as "from the very nature of the case, such an inquiry could not be made in Court"); 1825, *Gardiner Peerage Case*, *LeMarchant's Rep.* 61 (physician, having in Court a register of 9,000 cases of parturition, allowed to refer to notes of specific relevant cases taken from the register); 1847, *Johnson v. Kershaw*, 1 De G. & Sm. 260, 264 (expert's statement of the results of an ex-

amination of account-books, held conditional on the books being put in evidence); *Ala.*: 1902, *Willis v. State*, 134 Ala. 429, 53 So. 226 (embezzlement; principle applied); *Ark.*: 1895, *Woodruff v. State*, 61 Ark. 157, 170, 32 S. W. 102 (testimony to a balance of voluminous accounts, received on the facts, by a majority); 1902, *Ritter v. State*, 70 id. 472, 69 S. W. 262 (embezzlement; expert accountant allowed to testify to the shortage shown in voluminous bank-books); *Cal.*: C. C. P. 1872, §§ 1855, 1937 (production excused "when the original consists of numerous accounts or other documents, which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole"); 1898, *San Pedro L. Co. v. Reynolds*, 121 Cal. 74, 53 Pac. 410 (expert's schedule-summaries of account-books, admitted); *Colo.*: C. C. P. 1891, § 356 (like Cal. C. C. P. § 1855);

of *infringement of copyright*, the material passages may be culled from the entire volume and presented in such a way as to be conveniently com-

Conn.: 1899, *McCann v. Gould*, 71 Conn. 629, 42 Atl. 1002 (state of accounts; summaries allowable, in trial Court's discretion, if the examination of items would consume time and confuse jury; but the originals must be produced if demanded); *Del.*: 1898, *Curry v. Charles Warner Co.*, 2 Marv. Super. 98, 42 Atl. 425 (witness' schedule of results of account books in court, allowed to be used); *Ga.*: 1861, *Gunt v. Carmichael*, 31 Ga. 737, 741 (results based on invoices, etc., not introduced; excluded); *Ida.*: Rev. St. 1887, § 5999 (like Cal. C. C. P. § 1855); *Ill.*: 1902, *Bartlett v. Wheeler*, 195 Ill. 445, 63 N. E. 169 (testimony that certain books of account showed a shortage, not admitted on the facts); *Ind.*: 1884, *Rogors v. State*, 99 Ind. 218, 228 (treasurer's accounts; experts' examinations of the books, received; "witnesses so testifying, to give their evidence weight, should be prepared to corroborate every statement by references to the records, in the presence of the jury, wherever either party desires it, in either the examination or cross-examination"); 1887, *Hollingsworth v. State*, 111 Ind. 289, 297, 12 N. E. 490 (defaulting treasurer; expert accountants' examination of the treasurer's books, etc., admitted, the documents being "voluminous and multifarious, and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts"); 1893, *Equitable Acc. Ins. Co. v. Stont*, 135 Ind. 444, 453, 33 N. E. 623 (insurance accounts; general principle sanctioned, but the pleadings here treated as excluding it); 1895, *Chicago St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451 (expert's statement of results of complicated account-books, admitted); *Ia.*: 1890, *State v. Caldwell*, 79 Ia. 432, 441, 44 N. W. 700 (expert's statement of results of examination of accounts, the books being in evidence, allowed); *Ky.*: 1903, *Louisville Bridge Co. v. R. Co.*, — *Ky.* —, 75 S. W. 285 (tables of tolls paid, summarizing the contents of thousands of waybills, admitted); *La.*: 1901, *State v. Mathis*, 106 La. 263, 30 So. 834 (embezzlement; an expert's statement as to the results of his examination of the defendant's books, admitted, the books being assumed to have been offered); *Md.*: 1893, *Lynn v. Cumberland*, 77 Md. 449, 458, 26 Atl. 1001 (expert's summary of tax-figures, books being in court, admitted); *Mass.*: 1854, *Boston & W. R. Co. v. Dana*, 1 Gray 83, 89, 104 (schedules of sales of tickets, admitted; see quotation *supra*); 1874, *Walker v. Curtis*, 116 Mass. 98, 100, *semble* (summary of estimates of days' work admitted; here the books were produced); 1894, *Bicknell v. Mellett*, 160 id. 328, 35 N. E. 1130 (computations by an expert from an insolvent's account-books, admissible in trial Court's discretion); *Minn.*: 1891, *Wolford v. Farnham*, 47 Minn. 95, 49 N. W. 528 (summary of accounts from the firm's books, brought into court, admitted; though "the regular way would have been to introduce the books" also formally in evidence); 1901, *State v. Clements*, 82 id. 434, 85 N. W.

229 (receipt of bank-deposit during insolvency; the journals being in evidence, an expert's summaries of them were received); 1902, *State v. Salverson*, 87 id. 40, 91 N. W. 1 (expert's summaries of a bank's books produced in court, held admissible); *Miss.*: 1878, *State v. Lewenthal*, 55 Miss. 589 (tax-collector's books; memoranda of voluminous contents excluded, because the books were not also offered); 1896, *Hanenstein v. Gillespie*, 73 id. 742, 19 So. 673 (account-books belonging to a witness testifying on deposition; that the books were not annexed as exhibits, but were set out by copies of entries, held proper); *Mo.*: 1870, *Ritchie v. Kinney*, 46 Mo. 298, 299 (receipts and disbursements; condensed statement showing aggregates, not admitted, the account-books not being produced); 1888, *Masonic M. B. L. O. v. Lackland*, 97 id. 137, 139, 10 S. W. 895 (expert's results of an examination of account-books, admitted, the documents being in court); 1890, *State v. Findley*, 101 id. 217, 223, 14 S. W. 185 (tax-receipts, etc.; the papers being present, an expert was allowed to state the result of his examination); *Mont.*: C. C. P. 1895, § 3131 (like Cal. C. C. P. § 1855); *Nebr.*: 1898, *Bartley v. State*, 53 Nebr. 310, 73 N. W. 744 (expert's examination of account-books, received, the books being in court); 1900, *Ree Pub. Co. v. World Pub. Co.*, 59 id. 713, 82 N. W. 28 (state of complicated accounts; books must be present in court, for purposes of cross-examination); *Nev.*: Gen. St. 1885, § 3449 (like Cal. C. C. P. § 1855); *N. Y.*: 1878, *Von Sachs v. Kretz*, 72 N. Y. 548 (witness' statement of results of examination of account-books in court, admissible in referee's discretion); *Or.*: C. C. P. 1892, § 691 (like Cal. C. C. P. § 1855); 1895, *State v. Reinhart*, 26 Or. 466, 38 Pac. 822 (expert's summary of account-books put in evidence, admitted); 1902, *Salem L. & T. Co. v. Anson*, 41 id. 562, 67 Pac. 1015, 69 Pac. 675 (expert's testimony to the results of an examination of voluminous accounts, admitted, the books being in court); *Tenn.*: 1874, *Shepherd v. Hamilton Co.*, 8 Heisk. 380 (officer's failure to pay over funds; a witness not allowed to state "the results of his examination" of the books and vouchers); 1900, *Galbreath v. Knoxville*, — *Tenn.* —, 59 S. W. 178 (summary statement of book-balance, allowed, the books being in court); *U. S.*: 1873, *Burton v. Driggs*, 20 Wall. 125, 136 ("When it is necessary to prove the results of voluminous facts or of the examination of many books and papers, and the examination cannot conveniently be made in court, the results may be proved by the person who made the examination"); 1898, *Rollins v. Board*, 33 C. C. A. 181, 90 Fed. 575 (tabulated statements by an expert of records of county indebtedness, etc., the books being offered also, admitted); 1898, *Northern P. R. Co. v. Keyes*, C. C. C., 91 Fed. 47 (similar); *Utah*: Rev. St. 1898, § 3410 (like Cal. C. C. P. § 1855).

Compare the cases cited *post*, § 1244, where

pared.² Upon the same principle, summaries of official or corporate records might properly be presented;³ and testimony, by one who has examined records, that no record of a specific tenor is there contained is receivable instead of producing the entire mass for perusal in the court-room.⁴

(d) "Of the Writing Itself."

§ 1231. What is the "Original" Writing? **General Principle.** The fundamental notion of the general rule under consideration is that the terms of a writing must be proved by producing it and not by offering testimony about them. It is commonly said that the "original" must be produced, and not a copy. But "original" is a relative term only. When a particular paper is said to reproduce the terms of another, the former is the "copy," the latter the "original." Thus, "original" and "copy" are words correlative, with reference to the succession of existence between them, and have no necessary connection with the present rule. Given merely two papers, A and B, of which A was copied from B, and A thus is the "copy" and B the "original," we still have no light at all on the application of the present rule, *i. e.* on the question whether paper A can be offered without accounting for the non-production of paper B. For example, paper A might be a libellous document handed by M to N, while paper B was kept by M in his private desk; so that to prove the publication of a libel, paper A and not paper B would be the document whose production the present rule would require; yet relatively to each other paper A is a "copy" and paper B an "original." Again, paper A may have been deposited for safe-keeping with N, as bailee, and in an action for negligently injuring it, paper A is the document to be accounted for under the present rule, and paper B could be used

a similar result may be reached, in some cases, by a different principle.

For the *opinion* rule as applied to such testimony, see *post*, §§ 1957, 1959, 1978.

¹ 1839, *Lewis v. Fullerton*, 2 Beav. 6, 8 (exhibits on both sides showing copied passages, etc., used by the Court to facilitate comparison); 1826, *Mawman v. Tegg*, 2 Rnsa. 385, 398 (same process sanctioned by Eldon, L. C.); 1869, *Lawrence v. Dana*, 4 Cliff. 1, 72 (testimony of experts as to the extent of copying in a voluminous work charged to infringe a copyright, received, although the Court also examined the original material for itself); 1897, *West Pub. Co. v. Lawyers' Coop. P. Co.*, 25 C. C. A. 648, 79 Fed. 756 (in ascertaining the extent of a borrowing of paragraphs of syllabi, tables prepared by witnesses who had examined thousands of cases were used as evidence of their contents, after the Court had tested their accuracy).

² 1901, *Schamacher v. Pina Co.*, — Ariz. —, 64 Pac. 490 (expert's summaries of fee-records in probate court, admitted); 1896, *Adams v. Board*, 37 Fla. 266, 20 So. 266 (substance of a number of records of a Board, excluded); 1860, *Thornburgh v. R. Co.*, 14 Ind. 499, 501 (witness producing corporation-record, allowed to state the aggregate footings); 1897, *State v. Brady*, 100 Ia. 191, 69 N. W. 290 (to

show a system of defrauding by false warrants, more than 500 in all, a tabulated statement from the voluminous records was admitted); 1899, *Piano Mfg. Co. v. McCoid*, — id. —, 80 N. W. 639 (to show insolvency, a list of the recorded mortgages, etc., made by one testifying, excluded); 1902, *Blum v. State*, 94 Md. 375, 51 Atl. 26 (summary of claims proved under a receivership, verified by the receiver, admitted); 1903, *Scott v. R. Co.*, — Or. —, 72 Pac. 594 (average of rainfall for 18 years, allowed to be testified to from official records without stating detailed entries); 1896, *Ludtke v. Hertzog*, 18 C. C. A. 487, 72 Fed. 142 (testimony to the identity of an enrolled soldier as gathered from a perusal of the various archives containing his name and doings, admitted); 1900, *Jordan v. Warner*, 107 Wis. 539, 83 N. W. 946 (summary of complicated land-records and tax-rolls, the originals being before the court, admitted).

³ 1897, *Hoffman v. Pack*, 114 Mich. 1, 71 N. W. 1095 (a clerk, allowed to testify that no records of a certain sort existed). The same result may be reached on the principle of § 1244, *post*, where other cases are cited.

Whether an official custodian may make a hearsay statement, by certificate, to the same effect, is a different question; see *post*, § 1678. For the *opinion* rule, see *post*, §§ 1957, 1978.

only secondarily, although the former is only a "copy" and the latter is an "original." Thus, the terms "copy" and "original," being purely relative to each other, have no inherent relation to the present rule, and the term "original" has no real significance in indicating *which* paper it is (of all possible papers) whose production is required by the rule. In order to state the rule, then, in terms which will indicate in the rule itself what documents are included in its scope, it must be noted that the production required is the production of *the* document *whose contents are to be proved in the state of the issues*. Whether or not that document was written before or after another, was copied from another, or was itself used to copy from, is immaterial. The question becomes: Is this the very document whose contents are desired to be, and, in the now state of the issues, by the substantive law may lawfully be proved? This inquiry is of course usually answered without hesitation; but there are numerous instances in which a difficulty of principle arises.

The cases in which a question may arise fall into four groups: (1) Cases in which the document to be proved was brought into existence in duplicate or multiply form, — chiefly, the case of *duplicate originals*; (2) cases in which a document, first made by copying from another, has since been *acted upon or dealt with at other times*, by the same or another person, so that for the purposes of such later acts it is *the* document to be proved; (3) cases in which, of two or more documents, one or another of them will be the document in issue according to the *substantive law* of contract, property, etc., applicable to the case; (4) cases in which, by the rule of Integration, or *Parol Evidence* (*post*, § 2429), a document which would otherwise be the one in issue has been annulled or superseded by another one, which thus becomes the only one allowable by law to be proved and therefore the one necessary to be produced.

§ 1232. (1) **Duplicates and Counterparts:** *Either may be used without producing the Other.* Where the writing constituting a bilateral transaction is executed by the parties in duplicate or multiply, each of these parts is "the" writing, because by the act of the parties each is as much the legal act as another. It can make no difference that one party has signed only the document taken by the other, except where it is desired to prove specifically the signature. Such a duplicate or counterpart, then, may be used without accounting for the non-production of any other, because the present rule is satisfied by the production of any one part:

1809, *Ellenborough*, L. C. J., in *Philipson v. Chase*, 2 Camp. 110: "If there are two co-temporary writings, the counterparts of each other, one of which is delivered to the opposite party, and the other preserved, as they may both be considered as originals, and they have equal claims to authenticity, the one which is preserved may be received in evidence, without notice to produce the one which was delivered."

This result is generally accepted.¹

¹ 1842, *Doe v. Fulman*, 3 Q. B. 622 (to prove counting for the part signed by W.); 1858, *W. seized, a counterpart of a lease by him Leonard v. Yongg*, 4 All. N. Br. 111 (certain signed by the lessee was received, without ac- leases, held duplicate originals); 1868, *Clev-*

§ 1233. **Same: All Duplicates or Counterparts must be accounted for before using Copies.** Conversely, since all the duplicates or multiplicates are parts of the writing itself to be proved, no excuse for non-production of the writing itself can be regarded as established until it appears that all of its parts are unavailable (*i. e.* lost, detained by the opponent or by a third person, or the like). This is well settled, though not always in the light of the correct reason.

1825, *Rest, C. J.*, in *Munn v. Golbold*, 3 Bing. 202: "When there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy. It is prepared with more care than any other copy, and the party who produces it, and against whom it is used, by taking and keeping it as a part of the deed, admits its accuracy. The Courts have therefore always required that if one part of a deed be lost, and another part be in existence, it must be produced"; but ". . . merely as secondary evidence of the part that was lost."¹

In the foregoing passage, the counterpart is treated as merely a preferred variety of copy (*post*, § 1273); but the same result is necessarily reached, apart from any theory of preferred copies, from the nature of the general rule.

§ 1234. **Same: Duplicate Notices, Blotter-Press Copies, and Printing-Press Copies, as Originals.** (1) A doctrine was early established that where a notice was made by writing it out twice, at the same sitting, the writings were in fact duplicates, though not written nor executed contemporaneously, and that thus the one retained could be used without accounting for the non-production of the one delivered.¹ This theory seems to have been in

land & T. R. Co. v. Perkins, 17 Mich. 296 (contract exchanged in duplicate; either receivable); 1876, *Ketchum v. Breunan*, 53 Miss. 597, 605, 608 (obscure); 1865, *Carr v. Carr*, 36 Mo. 408, 411, *semble* (either receivable); 1827, *Lewis v. Payu*, 8 Cow. 71, 76 (two copies of a lease, each executed by both parties; "both are properly originals," on an issue of the existence of the tenancy); 1830, *Jackson v. Deuison*, 4 Wend. 558 (counterpart of an agreement usable like the original); 1847, *Bogarius v. Trinity Church*, 4 Sandf. Ch. 633, 730, *semble* (the lessor's counterpart of a lease is the original where it is offered as containing the lessee's declarations of a holding under the lessor); 1900, *State v. Allen*, 56 S. C. 495, 35 S. E. 204 (school certificates); 1828, *Carroll v. Peake*, 1 Pet. 18, 23 (opponent's copy of an agreement of lease, held an original, on the facts).

The earlier practice seems to have been to treat the counterpart of a deed as a copy or secondary, as may be inferred from the utterances quoted *post*, § 1273, upon the preferred order of copies. Moreover the quotation in the next section shows the persistence of this idea.

¹ *Eng.*: 1740, *Villiers v. Villiers*, 2 Atk. 71, *Hardwicke, L. C.*; 1773, *Ludlam's Will*, Lofft 362 (*Mansfield, L. C. J.*): "If you cannot prove a deed by producing it, you may produce the counterpart"; 1795, *R. v. Castleton*, 6 T. R. 236 (indenture of apprenticeship); 1825, *Munn v. Golbold*, 3 Bing. 292 (quoted *supra*); 1834,

Alivon v. Furnival, 1 Cr. M. & R. 277, 292; 1836, *Doe v. Wainwright*, 1 Nev. & P. 8, 12 ("a counterpart is the next best evidence"); *U. S.*: Ga. Code 1895, § 5173; 1872, *Breed v. Nagle*, 46 Ga. 112 (lease in duplicate; in action by stranger against lessee, original of lessee, and not merely of lessor, to be accounted for); 1886, *Cincinnati N. O. & T. P. R. Co. v. Dishrow*, 76 id. 253 (duplicate contract; after accounting for both parts, a copy allowed); 1900, *Rodriguez' Estate*, 13 How. 202, 205 (counterparts of leases preferred to copies); 1871, *White v. Herrman*, 62 Ill. 73 (duplicate original of a contract, preferred to a copy); 1827, *Erwin v. Porter*, 6 Mart. n. s. 166, *semble*; 1874, *Dyer v. Fredericks*, 63 Me. 173 (duplicate originals of a bill of lading; rule applied); 1829, *Poignard v. Smith*, 8 Pick. 272, 279 (counterpart of a mortgage required). *Contra*: 1844, *Hewlett v. Henderson*, 9 Roh. La. 379, 381, *semble*.

² 1796, *Gotlieb v. Dauvers*, 1 Esp. 455 (*Eyre, C. J.*, said "that where two copies of any instrument or notice were made at the same time, both were to be deemed originals"; here a notice to take away a crane); 1799, *Jory v. Orchard*, 2 B. & P. 39 (a written statutory demand; the attorney "made out two papers for that purpose, precisely to the same effect, and signed them both for his client, one of which he delivered" and the other he kept; held that the latter, as a counterpart or "duplicate original," could be used in evidence; the analogies of a

part the origin of the rule of thumb, already considered (*ante*, § 1206), that no notice to produce a notice need be given; but though the theory would logically extend to any kind of a document written in duplicate at the same sitting, such an extension appears not to have occurred.³ The fallacy of the theory seems to lie in this circumstance, that what makes two numbers of any instrument duplicates and equivalent is that the legal act as consummated embraces them both; it is not the coincidence of writing (for the counterpart of a deed may be written after an interval), but the unity given by the final legal act. Thus, if both numbers of a notice were served, and then the server retained one, the two would indeed be duplicates; but the mere writing at one sitting, followed by a legal act of service performed with one number only, cannot make the other an equivalent "original" for the purposes of the present rule.

(2) A reproduction by *blotter-press* or *letter-press* cannot be considered as a duplicate;⁴ and policy here supports principle, for such reproductions are by no means uniformly identical or accurate. The same must be said of any process of machine-reproduction which consists in obtaining repeated ink-traces from a single writing so prepared as to furnish such traces by pressure or by chemical operation.

notice to quit and a notice to a justice were considered to control, and the existing practice to use the "duplicate original" was confirmed; *Rooke, J., diss.*; 1803, *Snrtees v. Hubbard*, 4 Esp. 203 (copy of a notice of assignment, written at the same time and signed by the party; admitted, *semble*, as a duplicate original, per *Ellenborough, L. C. J.*); 1874, *Hollenbeck v. Stanberry*, 38 Ia. 325, 327 (copy of original summons served upon party, equivalent to the summons itself); 1874, *Barr v. Armstrong*, 56 Mo. 577, 586 (two numbers of notice written at same time and one served; each held an original); 1816, *Johnson v. Haight*, 13 John. 470 (notice of dishonor proved by copy made at the time, as "a duplicate original"); 1826, *Eisenhart v. Slaymaker*, 14 S. & R. 153, 156 ("every written notice is to be proved by a duplicate original").

³ 1800, *Anderson v. May*, 2 B. & P. 237 (copy of a bill of costs delivered to the defendant; admitted, on the authority of *Jory v. Orchard*); 1809, *Philipson v. Chase*, 2 Comp. 110 (doctrine conceded, but held not to apply to a book entry of an attorney's bill); 1822, *Kine v. Beaumont*, 3 B. & B. 288, 291, *semble* (three judges could not see "any great difference" between "a duplicate original and a copy made at the time"); 1827, *Colling v. Treweek*, 6 B. & C. 394, 398 (an attorney's bill, signed; a copy, made at the same time, but not signed, but offered to be signed at the trial; undecided); 1880, *Central Branch U. P. R. Co. v. Walters*, 24 Kan. 504, 509 (a written demand was essential to the claim; a copy drawn up at the same time with the one served, held not equivalent to the original).

⁴ 1812, *Nodin v. Murray*, 3 Camp. 228; 1885, *Spottiswood v. Weir*, 66 Cal. 525, 529, 6 Pac. 381; 1890, *Ford v. Cunningham*, 87 id. 209,

210, 25 Pac. 403; 1876, *Watkins v. Paine*, 57 Ga. 50; 1873, *Richards Iron Works v. Glennon*, 71 Ill. 11; 1874, *King v. Worthington*, 73 id. 161, 163; 1883, *Durringer v. Moschino*, 93 Ind. 495, 499; 1887, *State v. Halstead*, 73 Ia. 376, 378, 35 N. W. 457; 1898, *Seibert v. Ragdale*, 103 Ky. 206, 44 S. W. 653; 1899, *Heilman Milling Co. v. Hotaling*, — id. —, 53 S. W. 655; 1871, *Marsh v. Hand*, 35 Md. 123, 127; 1869, *Goodrich v. Weston*, 102 Mass. 362, *semble*; 1890, *Smith v. Brown*, 151 id. 338, 340, 24 N. E. 31 (title to a judgment; the assignment in issue); 1895, *Traber v. Hicks*, 131 Mo. 180, 32 S. W. 1145; 1880, *Delaney v. Erickson*, 10 Nehr. 492, 501, 6 N. W. 600; 1883, *Ward v. Beals*, 14 id. 114, 119, 15 N. W. 353; 1898, *Westinghouse Co. v. Tilden*, 56 id. 129, 76 N. W. 416; 1870, *Foot v. Bentley*, 44 N. Y. 166, 170.

Distinguish the following: 1859, *Nathan v. Jacob*, 1 F. & F. 452 (as an admission, a copy kept in a letter-book by the writer is equivalent to the letter itself, and is an original).

By statute the rule has sometimes been altered: Cal. C. C. P. 1872, § 1937, as amended in 1901 ("Where an impression of a letter is taken in a letter-press copy-book before the mailing of the original, such letter-press copy must be deemed an original equally with the letter so copied, and may be read in evidence upon proof of the due mailing of the letter so copied"; for the validity of these amendments, see *ante*, § 483); Haw. Civil Laws 1897, § 1407 (original not required, where "any writing whatsoever shall have been copied by means of any machine or press which produces a facsimile impression or copy of such writing," on proof that the copy offered was so taken from the original).

(3) The case of a *type-machine* (the ordinary printing-press, or its equivalents) is different. Here, the only variances that can occur between different numbers reproduced by printing must arise from a change in the type or from the exhaustion of the ink. But the ordinary printing-press is now self-feeding in respect to ink; and, on the supposition that the type is not intentionally altered, all the reproductions from the same setting of type may be regarded for practical purposes as identical and equivalent. In those type-writing office-machines in which the paper is stationary and the hand applies a movable type or a pen, producing an impression through several sheets at once, the case is more difficult; for though the first few impressions may be identical, yet the lower sheets are likely to be imperfect.

As to these various special machines, no rulings seem to have been made.⁴ But for the *printing-press* having fixed type, it ought to be clear that any one of the multiply impressions obtained from a single and unaltered setting of type are equivalent, and that therefore to prove the contents of any one such impression any other one may be used without accounting for the former.⁵ In these days, to be sure, of numerous differing editions of newspapers within a single day, and even of plural editions of periodical magazines and of novels with alterations made since the printing of the first copies, the proof of the above preliminary condition, namely, the absence of alteration in the type, becomes a more difficult matter; but this aspect of the subject does not seem yet to have been recognized in judicial rulings.

A more important circumstance is that the natural operation of the above simple principle is in practice complicated and disturbed by the intervention of other principles. Thus, (a) a printed impression may or not be the writing to be proved, according as it or the *manuscript draft* constitutes the legal act desired to be proved (*post*, § 1235); (b) a specific printed impres-

⁴ Compare the Hawaiian statute, *supra*.

⁵ 1817, *R. v. Watson*, 2 Stark. 116 (the defendant caused 500 placards to be printed and carried away 25 of them for posting; to prove the contents of those posted, one of the remainder was admitted; "every one of those worked off are originals, in the nature of duplicate originals"; "since it appears that they are from the same press, they must all be the same").

In the following case the principle was left undecided: 1837, *Watts v. Fraser*, 7 A. & E. 223, 232 (the defendant, to show provocation by the plaintiff's libel, offered a copy of a newspaper deposited under the law by the plaintiff at the public Stamp-Office; excluded, because knowledge of its contents by the defendant was not shown; whether, if knowledge of the contents of another number of the same issue had been shown, this number would have been received to prove contents, not decided).

In the following cases no common printing was shown, and thus the impressions in question could not be assumed to be identical: 1849, *Boosey v. Davidson*, 13 Q. B. 257, 266 (to prove prior publication of certain operatic pieces, production was required of copies alleged to have

been seen elsewhere; for the identity of the contents with those of registered copies in court was to be shown, and there was by hypothesis no common printing); 1847, *McGrath v. Cox*, 3 U. C. Q. B. 332 (to prove a libel, the pamphlet charged as published could not be produced, nor was any one who had read it produced so as to be able to identify it with another pamphlet offered; a common printing was not shown, and the evidence of identity of general appearance, title-page, and dedication, was held not sufficient; *Jones, J. diss.*; the real error in the case lies in holding the proof of common printing insufficient; for the pamphlet was one circulated at an election, and the general evidence of correspondence sufficed to dismiss doubt for any reasonable person not sitting in the judicial atmosphere of artificial reasoning).

In the following cases the principle stated in the text was ignored or repudiated: 1817, *Williams v. Stoughton*, 2 Stark. 292 (to show the contents of a prospectus received by a school-patron, another printed copy was rejected); 1881, *Southwestern R. Co. v. Papot*, 67 Ga. 675, 686 (newspaper itself the original, not some other printed copy, in proving publication of notice of sale).

sion may by the substantive law be the only one *in issue*, and then it must be accounted for before another can be used (*post*, § 1237); (c) and in that case, a question may arise (treated *ante*, §§ 415, 440) as to the sufficiency of the evidence of the *identity* or correctness of the copy offered; (d) a printed impression may be *read aloud* and then the words uttered may be proved, if material under the issues, without producing the printed impression (*post*, § 1243);⁶ (e) and, finally, the act of *sending* or *delivery* may not require production (*post*, § 1248).

§ 1235. (2) Copy acted on or dealt with, as an Original for Certain Purposes (Bailments, Admissions, Bank-books, Accounts, etc.). Where an act material to be proved consists in the adoption of a paper by acting upon it or dealing with it, the rule requiring production applies to this paper, as involving the terms of the act; so that it is immaterial whether the paper was first made by copying another paper. For the purposes of proving the act in question, the specific paper dealt with is *the* writing to be produced. For example, in an action against a *bailee* for wrongful dealing with a document deposited, the document deposited, whether a copy or an original, is the document to be accounted for.¹ Again, in proving the terms of an *admission* by an opponent, where he orally or otherwise has acknowledged the correctness of a certain document, the document thus acknowledged (usually a *bank-book*) is the one to be accounted for, whether it is a copy of something else or not.² Again, in proving an *account stated*, the statement furnished is the document to be proved, though it may be only a copy from books of account.³ So also the criminal act to be proved may consist in the *reading* or *posting* of a document which otherwise may be but a copy from something else;⁴ and other illustrations are of frequent occurrence.⁵

⁶ Distinguish, moreover, the question of authenticating the publisher of printed matter (*post*, § 2150).

¹ See examples *ante*, § 1205.

² 1838, *Lawton v. Tarrat*, 4 All. N. Br. 1, 8 (a written statement by a debtor was shown by him to the creditor, who copied it in his presence; whether the creditor's writing was an original, not decided); 1897, *State v. Halstead*, 73 Ia. 376, 377 (embezzlement; in showing deposits by defendant in a bank, his deposit tickets are not secondary to the bank-books made up from them); 1898, *Kelly v. Elevator Co.*, 7 N. D. 343, 75 N. W. 264 (defendant's agent's stub-entries copied from original entries and offered by plaintiff as admissions; allowed, the originals here being destroyed; but, on principle, the latter showing was not necessary); 1897, *State v. McCanley*, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382 (to show the state of the defendant's account at a bank, the bank's books were introduced; held, that the defendant's checks need not be produced, because the defendant's examination of his pass-book, made up from the bank-books, was an admission of the latter's correctness; and thus the books came in as an admission, not as secondary evidence of the checks).

³ 1835, *Vinal v. Burrill*, 16 Pick. 401, 407 (account stated; to prove its contents, the

account delivered, and not the books from which it was taken, is the original); 1898, *Missouri, P. R. Co. v. Palmer*, 55 Nehr. 559, 76 N. W. 169 (plaintiff suing for medical expenses; physician's bill rendered, treated as original, not his account-books).

⁴ 1817, *R. v. Watson*, 2 Stark. 116 (C. took a manuscript to a printer, who printed 500 copies as a placard; the defendant came and took away 25 of them; one of the remainder was offered, upon a trial for posting a treasonable proclamation; the rule held not to require the production of the manuscript, because the defendant "adopted the printing," and thus the printed placards became the originals); 1820, *R. v. Hunt*, 3 B. & Ald. 566, 568, 572 (seditious resolutions read at a meeting; a copy had been given to the witness by the defendant at the time as representing what was to be read, and the witness testified that they were read as in the copy; the copy held sufficient as an original for the purpose).

⁵ 1887, *Comer v. Comer*, 120 Ill. 420, 430, 11 N. E. 848 (copy of letter; copy attached to contract and made a part of it becomes an original). So for a *letter-press copy*: *ante*, § 1234, note 3.

Compare the Doctrine of § 1242, *post*.

§ 1236. (3) Copy made an Original by the Substantive Law applicable; (a) Telegraphic Dispatches. Of two or more documents, copied one from another, the substantive law of property, contracts, crimes, or torts, may indicate a specific one as the material one under the issue. In that case, it is immaterial whether or not the one thus indicated was, when first made, a "copy" from another; it must be accounted for. The principle is essentially the same as in the foregoing class of cases; the difference is merely that here it cannot be told which document is *the* writing to be produced, until some point of substantive law has been determined; when that is determined, it immediately indicates the document to which the present rule of evidence applies. Since the difficulty is raised and is determined solely by the substantive law, it is not necessary here to review all the various instances; it will suffice merely to indicate the bearings of the question in the cases of chief difficulty and commonest occurrence.

(a) Whether, in proving the terms of a telegram, the dispatch sent or the dispatch delivered and received is the one to be accounted for, depends upon the substantive law involved. In an action, for example, by a customer against a broker for falsely reporting his bankruptcy to a third person, the dispatch sent would be the one to be proved; but in an action against a telegraph company by an addressee for delayed delivery, the dispatch delivered would be the material one; while in an action by an offeree against an offeror in which the acceptance of the offer is denied, the solution would depend on the rule in force as to the necessity of receipt of acceptance by the offeror; and in certain other actions both the sent and the received dispatches would have to be accounted for. These discriminations are accepted by most Courts, though in many rulings the grounds for decision are left obscure.¹

¹ Eng.: 1857, *R. v. Regan*, 16 Cox Cr. 303 (to prove a telegram sent by the accused, the writing handed to the telegraph office, not the copy received, is the original); *N. Br.*: St. 1881, c. 14, § 2 ("secondary evidence" may be given of a telegram "sent to the opposite party or shown to be in his possession" after the usual notice and failure to produce); *V. Sc.*: Rev. St. 1900, c. 163, § 30 ("as proof of the contents of the original telegraphic message" the party may introduce "the message received by him from the telegraph office," on ten days' notice to the opponent, and provided he "proves that it was received at the telegraph office of the place to which it purports to be addressed"); *Ont.*: 1859, *Kinghorne v. Tel. Co.*, 18 U. C. Q. B. 60, 66 (action for failure to deliver telegram; question whether the dispatches satisfied the statute of frauds; for this purpose the dispatch as handed to the operator was considered); *Ala.*: 1879, *Whilden v. Bank*, 64 Ala. 1, 13, 30 (action on promise to pay bill of exchange; to prove telegrams sent to the defendant, the originals on file at the sending office were produced; showed, the delivered message being out of the jurisdiction; question reserved, as to which was the original); 1884, *Western Union T. Co. v.*

Fatman, 73 id. 285, 292 (action for failure to deliver telegram in season; received telegram admitted as the original); 1884, *Pensacola R. Co. v. Schaffer*, 76 id. 233, 237 (telegram received, treated as secondary, the message being by one who delayed performance of contract); *Ga.*: 1893, *Conyers v. P. T. C. Co.*, 92 Ga. 619, 622, 19 S. E. 253 (action for failure to deliver with diligence; delivered message the original); 1893, *Western Union T. Co. v. Bates*, 93 id. 352, 355, 20 S. E. 639 (same as the *Fatman* case, *supra*); 1894, *Western U. Tel. Co. v. Blance*, 94 id. 431, 19 S. E. 255 (action for failure to deliver with diligence; delivered paper the original); *Ill.*: 1861, *Matteson v. Noyes*, 25 Ill. 591 (assumpsit; dispatch sent treated as the original, and dispatch received as a copy); 1871, *Morzan v. People*, 59 id. 58, 61 (party telegraphing the sheriff to stop a sale; dispatch received is the original); 1888, *Anhenser-Busch B. Ass'n v. Hutmacher*, 127 id. 652, 657, 21 N. E. 626 (assumpsit for services; telegrams sent by defendant to plaintiff; delivered dispatch held the original); *Ind.*: 1874, *Western Union Tel. Co. v. Hopkins*, 49 Ind. 228, 227 (damages for failure to transmit message; dispatch handed to the operator treated as the original); 1888,

§ 1237. **Same: (b) Printed Matter.** If a contributor sues a magazine for an article accepted but not paid for, the manuscript accepted is the document to which the rule applies. If a person whose interview has been published in a newspaper is sued for libel, the words uttered are the thing to be proved, though the printed words would equally be provable if the printing was authorized by the defendant.¹ If the libel was charged as published in a newspaper or other printing of which multiple numbers existed, the number charged would in theory be the document to be proved,² though it would seem (on the principle of § 1234, *ante*), that the production of any other number printed from the same type-setting would satisfy the rule.³ In this connection, there may also be involved the principles of § 1243, *post*,

Terre Haute & I. R. Co. v. Stockwell, 118 *id.* 98, 102, 20 N. E. 650 (that telegrams were sent by a conductor; oral testimony allowed, since it did not appear that the telegrams were in writing); *Id.*: 1889, *Riordan v. Gungrety*, 74 *Id.* 688, 693, 39 N. W. 107 (whether defendant sent a telegram; copy made at the receiving office, admitted, the sent document being shown lost); *Id.*: 1880, *Smith v. Easton*, 54 *Id.* 138, 145 (whether a contract was made by telegram; the promisor's telegram sent to the telegraph office, held the original, and here held not sufficiently authenticated); *Mass.*: 1895, *Nickerson v. Spindell*, 164 *Mass.* 25, 41 N. E. 107 (addressee's dispatch the original, unless a rule of law makes sender's dispatch binding); *Miss.*: 1884, *Wilson v. R. Co.*, 31 *Minn.* 481, 18 N. W. 291 (to prove a hiring by telegram, the dispatch received is the original; on proof of its loss, oral testimony of its contents is admissible); 1890, *Nichols v. Howe*, 43 *id.* 181, 45 N. W. 14 (contract by telegram; production of the telegram required); *Miss.*: 1859, *Williams v. Brickell*, 37 *Miss.* 682, 686 (hiring by telegram; plaintiff must prove the dispatch received); *N. H.*: 1869, *Howley v. Whipple*, 48 *N. H.* 487 (to show that J. G. had sent a telegram from Montreal, held, the dispatch as handed for transmission in Montreal was the original); *N. Y.*: 1883, *Oregon S. Co. v. Otis*, 14 *Ahb. N. C.* 388, 100 *N. Y.* 446, 453, 3 *N. E.* 485 (contract said to be made by the defendant as agent for the plaintiff; the "original message" said to be the primary evidence; opinion obscure); *S. D.*: 1899, *Western Twine Co. v. Wright*, 11 *S. D.* 521, 78 *N. W.* 942 (contract of warranty; received dispatch from promisor, admitted for promise, after evidence that telegraph company's rules required the destruction of originals after six months); 1902, *Distad v. Shanklin*, 15 *id.* 507, 90 *N. W.* 151 (breach of contract; sender's copy admitted, the original having been destroyed by the telegraph company); *Tex.*: 1887, *Prather v. Wilkins*, 68 *Tex.* 187, 4 *S. W.* 252 (no discrimination made on this point); *U. S.*: 1894, *U. S. v. Dunbar*, 60 *Fed.* 75 (admission of contents of a telegram, received); 1895, *Dunbar v. U. S.*, 156 *U. S.* 185, 196 (telegram received by B. and admitted by the defendant to have been sent by him, received); *Vt.*: 1856, *Durkee v. R. Co.*, 39 *Vt.* 127, 140 (action for commissions in raising

loan for the defendant; to prove the contract, telegrams were involved; *Redfield, C. J.*, "It depends upon which party is responsible for the transmission across the line, or in other words whose agent the telegraph is"; where the received dispatch is the legally material document, it must be accounted for; a recorded copy of it would "ordinarily" be preferable to mere recollection; and the message as handed in by the sender "perhaps" might also serve as a copy; but "where the party to whom the communication is made is to take the risk of transmission, the message delivered to the operator is the original"; 1877, *State v. Hopkins*, 50 *id.* 316, 323, 332 (to show knowledge by communication, the delivered form of a telegram delivered to the defendant was received; to prove the contents of a telegram sent by the defendant, a copy of the delivered form was received, on proof of destruction of the sent original by the telegraph company); *Wis.*: 1876, *Saveland v. Green*, 40 *Wis.* 431, 440 (contract by telegram; received message here the original, under the law of contracts); 1882, *Randall v. N. W. Tel. Co.*, 54 *id.* 140, 143, 11 *N. W.* 419 (undecided).

For authentication of telegrams, see *post*, § 2154.

¹ 1824, *Adams v. Kelly, Ry. & Mu.* 157 (libel; the defendant had told the matter to a reporter, who had taken it in writing, and it had then been published by a newspaper, which was the libel charged; held, that the newspaper statement must be shown to be the same as that which the defendant made to the reporter, and therefore the writing became an original to be produced; here the words as printed had to be shown to be authorized by the defendant).

² 1835, *Johnson v. Morgan*, 7 *A. & E.* 233 (libel by a song; the particular copy whose publication was alleged had been lost; and this showing was held requisite before other copies could be resorted to); 1847, *McGrath v. Cox*, 3 *U. C. Q. B.* 332, 337 (*Robinson, C. J.*: "The plaintiff [in libel], as I conceive, must be looked upon always as prosecuting for the inquiry arising from publishing some one certain libel to which particular act of publication his cause of action is confined").

³ Thus the preceding two cases would seem to be unsound. Compare the cases cited *ante*, § 1234.

as well as of Authentication (*post*, § 2150) and of Identity (*ante*, §§ 415, 440).

§ 1238. *Same: (c) Wills and Letters of Administration.* (1) At common law, the Ecclesiastical Court had jurisdiction to administer personalty and to adjudicate *wills* of personalty, but not to adjudicate *wills* of realty. Hence, a will of personalty, when probated, became a part of that Court's records, but a will of realty remained, even after probate, merely a deed taking effect after death.¹ It followed that a will of personalty need not be produced, but could be proved by the Court record or a copy of it, while a will of realty must be produced or accounted for.² Modern legislation has given Probate Courts jurisdiction over both kinds of wills; so that this distinction no longer exists; but the statutes dealing with the matter provide sometimes that the will itself, and not merely the record or a copy of it, may be required by the Court to be produced or accounted for (*ante*, § 1215, *post*, § 1658). (2) The Ecclesiastical Court's grant of *letters testamentary* to an executor of a will over which it had jurisdiction, or of *letters of administration* on intestate personalty, was a judicial act constituted by the record; so that the letters themselves, *i. e.* the credentials given to the representative, were merely a copy of the judicial record; hence, in proving such an appointment, the Court record became the document to be proved, and for this purpose a certified copy of the record would suffice, without producing the letters, which were themselves legally only a copy of the record.³ This also has been expressly regulated by modern statutes (*ante*, § 1215, *post*, § 1658).

§ 12 . *Same: (d) Government Land-Grants, Land-Certificates, and Land-Patents; Mining Rights; Recorded Private Deeds.* (1) An ordinary deed by a private party is itself the effective instrument of transfer, even under legis-

¹ 1726, Gilbert, Evidence, 71 ("The probate of a will is good evidence as to the personal estate, and they are the records of that Court, and therefore a copy of them under the seal of that Court must be good evidence. . . . [But for real estate] he must have the original will, and not the probate only, for where the original is in being, the copy is no evidence, and the probate is no more than a true copy, under the seal of the Court, of a private instrument").

² 1695, Newport's Case, Skln. 431 (a copy of the record of the Ecclesiastical Court was received to show the contents of a will of personalty; "the act of the Court is the original, and the will is proved by the act of the Court, . . . and so a copy of the act of the Court is sufficient"); 1696, R. v. Haines, lh. 583 ("A copy of a probate of a will where the Court has jurisdiction is good, because the probate itself in such case is an original act of the Court"); 1837, Doe v. Mew, 7 A. & E. 240, 253 (the will with a memorandum of the surrogate that the executor had proved the will and probate been sealed, admitted irrespective of the probate itself). *Contra*: 1805, Jackson v. Lucett, 2 Cal. 363, 367, *semble* (record of judge of probate is secondary).

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³ 1822, Plumer, M. B., in Cox v. Allingham, Jac. 514 ("The thing which it is required to prove is to whom the Ecclesiastical Court has granted the power of administering the property. The ordinary evidence is the probate; which is a copy of the will, with a certificate under the seal of the Court that probate has been granted to the executor. It is only the act of the Ecclesiastical Court that is to be proved. Now we have here the original book containing the entry of the act of the Court. The probate is only a copy of this act; this is the original and therefore the primary evidence"). *Accord*: 1807, Elden v. Keddeil, 5 East 187; 1826, Lane v. Clark, 1 Mo. 658; 1834, Farnsworth v. Briggs, 6 N. H. 561 (record of the Court as to granting administration is the original, of which the letters are only a copy); 1830, Jackson v. Robinson, 4 Wend. 436, 442 (records of Probate Court are the original, and therefore copies of them are receivable without showing the loss of the letters of administration); 1830, Hoskins v. Miller, 2 Dev. 360; 1831, Browning v. Huff, 2 Bail. 174, 179 (action by administrator; the ordinary's record-book sufficient, for the letter of administration is merely a certificate that the order exists).

lation making its public registration an additionally necessary element of validity. It has already been seen that, even where by common-law principles or by express statute the deed's contents may be proved by the registry or a copy of it, still the present rule is always thought of as applying to the deed itself and its production is merely excused on the ground that it is practically unavailable, by reason of its proved loss or its possession by another or the inconvenience involved in requiring it (*ante*, § 1224). As to other deeds of transfer than Government land-grants, it is generally accepted that the *party's deed of conveyance* is the constitutive document (*i. e.* the original to be accounted for), and that the official register is merely a copy of that original,¹ though in transfers of *mining-rights* there occur certain partial modifications of this principle² and the *Torrens system of title-registration* may involve decided alterations of this.³

(2) But where the *Government* itself makes the grant of land, and not merely furnishes an office for registering the grants of private persons, the question arises whether the constitutive document of grant (and therefore the document to be produced or accounted for) is the Government's own entry or record of the grant, or is the certificate, patent, *testimonio*, *expediente*, or other document delivered to the grantee by the Government as his muniment of title. Herein is involved a question of property-law, not of evidence. The rule of evidence is easily applied, as soon as the question of property-law is answered. If the first alternative above is taken, the original and constitutive document being the Government record, not removable from official custody, it may be proved by a copy therefrom (*ante*, § 1218) without regard to the whereabouts of the grantee's certificate, which is thus merely a copy of the official book. If, on the contrary, the latter alternative above is taken, the grantee's patent, certificate, or other document, is the original, and the Government book is merely a copy of it, so that the necessity of producing or accounting for the grantee's document depends upon the rule of the particular jurisdiction adopted for the ordinary case of a recorded conveyance (*ante*, § 1225). The answer to this question of property-law has differed in different jurisdictions, and it would be without the present purview to examine the reasons for this variance in the results. It is enough to note that there are three different classes of Government grants involved, namely, the ordinary land-grants of the Federal and State Governments (having several sub-varieties — "patent," "scrip," "location," etc.), the land-grants of the Spanish Government (affecting chiefly titles in Louisiana,

¹ 1826, Ewing, C. J., in *Fox v. Lambson*, 8 N. J. L. 275, 280 ("[The counsel] assimilates it to a common-law record, as for example of a judgment, and because such a record would be evidence he argued that the entry in question was so. But there is no analogy. The common-law record is in itself the original and supposes no other in existence. The record or registry of a deed or other instrument of writing is but a copy and presupposes an original"). *Accord*: 1886, *Brown v. Griffith*, 70 Cal.

14, 16; see *post*, § 2456, where the subject is treated from the point of view of the parol evidence rule.

² 1859, *McGarrity v. Byington*, 12 Cal. 426, 430 (same as next case); 1860, *Atwood v. Fricot*, 17 id. 37, 42 (record of transfer of mining-right; held an original, as showing compliance with regulations, but secondary to the document and fact of transfer); 1864, *St. John v. Kidd*, 26 id. 263, 270, *semble* (same).

³ See the statutes cited *ante*, § 1225.

Missouri, and Texas), and the land-grants of the Mexican Government (affecting chiefly titles in Arizona, California, New Mexico, and Texas).⁴

⁴ Besides the following statutes and precedents directly dealing with the subject, other statutes and decisions more or less connected will be found elsewhere; (1) on letters, etc., filed in a public office (*ante*, § 1219, *post*, § 1680); (2) on recorded conveyances in general (*ante*, § 1223, *post*, § 1651); (3) on certain record-books of the land-office (*post*, § 1659); (4) on judicial records (*ante*, § 1215, *post*, §§ 1640, 1681); (5) on official certificates and returns (*post*, §§ 1672, 1674); (6) on preferred copies of records (*post*, § 1269); *Alabama*: Code 1896, § 1812 (patents of the United States or any State are admitted "without further proof"); § 1813 (land-office certificates, admissible; register's certified copy of land-office documents in this State are *prima facie* evidence of the facts contained therein); 1841, *Hines v. Greenlee*, 3 Ala. 73, 75 (certified copy of U. S. record of land patent, received without accounting for the first patent issued; Ormond, J.: "The patent [issued to patentee] is not the title, but merely evidence; . . . [the record] is a public act, and therefore a second patent which may issue is not a copy of the first, but is rather a republication of the original"; 1872, *Jones v. Walker*, 47 id. 175, 178, 183 (deed of Federal government-land to plaintiff, filed at the land-office; production required); 1888, *Woodstock Iron Co. v. Roberts*, 87 id. 436, 438, 6 So. 349 (transcripts of land-patents; *Jones v. Walker* repudiated, since the document is in official files; *Hines v. Greenlee* followed; the original in the public record and of course cannot be produced); 1889, *Ross v. Goodwin*, 88 id. 390, 391, 396, 6 So. 682 (same); 1893, *Beasley v. Clarke*, 102 id. 254, 255, 14 So. 744 (same); 1895, *Holmes v. State*, 108 id. 24, 26, 18 So. 529 (same, for a letter of cancellation of entry); 1902, *Hammond v. Blue*, 132 id. 337, 31 So. 357 (U. S. land-patent or a certified copy is preferred to a tract book); *Alaska*: Civ. C. 1900, § 110 (like Or. Annot. C. § 3039); *Arkansas*: Stats. 1894, § 2879 (certified copy, by register or receiver of land-office of the State, of entries in books or of papers filed, admissible); § 724 (recorder's certified copy of recorded deed of commissioner of State lands, admissible); 1848, *Finley v. Woodruff*, 8 Ark. 328, 342 (State land-office claim-entries, etc., are primary, so that copies are receivable); 1892, *Dawson v. Parham*, 55 id. 286, 290, 18 S. W. 48 (entries of purchase in swamp-land-office, receivable); 1893, *Steward v. Scott*, 57 id. 153, 158, 20 S. W. 1088 (land-office entry, *semble*, held secondary to the certificate therefrom in showing title); *California*: C. C. P. 1872, § 1925 ("A certificate of purchase or of location of any lands in this State, issued or made in pursuance of any law of the United States or of this State, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein"; for the invalid amendment, see *ante*, § 488); 1859, *Gregory v. McPherson*, 13 Cal. 562, 572, 574 (the grant of land by a Mexican governor, forming part of the *expediente* or whole record of granting, is the original, of which the copy or certificate to the grantee is only a copy; a proof of the former may therefore be made without accounting for the latter; Mexican grant on file in U. S. Surveyor-general's office; examined copy allowed, there being an inability to remove original from office); 1860, *Natoma W. & M. Co. v. Clark*, 14 id. 544, 549 (Mexican grant on file in U. S. Surveyor-general's office; production not required, the presence of the original there being shown, and certified copy under the statute being used); 1861, *Soto v. Kroier*, 19 id. 87, 94 (Mexican grant on file in Surveyor-general's office; in using an examined copy at common law, the legal impossibility of taking the original from the file must be shown; but if under the statute a certified copy is used, the original need not thus be expressly accounted for); 1867, *Donner v. Palmer*, 31 id. 500, 509 (same as *Gregory v. McPherson*, for Alcalde's book of grants); 1874, *Hill v. Reese*, 47 id. 294, 348 (approving *Donner v. Palmer*); 1877, *Bixby v. Bent*, 51 id. 590 (translation only, without original or certified copy, of Mexican grant on file in land-office, excluded); 1891, *Eltzroth v. Ryan*, 89 id. 135, 139, 26 Pac. 647 (U. S. land-patent; certified copy from land-office receivable, without accounting for patentee's certificate); *Colorado*: Annot. Stats. 1891, § 1748 (U. S. land-office register's certificate of entry on purchase, admissible, but a patent is to be paramount title); § 1756 (recorded patent provable by copy like recorded deed); St. 1891, p. 274, § 2 (certified copy of recorded deed of State land by Governor, admissible); *Florida*: 1886, *Liddou v. Hodnett*, 22 Fla. 442 (certified copies of patents from U. S. general land-office, admitted); 1894, *Sullivan v. Richardson*, 33 id. 1, 98, 14 So. 692 (early Spanish grant; the grantee's document, on the facts, treated as an original, and admissible); *Georgia*: Code 1895, § 5674 (party's oath that original grant is "not in his power or possession and that he knows not where it is," sufficient); 1878, *Brown v. Driggers*, 60 Ga. 114, 115; 62 id. 354, 355 (homestead plat given to party is the original, as against a certified copy); *Hawaii*: Civil Laws 1897, § 1399 (in proving "any grant of land, lease, or other conveyance of any Government land or real estate, it shall not be necessary to produce the original patent, grant, lease or conveyance," but a certified copy under the hand and official seal of the Minister suffices); *Hawaii*: Rev. St. 1887, § 5983 (like Cal. C. P. § 1925); *Illinois*: Rev. St. 1874, c. 19, § 10 (deeds, etc., affecting land by trustees of Illinois and Michigan canal or canal commissioners, provable by certified copy of record); § 11 (books and entries of sale by the same, provable by certified copy under official seal of secretary of commissioners); c. 30, § 41 (St. 1879, May 29) (on affidavit by party or agent that "the required U. S. patent conveying or concerning the title to the lands" in question "is lost, or not in the power of the party wishing to use it on such trial of any such case, and that to the best of his knowledge said patent was not in-

§ 1240. Same: (c) Tax-lists, Ballots, Notarial Acts, and Sundry Documents. Similar questions, depending wholly on some principle in another branch of

tionally destroyed, or lost, or in any manner disposed of for the purpose of introducing a copy thereof in place of the original," and if the original has been recorded with the county recorder, then the record or recorder's certified copy is admissible); c. 51, § 20 (U. S. land-office register's certificate of entry on purchase of any tract of land in his district, admissible); § 21 (land-patent to be paramount title than register's certificate); § 22 (where State land has been sold and Governor's patent issued, and "said patent has been or shall purport to be recorded" in the county "and said patent shall be lost, or out of the power of the party desiring to use the same to produce in evidence," recorder's certified copy is admissible to prove issuance and contents of patent; rule to apply to U. S. land patents and certain canal deeds); § 23 (certified copy by custodian of "book and entries" of sale of State lands, admissible; certificate of purchase or issuance of patent admissible, but patent is to be paramount title; custodian's certified copy of "books and entries" of sales of swamp and overflowed lands, admissible; officer's certificate of sale or entry thereof and execution of deed therefor, admissible in place of deed, "if the original deed be lost, or it be out of the power of the party wishing to use the same to produce it in evidence, and such original deed has never been recorded"; and whenever both the deed is lost, etc., and the books of sale, etc., "have also been lost or destroyed," and a proper return of such sales has been made to the auditor of public accounts, the auditor's certified copy under official seal of such return is admissible); c. 122, § 265 (recorded State patent for school lands, provable by certified copy); § 266 ("duplicate copies" of such certificates of purchase and patents, obtained after affidavit of "loss or destruction of the originals," admissible); 1844, *Graves v. Bruen*, 6 Ill. 167, 172 (an auditor's patent to public land; copy from the record in case of loss not receivable; duplicate patent necessary); 1853, *Lane v. Bommelmann*, 17 id. 95 (land-patent; original need not be produced because a public record); 1861, *Lee v. Getty*, 26 id. 76, 80 (land-office record or recorded paper; provable by exemplification); 1868, *Huls v. Buntin*, 47 id. 396, 397 (patent lost; certified copies of the land-office books of entry, admissible); 1883, *Wileox v. Jackson*, 109 id. 261, 265, ("half-breed scrip" and locations under it); 1886, *Gornley v. Uthe*, 116 id. 643, 649, 7 N. E. 73; (land-office records proved by exemplified copy); *Indiana*: Rev. St. 1897, §§ 475, 477, 481 (records of U. S. land-office or office for sale of Canal or Michigan road lands, provable by certified copies by keeper or State Secretary or auditor); § 482 (State or Federal patents of Indiana land, and record thereof, and certified copies, admissible); 1838, *Smith v. Mosier*, 5 Blackf. 51, 53 (U. S. land-office patents; original must be accounted for; affidavit filed in local land-office, not being removable, copy admissible); 1842, *Rawley v. Doe*, 6 id. 143 (first point of preced-

ing case followed); 1847, *Stephenson v. Doe*, 8 id. 508, 512 (same; hint doubting for the case of a non-patentee offering the recorded copy); *Iowa*: Code 1897, § 4633 (U. S. land-patents recorded in county, provable by recorder's certified copy); 1853, *Stone v. McMahan*, 4 Greene 72 (land-office receiver's duplicate receipt is an original under the statute); 1858, *Curtis v. Hunting*, 6 Ia. 536 (recorded land-patent; original required); 1880, *Chicago, B. & Q. R. Co. v. Lewis*, 53 id. 101, 107, 4 N. W. 842 (certified copies of land-office selections, admitted); *Kansas*: Gen. St. 1897, c. 97, § 9 (certified copy, by register or receiver having custody, of papers lawfully deposited with U. S. land-office in the State and of official communication thereto from any Federal department, admissible like the original); § 13 (certified copies under official seal by register of deeds of U. S. land-patents recorded in county, admissible); *Louisiana*: Rev. L. 1897, § 1445 (recorded land patent or register's certificate, or receiver's receipt, by officers of Louisiana or of general Government, provable by recorder's certified copy; provided the party "make affidavit that the original of such patent or certificate is not in his possession or under his control," and opponent may dispute genuineness); 1823, *Roman v. Smith*, 1 Mart. n. s. 473 (whether the Spanish Governor's *decreta* or his grant was an original delivered to the grantee, or whether the official record of it was the original); 1836, *Montrenil v. Pierre*, 9 La. 356, 371 (Spanish notary's original, register, and *traslado*, examined); 1836, *Vidal v. Duplantier*, ib. 525 (Spanish *testimonio*); 1841, *Lavergne v. Elkius*, 17 id. 220 (Spanish land-grant); 1859, *Beauvais v. Wnll*, 14 La. An. 199 (title-deeds filed in land-office; production not required); *Maryland*: Pub. Gen. L. 1888, Art. 35, § 52 (land-office commissioner's certified copy under seal of any patent, certificate, entry in book deposited, or paper filed, admissible); § 53 (same for certificate in land-office with surveyor's notes, etc.; admissible "as if it were the original paper and proved to be" in the surveyor's writing and the surveyor proved dead); *Michigan*: Comp. L. 1897, § 8984 (land-patent provable by certified copy of record); § 10197 (documents, etc., filed or recorded in U. S. land-office in Michigan, provable by register's or receiver's certified copy); § 1270 (same for Secretary of State's certified copy under seal of Federal approval of land selections); § 1377 (same for his copy of land-patents for internal improvements); 1856, *Lacey v. Davis*, 4 Mich. 140, 150 (certified copy of U. S. land-patent, received where the original was lost); 1876, *Bradley v. Silsbee*, 33 id. 328 (land-patents recorded in office of Secretary of State; original required, because not authorized to be so recorded); *Minnesota*: Gen. St. 1894, § 2963 (land-office record of patents, etc., or certified copy, admissible); § 5753 (receipt or certificate of register or receiver of any U. S. land-patent as to entry, purchase, or location, to be evidence of title); § 5754 (certificate of register or receiver

the law, are to be noticed in various directions. For example, whether the tax list or assessment-roll as drawn up by the assessor or as placed in the hands

of any U. S. land-office within this State, a copy of the entry under homestead, etc., laws, to be produced as prima facie evidence of ownership); § 5756 (U. S. patents of land in this State, or duplicates from U. S. general land-office, recorded in county registry of deeds, provable by record or certified copy by register, like other conveyances of realty); § 5758 (survey-plats, provable by certified copy by register of land-office); *Mississippi*: Annot. Code 1892, § 1782 (certificates issued by authorized person, in pursuance of Act of Congress, founded on warrant, etc., from U. S., of land in this State, admissible); § 1784 (copies from books of land-entries "kept in any land-office in this State, or in the office of the Secretary of State, or land-commissioner, or other public office," certified by the officer having charge, admissible like the original certificate or entry); 1838, *Doe v. M'Caleb*, 2 How. Miss. 756, 767 (land-office certificate; original must be accounted for); 1839, *Woodriddle v. Wilkins*, 3 id. 360, 367 (land-patent at registry must be produced, by subpoena if necessary; but entries in the registry-books, provable by copy); 1846, *Sessions v. Reynolds*, 7 Sm. & M. 130, 152 (land-office certificate; copy allowed); 1896, *Boddie v. Pardee*, 74 Miss. 13, 20 So. 1 (as between the original certificate of entry of public land and a certified copy of the book of entries, there is under Code §§ 1782-1784 no preference for the former; both being merely copies of the entry which determines the title); *Missouri*: Rev. St. 1899, § 3104 (confirmations before commissioners of land claims or recorder of land titles, provable by certified copy by recorder or by lawful custodian); § 3105 (certificate of record of land-titles for New Madrid earthquake sufferers, and "all other books and papers" required to be kept in his office, provable by his certified copy); § 3107 (grants, etc., in "Livre Terrein," and other French or Spanish records and evidences of title lawfully deposited with recorder of land-titles, provable by his certified copy); § 3121 (letters from U. S. land department, land commissioner's lists of land, etc., recorded by register of lands, provable by register's certified copy); § 3122 (certain ancient archives of French or Spanish Government, affecting land-titles, and deposited with St. Louis recorder, provable by certified copy); § 8248 (certified copy of record swamp-land-patent, admissible); § 9078 (county recorder's certified copy under official seal of recorded land-patents, admissible); 1838, *Waldo v. Russell*, 5 Mo. 387, 394 (land-patent, proved by copy); 1858, *Barton v. Murrain*, 27 id. 235, 237 (patent in land-office, provable by certified copy); 1879, *Avery v. Adams*, 69 id. 603, 604 (land-office patent by certified copy; original need not be accounted for); *Montana*: C. C. P. 1895, § 3213 (like Cal. C. C. P. § 1925); *Nebraska*: Comp. St. 1899, § 4133 (certificates, patents, etc., of U. S. land-office, locally recorded, provable by certified copy of register of deeds); § 4155 (same for county clerk's copy of certain patents); § 5985 (certificate of land-office receiver as to sale to

individual, admissible if duplicate receipt is lost or destroyed; but is not proof of title against the holder of actual patent); *New York*: 1852, *Peck v. Farrington*, 9 Wend. 44 (original Federal patent need not be produced); *Ohio*: Rev. St. 1898 § 4115 (auditor's certified copy of State deed, admissible if the deed is "lost or destroyed by accident"); *Oklahoma*: Stats. 1893, § 4273 ("The usual duplicate receipt of the receiver of any land-office," or, if that be lost or destroyed or beyond the reach of the party, the receiver's certificate that the books of office show a sale, is proof "equivalent to a patent against all but the holder of an actual patent"); § 4274 (certified copy, by register or receiver of U. S. land-office in this Territory, of papers lawfully there deposited and of official communication there received from any department of U. S. Government, admissible); *Oregon*: Code 1892, § 3039 (record or certified transcript of duly recorded land patent, admissible like the original); *Pennsylvania*: St. 1833, P. & L. Dig. Evid. 33 (record of patents for donation lands, receivable); St. 1828, ib. Evid. 20 (deeds duly recorded in the land-office, though not in the proper county, provable by exemplification); 1835, *DeFrance v. Stricker*, 4 Watts 327, 328 (land-patent; copy of the register "in a contest with a party not claiming under the original," receivable); *Tennessee*: 1813, *Duncan v. Blair*, 2 Over. 213 (certified copy of warrant containing land entry; the recorded entry, not the party's location for the entry, is the original); 1899, *State v. Cooper*, — *Tenn. Ch.* —, 53 S. W. 391 (certificate of survey of land-grant, not required to be produced; affidavit of loss required, but not strictly dealt with; affidavit of a single party suffices; the opinion contains a detailed history of the land-grant laws in Tennessee); *Texas*: all the ensuing cases, except the last, deal with the Spanish *testimonio* and related documents; 1844, *Smith v. Townsend*, Dallas 569 (leading case); 1848, *Houston v. Perry*, 3 Tex. 390, 393; 5 id. 462, 464; 1851, *Lewis v. San Antonio*, 7 id. 288, 311; 1851, *Hendon v. Casiano*, ib. 322, 332, 1851, *Paschal v. Perez*, ib. 348 (leading case); 1852, *Titus v. Kimbro*, 8 id. 210, 212 (leading case); 1852, *Hubert v. Hartlett*, 9 id. 97, 102; 1853, *Wheeler v. Moody*, ib. 372, 375; 1856, *Hyne v. Fagan*, 16 id. 391, 398; 1859, *Nicholson v. Horton*, 23 id. 47; 1860, *Word v. McKinney*, 25 id. 258, 268; 1876, *Hlythe v. Houston*, 46 id. 65, 77; 1877, *State v. Cardinas*, 47 id. 250, 286, 290; 1878, *Guiner v. Cotton*, 49 id. 101, 114; 1883, *Houston v. Blythe*, 60 id. 506, 513; 1886, *Ney v. Munne*, 66 id. 268, 17 S. W. 407 (land-patent); *United States*: 1831, *Doe v. Winn*, 5 Vet. 233, 241 (exemplification under Georgia State seal of land-patent there recorded, admitted; Johnson, J., diss.; see quotation ante, § 1224); 1833, *U. S. v. Percheman*, 7 id. 51, 78, 84 (certified copy of Spanish land-grant, receivable, because the original decree is not issued but retained; the "copy is, in contemplation of law, an original"); 1833, *Minor v. Tilotson*, ib.

of the collector, is the original to be proved, depends on the theory of tax-law.¹ Whether the ballots cast at an election, or the certificate of the election-officers, is to be regarded as the proper object of proof in establishing the result of an election, involves the theory of election-law.² The traditional doctrine of *notariul acts* is that the notary's book-entry is the original act, and that hence the protest-copy first sent need not be produced.³ In

99 (land-grant in Louisiana; grant to patentee the original to be accounted for); 1840, *U. S. v. Wiggins*, 14 id. 334, 345 (certified copy of Spanish land-grant in Florida, received without accounting for the original); 1858, *U. S. v. Sutter*, 21 How. 170, 174 (Mexican land-grant in California; official record apparently treated as a copy; opinion obscure); 1860, *U. S. v. Castro*, 24 id. 346, 349 ("When therefore a party claims title to lands in California under a Mexican grant, the general rule is that the grant must be found in the proper office among the public archives; this is the highest and best evidence"; and accordingly the existence and loss of this public record must be shown; "written documentary evidence, produced by a claimant from a private receptacle" is not equivalent); 1902, *Carr Land & L. S. Co. v. U. S.*, 55 C. C. A. 433, 118 Fed. 821 (a tract book prepared by the commissioner of the general land-office to replace the burned local records, and proved by the local register to be used as such, is not a copy which must be certified by the commissioner under U. S. Rev. St. § 2469); *Utah*: Rev. St. 1898, § 3398 (like Cal. C. C. P. § 1923); *Virginia*: 1796, *Lee v. Tapscott*, 2 Wash. 276 (attested copy of land-patent recorded in County Court, admitted, without production of land-register or other books, here the date being old and possession having followed; *Lyons, J.*, diss.); *Washington*: 1860, *Ward v. Moorey*, 1 Wash. Terr. n. s. 104 (land-office papers, proved by certified copies); *Wisconsin*: Stats. 1898, § 4151 (any record, etc., of purchase or entry of land in U. S. general land-office or land-office located in this State, provable by certified copy by secretary of the interior, commissioner of the general land-office, or register of the land-office "respectively, having the custody thereof"); § 4151 a (certified copy of document, etc., lawfully kept in office of commissioners of public lands in this State, admissible); § 4152 (lists of land certified as conveyed to the State by the President, the head of any department of the U. S. Government, the commissioner of the general land-office, or "any other officer of the Government," admissible); § 4165 (receiver's certificate of purchase of public lands, and official certificate of entry, etc., by any register or receiver, admissible to show title); *Wyoming*: Stats. 1890, c. 76, § 3 (if the certificate of purchase or payment by any land-office receiver be "lost or destroyed or beyond the reach of the holder, secondary evidence of its contents is proof of title to the lands therein described, equivalent to a patent against all, except the United States or a holder of a patent from the United States").

¹ See the following examples: 1836, *Coman v. State*, 4 Blackf. 241, 243 (assessment-roll is the

original, as against the collector's transcript); 1884, *Standard Oil Co. v. Bretz*, 98 Ind. 231, 235 (tax-list duplicate; "each of the lists has all the force and effect of an original instrument"); 1886, *Clayton v. Rhem*, 67 Tex. 52, 2 S. W. 45 (assessment-roll); 1885, *Battin v. Woods*, 27 W. Va. 58, 63, 72 (official list of lands redeemed from tax-sales; tax-receipts not held originals; *Johnson, P.*, diss.). For the admissibility of the assessor's books, see *post*, § 1640. For testimony to the fact of an entry in such books, see *post*, § 1244.

Compare the statutes allowing certified copies (*post*, § 1680), and the *parol evidence rule* (*post*, § 2427).

² 1898, *Pusch v. Brady*, — *Ariz.* —, 53 Pac. 176 (oral testimony to contents of ballots not produced, not admissible); 1866, *Wheat v. Ragsdale*, 27 Ind. 191, 205 (ballot must be produced, if it is in existence and can be identified; otherwise, the voter may be asked for whom he voted; "we are aware that this course of examination would most probably be of but little practical importance, as but few voters would likely be able to identify their ticket; but, when insisted upon, it would be the proper course of examination, as being in conformity with the strict rules of evidence"); 1878, *Reynolds v. State*, 61 id. 392, 416, 424 (when preserved according to law, production required; certificate of canvassers is not sufficient, nor oral testimony of voters, as a substitute); 1892, *Crabb v. Orth*, 133 id. 11, 32 N. E. 711 (that the witness, a minor, voted for A; production of ballots unnecessary); 1880, *Warren v. McDonald*, 32 La. An. 987, 990; 1869, *Reese v. Reese*, 19 Oh. St. 306, 319 (testimony by candidate and others that by counting ballots he had found errors in the returns; ballots, poll-book, and tally-sheet, required to be produced). For the questions whether the results shown by the ballots are to override the official canvass, or whether the official canvass may be disputed by testimony of other persons, see *post*, §§ 1351, 2452. For the question whether a voter may testify orally to his vote, in spite of the *parol evidence rule*, see *post*, § 2452.

³ 1851, *Geralopulo v. Wieler*, 10 C. B. 690, 712 ("the general rule with respect to notarial instruments, that a duplicate made out from the original—or protocol—in the notarial book, is equivalent to an original made out at the time of the entry in the book"; here admitting a duplicate protest made after trial begun, instead of requiring secondary evidence of the one sent abroad at the time); 1851, *Phillips v. Poidexter*, 18 Ala. 579, 582 (original protest is the entry in notary's book, which is an official book, and therefore a copy of this may be received without accounting for the protest issued

these, and in similar cases depending on some principle of another department of law,⁴ no question of evidence is raised, for the application of the rule of evidence is simple enough when the other principle of law has been decided.

§ 1241. (4) **Records, Accounts, etc., as Exclusive Memorials under the Parol Evidence Rule.** By the principle of Integration or Parol Evidence (*post*, § 2425), a particular writing becomes under certain circumstances the exclusive repository of a transaction, superseding all other writings and rendering them legally immaterial. It follows that in proving the transaction this integrated document, or exclusive memorial, is the one, and the only one, to be produced or accounted for; the production of no other will suffice. Here, again, as in the two preceding groups of cases (§§ 1235, 1236), there is no controversy about the present rule of evidence; the rule applies to whatever document is declared by the substantive law to be the one material to the issue, and when the substantive law declares that a specific document is the sole material one and that others are worthless, the rule of production plainly applies to the former. Thus, the problem involved is one of the Parol Evidence rule, not of the present rule. The question arises chiefly in two sorts of cases: (a) The law sometimes *requires* integration, *i.e.* makes a certain writing the exclusive memorial. The chief representative type of this class is the judicial record. The question thus arises whether, for example, a clerk's docket-book is the record and may be produced instead of the judgment-book, or whether an original writ is the record in the same sense.¹ (b) By *act of the parties* an integration may occur, *i.e.* the transaction may be embodied in a single written memorial, to the exclusion of all others; and then, in proving the transaction, the former must be produced, but the latter cannot be.²

(e) "Whenever the purpose is to establish its Terms."

§ 1242. **General Principle; Facts about a Document, other than its Terms, provable without Production.** (1) The fundamental notion of the rule re-

by him to the parties); 1857, *McFarland v. Pico*, 8 Cal. 626, 635 (certificate of record of protest equally good with the original). Compare the statutes dealing with the admissibility of the notary's protest (*post*, § 1675).

In *Louisiana*, for sales, the notary's record has perhaps a peculiar status: 1902, *Hodge v. Palms*, 54 C. C. A. 570, 117 Fed. 396 (Louisiana notary's copy of his record of an "act of sale" is a duplicate original; compare the cases cited *ante*, § 1225).

⁴ 1824, *Salte v. Thomas*, 3 B. & P. 188 (to show the cause of a commitment to prison, an entry in the prison books, held merely a copy of the warrant of *committitur*, which was the true original); 1897, *Long v. McKissick*, 50 S. C. 218, 27 S. E. 636 (the sheriff's sale-book, and not the preliminary memorandum made at the sale); 1826, *Catlett v. Ins. Co.*, 1 *Palme C. C.* 594, 612 (certified copy of ship's register; register the

original); 1888, *Lycoming F. I. Co. v. Wright*, 60 Vt. 515, 521, 12 Atl. 103 (insurance license; no law requiring a record of it, the license itself is the original); 1886, *Singer v. Bennett*, 28 W. Va. 16, 22 (original and duplicate of agreement of incorporation filed in separate State offices are both originals).

Compare the statutes admitting *certified copies* of public records (*post*, § 1680); the rule for *conclusive registers or certificates* (*post*, § 1352); and the *parol evidence* rule as applied to official documents (*post*, §§ 2427, 2453).

¹ These questions are dealt with *post*, § 2450.
² Questions of this sort are dealt with *post*, §§ 2427, 2429; though occasionally it is difficult to distinguish whether the principle involved is that of Parol Evidence or of § 1235, *ante*, for example, where it is asked whether a deposit-ticket or a pass-book is the document to be proved in showing a deposit received.

quiring production is that in writings the smallest variation in words may be of importance, and that such errors in regard to words and phrases are more likely to occur than errors in regard to other features of a physical thing (*ante*, § 1181). Thus the rule applies only to the *terms of the document*, and not to any *other facts about the document*. In other words, the rule applies to exclude testimony designed to establish the terms of the document, and requires the document's production instead, but does not apply to exclude testimony which concerns the document without aiming to establish its terms :

1826, *Mills, J.*, in *Lamb v. Moberly*, 3 T. B. Monr. 179 (allowing proof of the fact of purchase of a note, without production); "We cannot agree . . . that the production of the note was necessary. It could only be held necessary by not attending to the distinction between proving the existence and contents of a note and the sale of a note. Of the former, the note is the better evidence; but of the latter the note furnishes no evidence. . . . The existence of a note is as certainly perceived by the senses or acknowledged in conversation as that of any other article of commerce; and it might as well be urged that before the acknowledgments of a sale of any other article could be given in evidence the article itself must be produced in court in order that the Court might see that it really existed, as that a note thus sold should be produced."

1839, *Green, J.*, in *Enloe v. Hull*, 1 Humph. 303, 310 (assumpsit for services in printing and publishing advertisements in a newspaper; production of the paper not required): "The work and labor for which this suit is brought was done upon the paper. . . . As well might the tailor be required to produce the coat or the watch-maker the watch as evidence that the work had been performed."

This much is generally accepted; the difficulty arises in applying the principle to specific cases. Testimony about a document cannot go very far without referring to its terms, and the instances in which some other fact about a document is material, and yet its terms are clearly not, are so few that in the other situations the natural tendency of Courts is to lean in favor of requiring production; since production would have to be made sooner or later in proving the terms as a material part of the issue. The line between testifying to terms or contents and testifying to other facts is not only thus difficult to draw in a given case, but its determination tends to become a matter of merely logical subtlety and verbal quibbling. There seems to be no way of invoking in its settlement any broad notion of policy definite enough to be useful in solving a given case. Moreover, apart from a few general classes of instances, the rulings depend generally upon the particular state of facts presented in each case and changing slightly in each instance, so that the rulings are generally of little profit as precedents.

(2) Besides this, the concurrent operation of the principle of *Integration*, or *Parol Evidence* (*post*, § 2429) has frequently to be distinguished. By that rule the oral part of a transaction may be legally annulled and made immaterial; so that though the oral part could be proved, so far as the present principle is concerned, without production, yet by the Integration rule the oral part is declared immaterial and ineffective and cannot be proved in any manner, so that the document becomes the exclusive transaction and

must be proved and therefore produced. For example, the fact that a sheriff has served a writ or has read it aloud to the party is a fact separate from the terms of the document, and could therefore be proved without production of the writ, so far as the present principle is concerned; but, so far as the Parol Evidence rule declares that the sheriff's indorsement of service on the writ is the sole memorial of the act, the oral doings become immaterial, and in proving the act, the terms of the writing must be proved, and therefore production is necessary. In the same way, so far as the law does not recognize an oral transfer of land, the terms of the written document may alone be proved; and, so far as the parties to any contract have voluntarily embodied it in a single writing, the writing alone, and no oral matters accompanying it, may be proved. Thus, in these cases, and in many other instances to be noted, the present principle would allow proof of an oral statement without producing a document concerned in it, and the requirement to produce the document is due solely to the operation of the Parol Evidence rule, which forbids the oral matter to be proved at all. The operation of the latter rule should not mislead us to attribute the result to any exception to the present principle or to an inconsistency in the judicial application of it.

(3) For the reason just noted, the controversy that often arises as to *who shall produce* a contract, is usually dependent in the same way on the Integration (or Parol Evidence) rule, and not on any doubt as to the present principle. For example, A sues B for work done on B's house, and upon the cross-examination of A's witness or upon the examination of B's witness, it is testified that the contract for the work was reduced to writing by the parties, and the question then arises which party shall produce it; for the party whose duty it is to produce it can go no further in his proof of the contract's terms without producing or accounting for it. In form, this is a question under the present rule; in reality, it is not. The question really is, under the Parol Evidence rule, whose duty it is to prove the contract to have been integrated, *i. e.* reduced to writing; is it the duty of the claimant alleging performance, or of the opponent alleging non-performance? So soon as this question as to the duty to prove the integration is settled, the present rule comes into application without any question, *i. e.* if it is A's duty to prove the writing, of course it is A who must produce or account for it, and *vice versa*. This question is therefore dealt with elsewhere (*post*, § 2447).

§ 1243. **Application of the Principle;** (1) **Oral Utterances accompanying a Document read or delivered;** (2) **Document as the Subject of Knowledge or Belief.** (1) When an *oral utterance accompanies* a dealing with a document, and assuming that the oral utterance is not forbidden to be proved, by the Parol Evidence rule (as noted in the preceding section), the oral utterance may be proved as a separate fact, without producing the document:

1808, *Ellenborough*, L. C. J., in *Smith v. Young*, 1 Camp. 439 (proof of a demand, in an action of trover, was oral, the witness stating that he had both orally demanded and also in writing served notice): "I may do an act of this sort doubly. I may make a

demand in words and a demand in writing; and both being perfect, either may be proved as evidence of the conversion. If the verbal demand had any reference to the writing, to be sure the writing must be produced; but if they were concurrent and independent, I do not see how adding the latter could supersede the former or vary the mode of proceeding."

1875, *Tilton v. Beecher*, Abbott's Rep. I, 389: *Witness* for plaintiff: "[Mr. Tilton had written the story of the whole affair for publication and wanted Mr. Beecher to hear it before publication,] and Mr. Tilton said to Mr. Beecher, 'I will read to you one passage from this statement, and if you can stand that, you can stand any part of it,' and he read to him a passage from that statement, which was about as follows as nearly as I can recollect"; Mr. *Evarts*, for defendant: "The statement will speak for itself"; Mr. *Fullerton*, for plaintiff: "What did he read?"; Mr. *Evarts*: "We want that paper and the part of it that was read, as it appeared in that paper, and it is not competent to recite out of a written paper by oral proposition what the written paper is the best evidence of"; Mr. *Fullerton*: "I propose to show what communication was made by Mr. Tilton on that occasion to Mr. Beecher; I do not care whether it originated in his own mind, or whether it was read from a paper, printed or written; it makes no difference; what it was that he said to him is what I have a right to"; Judge *Neilson*: "I think the witness can state what was said to Mr. Beecher, although he stated matter that had been incorporated in writing."

This result is illustrated in a variety of cases.¹

(2) Where a person's *knowledge* or *belief* about a document is material, the knowledge or belief may be shown as a fact separate from the document's terms, without producing it.²

§ 1244. *Same*: (3) *Identity of Document*; (4) *Summary Statement of Tenor of Multifarious Documents*; *Absence of Entries*. (3) Where a document is referred to as *identical* with or the same as another document, or as helping to identify some transaction or some other physical object, the question is a

¹ 1801, *Jacob v. Lindsay*, 1 East 460 (to prove a defendant's admission of indebtedness, a witness was allowed to testify that he had taken the account-book to the defendant, gone over the items with him, and heard the defendant admit the receipt of each one; the book could not be produced, being without the required stamp; production held not necessary); 1820, *R. v. Hunt*, 1 State Tr. s. s. 171, 252 (sedition; resolutions read at a meeting; printed copy verified as correctly giving what was read, allowed without producing the writing actually read); 1820, *R. v. Dewhurst*, ib. 529, 558 (sedition; resolutions read from a paper; objection of no notice overruled; Bayley, J., "No; that has been decided over and over again; though a man reads from a paper, a person may give an account of what he hears him say"); 1839, *Trewhitt v. Lambert*, 10 A. & E. 470 (the plaintiff read from a writing, and the defendant assented, not seeing the writing; held, that the oral transaction might be proved); 1869, *First Nat'l Bank v. Priest*, 50 Ill. 321 (that a cashier, asked for returns of sales, showed the plaintiff an account of sales; production not required; the thing proved being "the answer made to the inquiry"); 1852, *Glenn v. Rogers*, 3 Md. 312, 321 (a written demand for payment, delivered by messenger, production required, since no oral demand accompanied it); 1873, *Paige v. Loring*, Holmes

749 (fraudulent transfer to creditor; to show an admission, a witness was allowed to testify to the words of the defendant who took up a letter and read it to the witness, the thing to be proved being not the contents of the letter, but "what the defendant stated to him to be the contents"). For other questions arising in such cases as *R. v. Hunt*, *supra*, where a printed document is concerned, compare *ante*, §§ 1233-1235, § 415.

² 1816, *Wyatt v. Gore*, Holt N. P. 299, 303 (in proving previous currency of similar rumors in mitigation of damages for libel, the fact of their circulation in a newspaper was offered; production not required); 1897, *Kearney v. State*, 101 Ga. 803, 29 S. E. 127 (whether a witness knew of a document affecting her interest, admitted without production); 1874, *State v. Cohe*, 9 Nev. 179, 188 (over insurance as motive for arson; amount of insurance which insured believed he had, shown without production of policies); 1897, *Scullin v. Harper*, 24 C. C. A. 169, 78 Fed. 460 (same as to good faith in making a charge against an employee; the charge having been made after reading a record in a time-book, held that the book need not be produced to show what was read).

Contra: 1844, *Com. v. Bigelow*, 8 Metc. 235 (conversation about a bill to show the defendant's knowledge of its counterfeit character; rule applied to require production of the bill).

difficult one; and the ruling will depend upon whether in the case in hand greater emphasis and importance is to be given to the detailed marks of peculiarity or to the document as a whole regarded as an ordinary describable thing:

1845, *Lawrence v. Clark*, 14 M. & W. 250, 252; plea of fraud, to an action on a bill of exchange; to identify the bill spoken of as fraudulent, the bill was required to be produced; *Pollock*, C. B.: "The difficulty is, how do you prove the identity but by the contents?" *Rolfe*, B.: "You want to show that when a certain writing took place on a certain piece of paper, certain concomitant circumstances attended it; but then you must show it to be the same writing, as that which is stated on the record."

There is here naturally some inconsistency in the rulings.¹

(4) Where the total balance of accounts is desired to be stated, as by testimony to a person's solvency, or to a year's total sales, or to a year's aggregate profits, it is possible to regard the net result as something independent of the detailed terms of the account-books, and therefore provable without production; though there is here room for much difference of opinion.² But the fact that a specific entry or item exists or was made may directly involve the terms of the document so far at least as the fact of the entry can be distinguished from a status or relation produced by it.³ On the other hand, the

¹ 1867, *R. v. Elworthy*, 10 Cox Cr. 579 (perjury in stating that there was no draft of a certain statutory declaration; the identity of the draft so sworn to became material, i. e. which of two drafts was referred to; for proving the contents of a document said to be the draft in question, the rule was held applicable; *Bramwell*, B.: "If the only question had been as to the existence of a draft, the point would not have arisen; but it was thought fit to give evidence of the contents of it," and so "the general rule applies"); 1869, *Peterson v. Gresham*, 25 Ark. 380, 386 (to identify a quantity of cotton, evidence that a receipt for thirty-six bales had been given was admitted, without producing the receipt); 1879, *Lingenfelter v. Simon*, 49 Ind. 82, 89 (identification of note; production not required); 1885, *Sunberg v. Babcock*, 66 Ia. 515, 24 N. W. 19 (whether an invoice seen was the same as that in controversy; production required); 1900, *Myers' Estate*, 111 Id. 584, 82 N. W. 961 (identification of letters; production not required); 1867, *Higgins v. Carlton*, 28 Md. 135 ("whether the memorandum differed from the will in any other respects?" excluded); 1857, *Newcomb v. Noble*, 10 Gray 47, *semble* (that a horse at a place was the same one described in a mortgage; production of the mortgage not required merely for this purpose); 1845, *St. Louis P. Ins. Co. v. Cohen*, 9 Mo. 416, 439 (possession of a paper; it may be described to identify it without production); 1849, *West v. State*, 22 N. J. L. 212, 238 ("the witness had sworn that he believed that the deed in question was not identical with a deed which had been previously seen by him," describing the differences; production not required, because "it was a simple question of identity or diversity"); 1861, *Gilbert v. Duncan*, 29 Id. 133, 139 (whether the note sued on or another was agreed to be given; production of the

other not required); 1862, *Boucicault v. Fox*, 5 Blatchf. 87, 91 (copyright; whether the incidents of a drama were the same as those of a book; production of the book and the play required).

² 1791, *Roberts v. Doxon*, Peake 83 (one who had seen the accounts; "though he could not state the particulars of the books without producing them, yet he might speak to the general amount; . . . what from his general observation he perceived to be the general state of their accounts"); 1864, *Stratford v. Ames*, 8 All. 577 (amount of a bill rendered; production required); 1882, *Steketee v. Kimm*, 48 Mich. 322, 325, 12 N. W. 177 (aggregate amount of sales, allowed without producing the books); 1827, *Pircher v. Lodge*, 17 S. & R. 214, 226, per *Rogers, J.* ("The proof of the state of a person's pecuniary affairs is general in its nature; . . . it never was required that you should show a bill of sale for his personal property or the title-deeds of his real estate"); 1898, *Murdock v. Mfg. Co.*, 52 S. C. 428, 29 S. E. 856 (profits of a mill, as based on the books of the mill; production required). For solvency testimony, as affected by the opinion rule, see *post*, §§ 1937, 1959. For dispensing with the production of voluminous accounts, see *ante*, § 1230. For accounts as subjected to the integration rule, see *post*, § 1429 ff.

³ 1801, *R. v. Coppull*, 2 East 25 (whether a person was assessed for parish rates; the books must be produced); 1813, *Henry v. Leigh*, 3 Camp. 499 (the fact of the allowance of a certificate of bankruptcy; certificate required); 1856, *Darby v. Onseley*, 1 H. & N. 1, 5, 10 (whether a person's name is written in a book containing the names of members of an association; production required); 1880, *Appleby v. Secord*, 28 N. Br. 403 (testimony of one present at a trial, not admitted to show what the dispute

fact that an *entry* in a record or account-book *does not exist*, while in a sense it involves the document's terms, yet is usually and properly regarded as not requiring the books' production for proof; this may be justified either on the present ground or on that of the inconvenience of producing voluminous documents (*ante*, § 1230); it is difficult to ascertain which reason is the one judicially approved.⁴

and the decision was: production of record required; 1837, *Kennedy v. Dear*, 6 Port. 90, 96 (of a justice, whether a certain case was before him, allowed without production); 1855, *Doe v. Reynolds*, 27 Ala. 364, 376 (facts of foreclosure and sale; record must be produced); 1893, *Roden v. Brown*, 103 id. 324, 327, 329, 15 So. 598 (whether a bank's books showed an account with B.; production required); 1872, *Burk v. Winters*, 28 Ark. 6 (that a person was assignee in bankruptcy; production required); 1895, *Union Pacific R. Co. v. Jones*, 21 Colo. 340, 40 Pac. 892 (whether a verdict had been recovered; record required); 1811, *Arnold v. Smith*, 5 Day 150, 155 (that a ship had been libelled and condemned; rule applied); 1871, *Supples v. Lewis*, 37 Conn. 568 (the fact that an execution had been issued and given to an officer; production not required); 1829, *Humphreys v. Collier*, 1 Ill. 297 (that a person had been discharged in insolvency; record required); 1861, *Scott v. Scott*, 17 Ind. 308 (that certain persons were assessed for land; assessment roll required); 1879, *Binns v. State*, 66 id. 428, 430 ("the pendency of a suit, the parties to it, and its subject-matter, may be proved by parol, where the record is not the ground of the action"); 1889, *Hewitt v. State*, 121 id. 245, 23 N. E. 83 (maliciously killing a dog; to prove that it was listed for taxation, tax-list not required); 1892, *File v. Springel*, 132 id. 312, 31 N. E. 1054 (that a mortgage was held and a mortgage-suit was begun; production of mortgage and record unnecessary); 1795, *Owings v. Wyatt*, 3 Il. & McH. 393 (that the defendant was a common inkeeper, such persons being required to be licensed; production not required); Mich. Comp. L. 1897, §§ 2932, 3244, 3413 (village or city or county condemnation proceedings; register's testimony as to persons shown by records to be owners, admissible); 1899, *Reynolds v. State*, 58 Nebr. 49, 78 N. W. 433 (that a person was divorced; production of decree or copy required); 1849, *Chambers v. Hunt*, 22 N. J. L. 552, 562 (fact of a trial involves the production of the record); 1849, *Browning v. Flaugin*, ih. 567, 577 (proving the existence of a judgment-lien; production of the judgment required); 1848, *Smiley v. Dewey*, 17 Oh. 156, 159 (fact of appeal taken; record required); 1898, *Stone v. Langworthy*, 20 R. I. 602, 40 Atl. 832 (by a member of a town council, that a road was a highway, excluded); 1841, *Cross v. Haskins*, 13 Vt. 536, 540 (testimony by one receiving oil that he had credited H. for it on his books; the books not required to be produced); 1844, *Sherwin v. Bugbee*, 16 id. 439, 444, *sentle* (existence of school district; records not required); 1874, *Hlnbhard v. Kelley*, 8 W. Va. 46, 52 (that an appeal had been taken; production required).

Compare some of the cases under § 1249, *post*. For the fact of conviction of crime, see *post*, § 1270. For appointment to office, see *post*, § 2545. For the fact of incorporation, see *post*, § 1625.

⁴ The following list includes also the few cases *contra*, which are expressly so noted: 1831, *R. v. Backler*, 8 C. & P. 118 (like *People v. Eppinger*, Cal.); 1834, *R. v. Braunan*, 6 id. 326 (same); 1852, *Maule, J.*, in *Macdonnell v. Evans*, 11 C. B. 930, 938 ("Suppose a man is asked whether he made an entry in his day-book, and he says No; it cannot be necessary to produce the book"); 1894, *People v. Eppinger*, 105 Cal. 36, 38 Pac. 538 (forgery of check on B. C. Bank in name of H. & Co.; teller's testimony that no firm of that name "kept or had any account in his books," admitted); 1853, *Elkins v. State*, 13 Ga. 445, 440 (clerk allowed to testify that no liquor-license had been granted to E.; no record being required to be kept, the record is not complete; where a record is required, then it must be produced to show that no such part exists); 1886, *Mayson v. Atlanta*, 77 id. 663, 665 (like *Elkins v. State*); 1899, *Aspinwall v. Chisholm*, 109 id. 437, 34 S. E. 568 (absence of entry in account-books; production required); 1903, *Vizard v. Moody*, 117 id. 67, 43 S. E. 426 (that no tax returns were found in the records where they would properly be, admitted); 1874, *Chicago v. McGraw*, 75 Ill. 566, 571 (that no sales of U. S. land in a district were made; production of records required); 1853, *Nossaman v. Nossaman*, 4 Ind. 648, 651 (by a clerk, that no such marriage-record appeared, allowed); 1864, *Board v. Reinhart*, 22 id. 463 (that the defendant had never before in any transactions made a certain claim; production of the written transactions not required); 1871, *Lacey v. Marnan*, 37 id. 168, 170 (by the U. S. land-register, that no land-entry existed, allowed); 1902, *Com. v. Best*, 180 Mass. 492, 62 N. E. 748 (that no warrant for an arrest had been issued, admitted from one who had searched the record); 1901, *Wagner v. Supreme Lodge*, 128 Mich. 660, 87 N. W. 903 (testimony of the clerk of a lodge to plaintiff's non-membership, excluded on the facts); 1883, *Burgett v. McCiney*, 78 Mo. 676, 689 (that a part of a record did not exist; production required; after evidence of its existence and loss by opponent, evidence of its non-existence is admissible in rebuttal); 1895, *Smith v. Bank*, 45 Nebr. 444, 447, 63 N. W. 796 (principle conceded; but one who has merely searched the index of a registry of deeds may not speak as to the absence of a record); 1903, *Sykes v. Beck*, — N. D. —, 96 N. W. 844 (attorney's testimony that the county records contained nothing of a certain tenor, excluded; the official custodian's testimony is re-

§ 1245. **Same: (5) Fact of Payment of a Written Claim; Receipts.**
 (a) When a payment of money is made in discharge of a written claim — as, of a bond, a judgment — or in obedience to a written order, the *fact of paying*, including the amount paid, is usually a fact separate from the terms of the writing thus discharged, and the latter's production is not necessary. Nevertheless, in a given instance the terms of the writing may come to be drawn indirectly into the act of payment, — as where the question arises whether one draft or another was the object of the payment. For the ordinary situation first mentioned, it is generally agreed that production is unnecessary, but in instances of the latter sort production has been in some instances required.¹ (b) The fact that a *receipt* was given by the other party does not change the result, so far as the present principle is concerned.² But under the Integration (or Parol Evidence) rule the question may arise whether the receipt has not become the sole memorial of the transaction, so as to exclude the parol act of payment from consideration (*post*, § 2432). This question is generally answered in the negative. (c) Where the medium of payment is not coin or paper-money, but a *check, note*, or other form of writ-

quired); 1903, *Fisher v. Betts*, — *id.* — , 96 N. W. 132 (whether the tax records did not contain a warrant of levy; the custodian required to be called, in preference to an attorney who had searched the records); 1834, *Emrie v. Gilbert*, Wright 764 (accounting; whether an order on K. was included in the accounts due; production not required); 1865, *Blackburn v. Crawford*, 3 Wail. 175, 183, 191 (that a marriage register did not contain an entry of a certain marriage; production required).

Compare the instances *ante*, § 1230. Whether an official custodian's certificate that no entry or document exists is admissible is another question (*post*, § 1678). Whether the opinion rule affects this kind of testimony is noticed *post*, § 1657. Whether the custodian's certificate is preferred, is considered *post*, § 1273.

¹ 1801, *Rayne v. Stone*, 4 Esp. 13 (action to recover half of a payment made to a joint obligee by a surety; the security-document not required to be produced); 1834, *May v. May*, 1 Port. 129 (whether payment had been made under a power of attorney to M.; to prove that the power was to S., production required); 1843, *Planters' & M. Bank v. Borland*, 5 Ala. 531, 543, 545 (that payment of certain drafts had been made, and that a payment on judicial process had been made; production not required, the contents not being material to the issue); 1874, *Hollenbeck v. Stanberry*, 38 Ia. 325, 327 (payment of judgment, provable without production); 1894, *Shaffer v. McCrackin*, 90 Id. 578, 580, 58 N. W. 910 (same); 1861, *Cramer v. Shriner*, 18 Md. 140, 146 (settlement of accounts made on the basis of a memorandum; since the verbal transaction was independent of the writing, production was not required); 1876, *Mason v. District*, 34 Mich. 228, 234 (that money was paid out on written orders; production required); 1867, *Lowry v. Harris*, 12 Minn. 255, 271 (payment for deed; production not required); 1830, *Benton v. Cralg*, 2 Mo. 198

(payment of money, but not terms of the draft paid, admitted without production); 1836, *Davidson v. Peck*, 4 Id. 438, 444 (payment by co-defendant of judgment, and action against the other for the amount; payment of the judgment provable without producing it before the witness or reciting it in his deposition; carefully reasoned opinion); 1898, *Whiteside v. Hoskins*, 20 Mont. 361, 51 Pac. 739 (payment of a judgment; judgment not produced); 1903, *Roberts v. Dover*, — N. H. — , 55 Atl. 895 (whether certain fees had been paid, allowed without producing records); 1847, *Miliken v. Barr*, 7 Pa. 23 (that there was another note of similar date and indorsements, on which the payment pleaded had really been made; production of the other note required); 1811, *Fairfax v. Fairfax*, 2 Cr. C. C. 25 (payment of bond; production and proof of execution not required); 1827, *Patriotic Bank v. Coote*, 3 Cr. C. C. 169 (assumpsit for overdraft; whether a check was drawn in a firm-name; production required); 1846, *Hayden v. Rice*, 18 Vt. 353, 358 (action for contribution against joint promisor; to prove payment on execution, execution need not be produced).

² 1836, *Wiggins v. Pryor*, 3 Ala. 430, 433 (that money was paid and a receipt taken; production not required); 1877, *Davis v. Hare*, 32 Ark. 386, 390 (payment of taxes; the collector's books not required); 1832, *Denaett v. Crocker*, 8 Greenl. 239, 244 (payment of taxes provable orally, without producing the receipted bills); 1849, *Chambers v. Hunt*, 22 N. J. L. 552, 562 ("It is clearly competent to prove payment by parol, or rather by verbal testimony, even though there may be written evidence as a receipt or order"; but where the giving of an order of payment to a third person, and its tenor, was to be shown as payment, production was required). See also the cases cited *post*, § 2432.

ten obligation, the case for requiring production may be more clear (than in (a) *supra*), for in paying with money it is usually a mere matter of counting the number of pieces, while in paying with an instrument of obligation the terms of the writing may be of consequence; at any rate, when they do receive any emphasis under the issues, it would seem that the rule of production should apply.³

§ 1246. **Same: (6) Fact of Ownership; (7) Fact of Tenancy.** (6) The mere fact that a person is *owner* of property, whether real or personal, is a distinct thing from the terms of the document or documents by which he has become owner; although instances may be supposed in which the relation of ownership involves so directly the terms of a specific deed that the rule of production applies.¹ (7) The fact that a person occupies the relation of *tenant*, as to a piece of land or its owner, is a distinct fact; for he may have become tenant by parol or by writing, and the tenancy is the result of the transaction, and is not the transaction itself. Nevertheless, so far as the terms of a written tenancy are drawn into the question, the rule of production begins to be applicable.²

¹ 1791, *Breton v. Cope*, Peake 30 (plea, payment of a bond by transfer of bank-stock to the plaintiff; rule applicable, and copy of the transfer-book required); 1803, *Dover v. Maestrier*, 5 Esp. 92, *semble* (bribery, that the defendant gave the witness a £5 note, for which the witness signed a note payable on demand, admitted without producing the documents); 1880, *Ware v. Morgan*, 67 Ala. 461, 466 (that a payment was made by bill of exchange; production not required); 1859, *Daniel v. Johnson*, 29 Ga. 207, 210 (that notes were given in payment; production not required); 1858, *Ohio Ins. Co. v. Nannemacher*, 10 Ind. 234, 237 (that an offer of payment by check and note of a certain tenor was made; production required); 1890, *Coonrod v. Madden*, 126 id. 197, 25 N. E. 1102 (that a check was given in payment of note B, and not of note A, the one in suit; production of note B not required); 1865, *Cecil Bank v. Snively*, 23 Md. 253, 263 (that certain notes had been paid over by being sent to a bank and collected; production not required).

² 1880, *Street v. Nelson*, 67 Ala. 504, 507 (contract for sale of personalty; title to personalty "can be proved as a fact by oral testimony," unless the question arises between the parties); 1890, *Florence L. M. & M. Co. v. Warren*, 91 id. 533, 537, 9 So. 384 (testimony that the witness had not title, admitted); 1892, *Wolfe v. Underwood*, 97 id. 375, 378, 12 So. 234 (petitioners testifying that they own stock; books not necessary); 1858, *Newsom v. Jackson*, 26 Ga. 241, 245 (that B's wife owned certain negroes; deed required); 1890, *Kirkpatrick v. Clark*, 132 Ill. 342, 345, 24 N. E. 71 (whether a person was owner of land; oral testimony excluded); 1897, *Westfield Cigar Co. v. Ins. Co.* 169 Mass. 382, 47 N. E. 1026 (whether a person owned a building; "title by deed must ordinarily be proved otherwise than by the oral testimony of the owner"; but here the objection was not properly made); 1867, *McMahon v.*

Davidson, 12 Minn. 357, 369 (that a person was owner of a steamboat, allowed, "in the absence of any evidence that there was any writing"); 1868, *Fay v. Davidson*, 13 id. 523, 525 (same); 1867, *Baldwin v. McKay*, 41 Miss. 358, 362 (whether the plaintiff owned cotton; production of bill of sale required); 1834, *Lloyd v. Giddings, Wright* 694 (whether a lot was included within the boundaries of a conveyance produced; deeds adjoining the boundary not required to be produced); 1832, *Strimpfer v. Roberts*, 18 Pa. 283, 296 (letter claiming ownership; production of title-deeds not required); 1892, *Gallagher v. Assur. Co.*, — id. —, 21 Atl. 115 (that a certain person owned a leasehold; production of bill of sale not required); 1871, *Hart v. Vinsant*, 6 Helsk. 616 (replevin for rails cut; in showing the boundary of land by title-bond, production required); 1811, *Wilson v. Yongg*, 2 Cr. C. C. 33 (title-interest in an insured ship, production required).

For testimony to ownership as objectionable under the *Opinion rule*, see *post*, § 1960.

³ *England*: 1810, *Doe v. Morris*, 12 East 237 (ejectment against a tenant; tenancy proved by evidence of the payment of rent); 1810, *Doe v. Pearson*, *ib.* 239, note (same; no objection raised in either case from the present point of view); 1820, *R. v. Castle Morton*, 3 B. & Ald. 588 (to show the value of a tenement occupied by a pauper, the writing of lease was held to be necessary); 1825, *Cotterill v. Hobby*, 4 B. & C. 465 (case for injury to a reversioner's interest by cutting trees; the written lease required to be produced); 1827, *R. v. Holy Trinity*, 7 id. 611 (to prove the occupation of a tenement, as involving the settlement of a pauper, and to prove the amount of rent paid, the rule was not applied; the fact of tenancy and the value of the rent were proved by cross-examination without producing the written lease); 1828, *Strother v. Baer*, 5 Bing. 136 (action for injury to the plaintiff's reversion; whether, to prove the fact

§ 1247. *Sam.* (8) **Fact of Transfer of Realty, or (9) of Personality.** (8) It would seem a hard rule that would forbid a witness to say "I bought a house" without producing the title-deed; and yet how otherwise are we to avoid the argument that, since transfers of title to land must be in writing, oral testimony to such a transfer is testimony to the contents of a document not produced? The truth seems to be that much depends on the emphasis to be given in the particular instance to the detailed elements of the transfer. If, for example, a witness is qualifying as an expert in land values by stating that he has bought and sold land, the emphasis is upon the net fact that he has acted as buyer and seller, and not at all on the terms of the transfer; but if he is justifying a trespass as landlord of the premises, the emphasis is upon the fact that a document exists naming him and describing the premises; production should be required in the latter case, but not in the former. The rulings therefore vary, as might be expected; but it may be noted that the negative result is reached in some Courts by invoking the rule (§ 1252, *post*) as to collateral matters.¹ (9) The rule's application to the

of the reversionary interest, the written agreement of lease must be shown, left undetermined, *Gaselee and Park, J.J., contra, Best, C. J., and Barrongh, J., pro*; all the preceding cases are examined; 1830, *R. v. Merthyr Tydvil, 1 H. & Ad. 29* (amount of rental; lease required to be produced; distinguishing *R. v. Holy Trinity*, because there the amount was merely incidental evidence of value, while the later law of settlement of paupers made the amount of agreed rental material); 1832, *Doe v. Harvey, 1 Moo. & Sc. 374* (to prove the value of the premises, in an action for mesne profits, by showing the occupation by the defendant as tenant of P. and the amount of his rent, the rule was held applicable; the fact of occupation as tenant might have been proved apart from the writing, but not the tenancy under P.); *United States*: 1855, *Central R. Co. v. Whitehead, 74 Ga. 441, 443, 447, 452* (action for personal injury on a road said to be leased by defendant; plaintiff allowed to prove that it was leased, without producing the writing; *Hall, J., diss.*); 1879, *Hammou v. Sexton, 69 Ind. 37, 43* (fact of tenancy or occupancy provable by parol, in action by occupant against owner for taxes paid); 1870, *Gilbert v. Kennedy, 22 Mich. 5, 18* (trespass by lessee; to prove tenancy, production of lease required); 1875, *Storm v. Green, 51 Miss. 103, 106* (terms of a written lease; production required); 1855, *Putnam v. Goodall, 31 N. H. 419, 423* (whether a factory was leased to a specific person; production required); 1871, *Taylor v. Peck, 21 Gratt. 11, 17* (unlawful detainer, brought by landlord; the defendant, to prove himself tenant in possession, offered the plaintiff's receipts for rent, without producing the lease; received, because "the terms of the tenancy or of the lease . . . was perfectly immaterial; if he held them at that time as tenant, no matter on what terms and conditions, he held them lawfully"; *R. v. Holy Trinity* followed).

the burden of showing the agreement to be in writing (*post*, § 2447).

¹ In the following list are included rulings upon other kinds of transfers (*e. g.* of slaves) required to be in writing: 1828, *Cloud v. Patterson, 1 Stew. 394* (that a house and lot had been sold as the property of J. S.; production of deed required); 1896, *Goodson v. Brothers, 111 Ala. 589, 20 So. 443* (that land was sold by the sheriff as the plaintiff's; production required); 1859, *Ralues v. Perryman, 29 Ga. 529, 534* (that a slave was given to M.; deed required); 1876, *Prinrose v. Browing, 36 id. 369, 371* (that a conveyance was made to X; deed required); 1860, *Snapp v. Pierce, 24 Ill. 156, 158* (that a deed was executed in satisfaction of a bond; production of bond required); 1851, *Trimble v. Shaffer, 3 Greene Ia. 233* (that a deed was given, allowed without production); 1838, *Nancy v. Snell, 6 Dana Ky. 148, 156* (sale of slave; bill of sale required); 1868, *Calhoun v. Helden, 3 Bush 674, 676, nebula* (in proving lost deed, a deed, not an oral transfer, must be shown); 1847, *Roehuck v. Curry, 2 Ia. Au. 998* (that a slave had been emancipated; production of written act required); 1821, *Tucker v. Welsh, 17 Mass. 160, 165* (assumpsit by the assignee of a policy; to disprove the existence of a consideration for a prior assignment, the fact of a mortgage was held orally provable, as a "collateral fact"); 1866, *Thompson v. Richards, 14 Mich. 172, 183* (condition to give a deed; production required, in proving that a deed was given); 1869, *Clemens v. Conrad, 19 Id. 170, 173* (agreement to give deed; production not required, in testifying that a deed was given); 1873, *Hatch v. Fowler, 28 Id. 205, 210* (sale of land; production of contract required); 1891, *Showman v. Lee, 86 id. 556, 563, 49 N. W. 578* (to whom a mortgage was given; production not required); 1839, *Randolph v. Doss, 3 How. Miss. 265, 214* (that an administrator had sold land; production required); 1892, *Gallagher v. Land Co., 149 Pa. 25, 24 Atl. 115* (that the witness had

Distinguish the question which party has

fact of a sale of *personalty* depends upon the same considerations. It should be noted, however, that it is immaterial that the law does not require a writing for the sale of *personalty*, if in fact the sale was in writing.²

§ 1248. **Same:** (10) **Execution of a Document;** (11) **Sending or Publication of a Demand, Notice, etc.** (10) Where the *existence or execution of a document* is concerned, a good deal must depend on the emphasis in the particular instance. For example, to prove a pecuniary motive for murder, testimony that the defendant had seen the deceased receive a sum of money at the bank and give notes for it might be made without producing the notes; but, in an action for property transferred with intent to defraud creditors, the execution of other similar transfers to show intent could not be proved without producing or accounting for the documents. The rulings naturally are not harmonious; and again it is to be noted that the doctrine about "collateral" facts (*post*, § 1252) is often invoked to justify negative rulings.³

bought certain houses; production not required).

Compare also some cases under § 1249, *post*, and the New York cases under § 1256, *post*.

For the bearing of the *Opinion* rule, see *post*, § 1260.

² The cases are not harmonious: 1815, *Davis v. Reynolds*, 1 Stark. 115 (the plaintiff had bought a consignment of goods from the consignee, taking the indorsed bill of lading; his title allowed to be shown without the bill); 1863, *Towdy v. Ellis*, 22 Cal. 650, 659 (sale of goods in writing; production required); 1849, *Thompson v. Mapp*, 6 Ga. 260 (fact and time of a written sale of *personalty*; production not required); 1813, *Larkett v. Anderson*, Litt. Sel. C. 178 (assumpsit against one who sold a false bank-note; production not required); 1818, *Grimes v. Talbot*, 1 A. K. Marsh. 205 (purchase of *personalty*; bill of sale required to be accounted for); 1826, *Lamb v. Moberly*, 3 T. B. Monr. 179 (assumpsit for the price of a note bought; the fact of purchase and promise proved without production); 1875, *Sirrine v. Briggs*, 31 Mich. 443, 446 (sale of stock of goods; production of writing not required, the terms not being material); 1898, *Price v. Woffer*, 33 Or. 15, 52 Pac. 759 (tracing chain of title to *personalty* by successive sales and deliveries; production of bill of sale, if any, in each case, required).

³ *England*: 1848, *R. v. Duffly*, 7 State Tr. n. s. 795, 938 (one who saw a document written, not allowed to name the author without producing the original); 1848, *Sayer v. Glossop*, 2 Exch. 409 (rule applies to proof of handwriting); *United States*: 1853, *Dixon v. Barriay*, 22 Ala. 370, 381 (signature of a note in payment of a debt; production required; here, action for deceit in a sale); 1854, *Snoisgrass v. Branch Bank*, 26 id. 161, 173 (that the witness had seen notes of S. in the bank's possession; production not required to prove "the fact of the existence of such notes"); 1876, *Bell v. Denson*, 56 id. 444, 448 (fact of execution of mortgage, as showing possession; production required); 1886, *Hancock v. Kelly*, 81 id. 368, 378, 2 So. 281 (that a written instrument "relating to her dower interest" was signed, ad-

missible without production); 1828, *Mather v. Goddard*, 7 Conn. 304 ("I shipped, as per B. f.," production required); 1819, *De Pusey v. Du Pont*, 1 Del. Ch. 77 ("The naked fact of the execution of a paper may certainly be proved, under circumstances, without the production of the paper"; here production required in proving the fact of indorsement of notes as involving mismanagement of a partnership); 1871, *Pinckett v. Dillon*, 4 id. 198, 205 ("The execution of an agreement and the time, place, and circumstances of its being made, may for all purposes be proved by parol"); 1859, *Holcombe v. State*, 28 Ga. 66, 67 (the fact of writing a letter, admissible without production); 1870, *St. Louis & C. R. R. Co. v. Eakins*, 30 Ia. 279, 281 (to show performance of conditions of stock subscriptions, the fact of letting a contract, etc., proved without producing the writings); 1819, *Dupee v. Ashby*, 2 A. K. Marsh. 11 (existence of a written contract; rule applicable on the facts); 1899, *Ranney v. Donovan*, 78 Mich. 318, 325, 44 N. W. 276 (that the defendant asked him to sign a receipt of a certain tenor, that he refused, handed it back, etc.; production not required; "it was simply a part of the conversation"); 1891, *Muskegon v. Lumber Co.*, 86 Id. 625, 628, 49 N. W. 489 (whether he made a return of the tax-roll to the treasurer, allowed without production); 1830, *Benton v. Craig*, 2 Mo. 199 (who filed or signed a plea; production not required); 1878, *Bardin v. Stevenson*, 75 N. Y. 164, 166 (a witness to handwriting who had seen the defendant sign his name was allowed to say what kind of instruments he had signed, as affecting the degree of attention which the witness might have given); 1833, *Ellis v. Baldwin*, 6 Oh. 15 (to prove the fact of issuance of a license, production not required); 1860, *Shoenberger v. Hackmann*, 37 Pa. 87, 92 (action on a promise to pay heirs in consideration of their signing a release; "It was simply the act of signing the paper" that was to be proved; "it was therefore a collateral matter to the issue," and production of the release was not necessary).

Compare the rules as to *order of proof* of execution, loss, and contents, *ante*, § 1189.

(11) The act of *delivering, sending, or publishing a document*, regarded as distinct from the terms of the document, may of course be proved without production; but, so far as such proof implies anything as to the document's terms and seeks to establish those terms by indirection, the rule is applicable and production necessary.²

§ 1249. **Same:** (12) **Sundry Dealings with Documents. — Conversion, Loss, Forgery, Larceny, Agency, Partnership, Service of Writs, etc.** In an action of *trover* for the conversion of a document, the existence and the taking of a document of a certain sort may be regarded as facts distinct from its detailed terms, and thus the rule of production is not applicable:

1802, *Bucher v. Jarratt*, 3 B. & P. 145; *Heath, J.*: "There is a material difference between an action of *assumpsit* on a promise contained in an instrument in writing and an action of *trover* for the instrument itself. In the former the promise must be proved as laid, and consequently can be best proved by inspection of the instrument. In the latter the gist of the action is the tort"; *Rooke, J.*: "Where the written instrument is to be used as a medium of proof by which a claim to a demand arising out of the instrument is to be supported, there [notice is required . . .] before evidence of its contents can be received. But this being an action of *trover* for the certificate of registry itself, I can see no sound reason why evidence should not be admitted of the existence of the certificate, in the same manner as evidence of a picture or other specific thing is constantly admitted where it is sought to be recovered in the same form of action."

¹ *England*: 1808, *Smith v. Young*, 1 Camp. 439 (to prove the fact of a written demand or notice, production is necessary); 1813, *Doe v. Darnford*, 2 M. & S. 61 (the fact of giving written notice to quit, held to require the production of the writing); *United States*: 1847, *Bond v. Central Bank*, 2 Ga. 92, 99, 107 (contents of notice in a newspaper; production required); 1849, *Schley v. Lyon*, 6 Id. 530, 538 (same); 1851, *Pierce v. Carleton*, 12 Ill. 358, 364 (that a paper was published in the State by H. & S., allowed by parol); 1898, *Liugle v. Chicago*, 172 Id. 110, 50 N. E. 192 (fact of publication of notice; provable without production); 1899, *McChesney v. Cook Co. Collector*, 178 Id. 542, 53 N. E. 336 (fact of newspaper publication of notice; production not required); 1855, *Utthauk v. Turnpike Co.*, 6 Ind. 123, 127 (oath of publisher with one copy, sufficient to show publication on three occasions); 1866, *Des Moines v. Casady*, 21 Ia. 570, 572 (that an ordinance was published in a newspaper, and the number of times; provable by oral testimony, without producing the printed document; its contents being otherwise in evidence); 1869, *Hurlington G. Co. v. Greene*, 28 Id. 289 (fact of a notice given, production not required); 1886, *Bish v. Ins. Co.*, 69 Id. 184, 186, 28 N. W. 553 (that a proof of loss blank had been filled out and sent; rule not applicable); 1890, *Hagan v. Ins. Co.*, 81 Id. 321, 332, 46 N. W. 1114 (proof of loss; preparation and sending, provable without production); 1835, *Miller v. Webb*, 8 La. 516 (fact of publication of notice; production not required); 1837, *Baker v. Towles*, 11 Id. 432, 434, *semble* (same); 1867, *Beall v. Poole*, 27 Md. 645, 652 (the fact that complaints had been made by letter; production required); 1886, *Pouca v. Crawford*, 18 Nebr. 551, 553, 23

Id. 652, 668, 26 N. W. 365, 37 Id. 609 (whether a petition was presented; production not required); 1803, *Peyton v. Hallett*, 1 Cal. 363, 365, 380 (notice of abandonment of a vessel given by letter delivered; *semble*, the fact of notice provable without production; case obscure); 1817, *Moore v. Gilliam*, 5 Mand. 346, 347 (editor's testimony to fact of publication of advertisement, received without producing it); 1863, *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536, 546 (notice in newspaper as required by law; production of a copy of the newspaper required; "in cases where successive notices are required, we should incline to think that the production of one paper to show the contents, and proof by parol that there were successive publications of the same notice, would be enough"); 1874, *Sexton v. Appleyard*, 34 Wis. 235, 239 (fact of publication of notice; oral testimony sufficient).

For the use of a *publisher's affidavit* as an exception to the *Hearsay* rule, see *post*, § 1710; for its use as preferred to other testimony, see *post*, § 1339.

Compare the other cases on *newspaper copies*, *ante*, § 1234.

² 1794, *Cowan v. Abrahams*, 1 Esp. 50 (*trover* for a bill of exchange; the declaration described it; Lord Kenyon, C. J., held the rule applicable, and the King's Bench concurred; practically overruled by the above case); 1813, *Scott v. Jones*, 4 Tannt. 865 (Gibbs, J.: "It used to be the practice in actions of *trover* for bills of exchange to give notice to produce the bill; it has very lately been held in the Court of King's Bench that such notice is unnecessary"; here, *trover* for an agreement for a lease); 1830, *Whitehead v. Scott*, 1 Moo. & R. 2 (*trover* for a deed; production not required). The same

The same reasoning applies in other cases where the fact to be proved is merely some dealing with the document as a material object, for example, by *larceny*, embezzlement, or loss;² but otherwise for forgery or counterfeiting.³

An *agency* may have been constituted by a written authority; but the repeated acting upon it, being equally a granting of authority, may be proved without production.⁴ By the same reasoning, the fact that a *partnership* exists may be proved without producing the articles of partnership.⁵ In a large number of other instances, the result seems to depend on the present principle, though the precise grounds and the classification of the opinions are open to difference of interpretation.⁶ It may be noted that where the

result might be reached by treating the rule as applicable, but implying from the pleadings a notice to produce (*ante*, § 1205). The practical difference between the former and the latter reasonings would be that, if the document could not be produced for want of a stamp, by the former doctrine this would be immaterial, by the latter it would prevent proof by copy; but, further, that by the latter it would be necessary to show possession by the defendant.

² 1802, *Anon.*, cited in *Bueler v. Jarratt*, 3 B. & P. 145 (judgment for stealing a written instrument; notice to the defendant to produce, "certainly not the practice," and intimated to have been held unnecessary); 1898, *First Nat'l Bank of B. v. First Nat'l Bank of N.*, 116 Ala. 520, 22 So. 976 (action for loss of a package of transfers of land-certificates deposited, the claim of damages being for expense incurred in procuring substitutes; rule held not to apply to the transfers).

³ 1880, *Fox v. People*, 95 Ill. 71, 75 (forgery; rule applies to proof of former utterings); 1885, *State v. Breckenridge*, 67 Ia. 204, 25 N. W. 130 (other forged notes used to show intent; holding absolutely that production is necessary); 1886, *State v. Saunders*, 68 id. 371, 27 N. W. 455 (similar; holding that the document must be either produced or accounted for); 1823, *People v. Lagrille*, 1 *Wheeler Cr. C.* 412 (uttering counterfeit bills; other counterfeits must be accounted for by proof of destruction or of defendant's refusal on notice); 1847, *Reed v. State*, 15 Oh. 217, *semble* (other counterfeit bills should be produced or accounted for); 1865, *State v. Cole*, 19 Wis. 129, 134 (uttering counterfeit bill; to prove the uttering of other counterfeits as evidence of guilty knowledge, the bills must be produced or else accounted for by showing defendant's refusal to produce on notice or prosecution's inability to obtain them otherwise).

Compare the cases cited *ante*, § 1205 (notice to produce), and *ante*, § 318 (evidencing intent by other forgeries).

⁴ 1794, *Neal v. Erving*, 1 Esp. 61 (an agency proved by habitual action, without producing the instrument); 1812, *Spencer v. Billing*, 3 Camp. 310 (whether the plaintiff had habitually accepted bills addressed to him as partner; oral evidence allowed; otherwise, if the mode of dealing had varied, which would then involve the proof of "an individual written instrument"); 1814, *Haughton v. Ewbank*, 4 Id. 88

(to prove an agency, the defendant's habit of paying upon such documents signed by the agent was proved orally, though the authority was in writing).

Compare the effect of the *Opinion rule* (*post*, § 1960).

⁵ Here, however, the principle may perhaps really be the one referred to *ante*, § 1242, par. 3, i. e. that it is the *duty of the opponent to prove* that written articles of partnership exist; or the principle may be that of § 1255, *post*, that the articles may be proved by *oral admissions* of the opponent; or it may be that the partnership is a "collateral" fact, under § 1252, *post*. The opinions are seldom clear as to the precise principle invoked: 1875, *Price v. Hunt*, 59 Mo. 258, 261 (production not always required; but here required, the issue being whether a contract was one of partnership); 1810, *Widdifield v. Widdifield*, 2 Binn. 245, 249 (though by one witness the existence of a contract of partnership was proved, another was allowed to testify to the existence of a partnership, because they might have "afterwards formed a general partnership by parol"); 1852, *Cutler v. Thomas*, 25 Vt. 73, 79 (suit by creditor against partner; articles need not be produced by plaintiff); 1855, *Hastings v. Hopkinson*, 28 Id. 108, 117 (plaintiff charging a defendant as partner probably may prove the partnership as a fact independent of the articles; but a defendant defending by alleging partnership is invoking the articles and must produce them).

⁶ 1807, *Horn v. Noel*, 1 Camp. 61 (since a Jewish ceremony of marriage was merely the ratification of a previously written contract, to prove the fact of marriage, the contract was required); 1795, *Morgan v. Minor*, 2 Root 220 (that a certain prize in a lottery was drawn by his number; rule applicable); 1837, *Dyer v. Smith*, 12 Conn. 384, 391 (whether a person had a certain note in his possession; production not required); 1885, *Harris v. Collins*, 75 Ga. 97, 108 (that deeds of a certain description were deposited, given up again, etc., allowed, without production); 1858, *Rawson v. Curtiss*, 19 Ill. 456, 473 (that he saw a "letter of credit," excluded; production necessary); 1875, *Miller v. Road Co.*, 52 Ind. 51, 60 (that steps were taken to organize a corporation and that articles were filed; production not required); 1811, *M'Ilroy v. Kennedy*, 2 Binn. 381 (that a claim was set up under a bill of sale; production not required); 1897, *Barnes v. Com.*, 101 Ky. 556, 41 S. W. 773

fact to be proved is some dealing with a document which goes to form a *judicial record* — as, the serving of a writ, the time of trial begun —, the Parol Evidence rule (*post*, § 2450) may forbid the parol transaction to be shown at all, because the act in legal significance is constituted solely by the return on the writ or some other appropriate part of the record.⁷

§ 1250. **Same:** (13) *Miscellaneous Instances*. For a great many instances in which the present question arises it is unprofitable to pursue analysis more minutely or to seek a solution in any of the preceding generalizations.¹

C. EXCEPTIONS TO THE RULE.

§ 1252. (1) "Collateral" Facts; History. It was clearly enough settled, in the era of the rule of profert (*ante*, § 1177), that profert need not be made of a document whose contents were but an inducement to the claim alleged or, as it was commonly said, of a document which was "meer collateral to

(fact of receipt of a letter; rule not applied); 1853, *Hunt v. Roylance*, 11 Cnah. 117 (mode of keeping accounts, etc.; production of books required); 1886, *Simpson v. Waldbury*, 63 Mich. 439, 444, 30 N. W. 199 (that drafts were protested, not paid, and returned; production required); 1894, *Hobe v. Swift*, 58 Minn. 84, 88, 59 N. W. 831 (measurement of printer's ems in an advertisement; production required); 1892, *Shelton v. Reynolds*, 111 N. C. 525, 16 S. E. 272 (fact of showing a paper, but not the contents; production not needed); 1803, *Hurt v. Davis*, 1 Brev. 304 (assumpsit for services performed in pursuance of a written agreement; production required); 1812, *Forl v. Whitaker*, 3 id. 244 (trespass *q. c. f.*; evidence that the trespassing person acted under written orders from the defendant; production required); 1839, *Enloe v. Hall*, 1 *Hamp.* 303, 310 (services in printing and publishing advertisements in a newspaper; production of the paper not required); 1873, *Lacy v. Sugarman*, 12 *Heisk.* 354, 363 (whether an act was done within the lines of military occupation; the fact of actual occupation provable by parol, but to prove the limits as defined by military written order, the order must be produced); 1822, *Hutchinson v. Peyton*, 2 Cr. C. C. 365 (expenses in procuring insurance; production of policy required); 1856, *Houghton v. Paine*, 29 *Vt.* 57 (services in "gathering data and writing a memoir"; production of the memoranda, etc., made by the plaintiff, not required); 1892, *Johnson v. Marble Co.*, 64 id. 337, 353, 25 *Atl.* 441 (that the proceeds of a check were received by A and spent in a certain way; production unnecessary); 1788, *Dawson v. Graves*, 4 *Call* 127 (smuggling; testimony by W. that he had received 71 hogsheads though he had taken out a permit for 50 only; production of the permit required).
⁷ 1807, *Thomas v. Ausley*, 6 *Esp.* 80 (to prove the time of notice of a trial, the notice was required; and to prove the date of the trial at Nisi Prius, the record was required); 1837, *R. v. Murphy*, 8 C. & P. 297, 305 (the fact that a distraint was made under a warrant; rule

not applicable); 1851, *Thorne v. Mason*, 8 U. C. Q. B. 236 (malicious arrest; the writ required to be produced); 1886, *Foster v. Magill*, 119 *Ill.* 75, 82, 8 N. E. 771 (evidence of an act done to take possession of property does not require production of the record; but not so of a writ brought); 1876, *Stanley v. Sutherland*, 54 *Ind.* 339, 353 (that a farm had been sold on execution for a certain debt; allowed, the validity of the sale not being disputed); 1856, *Wyune v. Auburn*, 23 *Mo.* 30 (that a mare was taken under a writ; production required); 1892, *Bates v. Sabin*, 64 *Vt.* 511, 521, 24 *Atl.* 1013 (services rendered in serving process; production unnecessary).

Compare the cases *ante* under §§ 1241, note 2, and 1244, note 3.

¹ 1845, *Graham v. Lockhart*, 8 *Ala.* 9, 25 (fact of indebtedness as consideration for a deed "may as well be proved orally as by the production of the writing"); 1892, *Lavretta v. Holcomb*, 98 *Id.* 503, 510, 12 *So.* 789 (that a person was president of a club; minutes not required); 1858, *Poole v. Gerrard*, 9 *Cal.* 593 (to rebut evidence of marriage by habit and repute, testimony involving the terms of the contract were not received without the writing); 1871, *Jones v. Hopkins*, 32 *Ia.* 503, 506 (that a corporation was organized; rule applicable); 1830, *Foster v. Wallace*, 2 *Mo.* 231 (proving a co-signer of a bond to have signed merely as surety for the other; testimony to the fact of a debt allowable, without producing the instrument); 1835, *Rank v. Shewey*, 4 *Wats.* 218 (that an apparent surety on a bond was by another bond really co-obligor; production of the second bond required); 1892, *Price v. R. Co.*, 38 *S. C.* 199, 209, 17 *S. E.* 732 (employee's action for death; written regulation of the defendant must be produced, in proving a regulation); 1870, *Smith v. Large*, 1 *Heisk.* 5, 7 (debt on account for leather delivered; in showing the existence of a bond to deliver it, the bond must be produced).
 For the case of an appointment to office, see *ante*, § 1228.

the action"; subject only to the qualification that profert of such a deed was nevertheless to be made if the deed was requisite *ex institutione legis*:

1606, Lord Coke, in *Bellamy's Case*, 6 Co. Rep. 38 (trespass *de bonis asportatis*; the defendant pleaded ownership of the land; the plaintiff pleaded a lease assigned to him; the defendant pleaded a condition not to assign without the lessor's license; the plaintiff pleaded a license by deed, without making profert; then the defendant demurred): "The reason and cause that deeds are shewed to the Court is because it belongs to the judges to adjudge of the sufficiency or insufficiency of them; yet it was resolved that the plaintiff need not shew it in this case for three reasons: 1. Because the plaintiff doth not claim by the said deed of licence any interest in the house, but the licence is meer collateral to the interest of it and pleaded only to excuse the forfeiture of the lease, and is not like a release or confirmat, for they transfer their right; 2. A good difference was taken and agreed when a deed is requisite *ex institutionis legis* and when *ex provisione hominis*; for when it is requisite *ex institutione legis*, there it ought to be shewed in court, although it concerns a collateral thing and transfers or conveys nothing."¹

By some process of thought not clearly ascertainable, this limitation to the doctrine of profert was in England early repudiated as a limitation to the rule requiring production in evidence:

1750, L. C. *Hardwicke*, in *Cole v. Gibson*, 1 Ves. Sr. 503, 505 (bill to set aside an annuity; a bond which had been a part of the transaction was required to be produced): "A distinction is endeavored between a bill to set aside the bond or other instrument, and a case wherein it is made use of only by collateral evidence; but there is no such distinction in point of evidence; the rule being the same whether it comes in by way of collateral evidence, or the very deed which the bill is brought to impeach."²

But in the United States the exception has survived, usually more or less below the surface, and potential only in occasional instances, though in some jurisdictions fully recognized and constantly enforced.

§ 1253. **Same: Principle.** Such a limitation most assuredly has a justification. In the great majority of instances where the terms of a document are not in actual dispute, it is inconvenient and pedantic to insist on the production of the instrument itself and to forbid all testimonial allusion, however casual, to its terms:

¹ *Accord*: 1555, *Throckmerton v. Tracy*, Plowd. 148 (profert not required of one not privy to the deed); 1602, *Dagg v. Penkevon*, Cro. Jac. 70 (debt for tithes, by a lessee for years from a lessee for life from the queen by letters patent; profert of the latter not required, because "the title shewn in the declaration is but a conveyance to the action"); 1636, *Stockman v. Hampton*, Cro. Car. 441 (justification for trespass under a license from one having a remainder after an estate tail, the plea traversing the opponent's claim of estate in fee for his ancestor; profert not necessary, "because it is but an inducement to the traverse and is not answerable"); *ante* 1767, *Buller, Nisi Prins*, 249 ("When a man shews a good title in himself, everything collateral to that title shall be intended, whether it be shewn or not"); 1800, *Banfill v. Leigh*, 8 T. R. 571 (plaintiff sued as assignee of debts under power of attorney, by

which he had obtained an award under arbitration which defendant had promised to pay; in an action on the award, the plaintiff need not make profert of the assignment; *Kenyon, L. C. J.*: "It is not universally true that a profert must be made when the party pleading a deed derives title under it; . . . it is never necessary to make a profert of a deed which is pleaded only by way of inducement; and the deed in question is only inducement to the action").

² Yet this limitation is mentioned in the treatises of the 1800s: 1829, *Phillips, Evidence*, 7th ed., I, 303 ("The general rule that the best evidence is to be produced which the nature of the thing admits is to be understood as applying to deeds and agreements which form part of the issue or which are material to the issue"); 1842, *Starkie, Evidence*, 3d ed., I, 202; 1870, *Best, Evidence*, 5th ed., § 479.

1835, *Mulkey, J.*, in *Massey v. Bank*, 113 Ill. 334, 338: "[The general principle] has no application to the facts above stated. We fully recognize the rule that whenever the existence of a deed or other writing is directly involved in a judicial proceeding, whether as proof of the precise question in issue or of some subordinate matter that tends to establish the ultimate fact or facts upon which the case turns, such deed or other writing itself must be produced, or its absence accounted for, before secondary evidence of its contents is admissible. Yet while this rule is fully conceded, it is also true that a witness, when testifying, may, for the purpose of making his statements intelligible, and giving coherence to such of them as are unquestionably admissible in evidence, properly speak of the execution of deeds, the giving of receipts, the writing of a letter, and the like, without producing the instrument or writing referred to. To hold otherwise would certainly be productive of great inconvenience, and in some cases would defeat the ends of justice. References to written instruments by a witness for the purpose stated are to be regarded as but mere inducement to the more material parts of his testimony. The present case well illustrates the principle in question. As remotely bearing upon the issue to be tried, the plaintiff sought to show the appellant had avowed a purpose not to pay the note [whose execution was in issue],—that he had said he was going to put his property out of his hands in order to defeat the claim. Now this, under the issue, is the important part of the answer to the question ['whether the note was a renewal note'], if indeed any of it can be so regarded. All, therefore, that was said about the deeding of the land, the giving of the mortgage, and getting the loan of \$2,000, we regard as mere matter of inducement to the more important part of the testimony."

Two things, however, are to be noted. (1) The term "collateral," as a definition of the limits of this exception, is an unfortunate and elusive word, which is almost impossible of consistent application in practice. Yet a more satisfactory term or test is certainly difficult to fix upon. If we say that production is not necessary where the terms of the document are not *bona fide* disputed by the opponent, we go too far; for the opponent may not be prepared to dispute its terms and yet he may fairly desire the opportunity to see the document and not be obliged to accept the proponent's testimony to its contents; moreover, it would be difficult to ascertain beforehand whether the terms of all the documents to be used would be disputed. Again, if we say that the exception shall cover all documents not material as a part of the issues under the pleadings, we go once more too far; for a document may not form an element of the issue and yet may be important enough in evidence to require production. There seems no alternative but to accept the current and traditional term "collateral" as serving to define the exception. (2) But in any case the misfortune of inconsistent precedents and the disadvantage of an obscure definition can be obviated by applying strictly that salutary doctrine of judicial discretion. Let the trial judge determine absolutely, and without review, the application of the principle to each case. Whether a document is "collateral" is practically a question whether it is important enough under all the circumstances to need production; and the judge presiding over the trial is fittest to determine this question finally (*ante*, § 16).

It should here be noted that the present exception has sometimes been confused with the *Integration* or *Parol Evidence rule* in a peculiar way. It

is a part of that rule that an oral transaction, though reduced to writing, can be availed of where other parties are concerned, and the oral transaction is as between them the material one (*post*, § 2446). This does not mean that the writing's contents can be proved by oral testimony, but that the terms of the oral transaction can be shown. Having erroneously in mind this different rule, the Court of at least one jurisdiction has phrased the present exception so as to allow the terms of such a writing to be proved, between other than the parties, orally and without production.¹ This is purely a local misunderstanding; it has never elsewhere been doubted that the present applies to all writings, whether or not the parties in the case were the parties to the document.²

§ 1254. **Same: Specific Instances.** There is naturally little to be found by way of further generalization in collating the precedents. Each case has depended much on its own circumstances. The important thing to note is that the present doctrine has been invoked in deciding many of the cases falling under another aspect of the general principle (*ante*, §§ 1242-1250). For example, in proving that a defendant paid money upon a note, the payment of the money is an act separate from and not involving the terms of the document, so that to prove the payment is not to prove the document's contents, and therefore the rule of production does not apply; nevertheless many Courts express this by saying that the document is "collateral" and that hence the exception to the rule comes into play. Most of the cases in which the term "collateral" is invoked can be sufficiently explained by that principle.¹

¹ 1873, *Pollock v. Wilcox*, 68 N. C. 46, 49 (action to set aside a deed in fraud of creditors; the defendant was allowed to show orally the contents of notes surrendered and notes made by him as the price of the land; the rule not being applicable except between "the parties to a contract"); 1895, *Carden v. McConnell*, 116 Id. 875, 21 S. E. 923 (action for slander of title; plaintiff's proof of a deed by him to L., allowed to be by parol, on the ground that the rule did not apply as between strangers to the deed); 1896, *Archer v. Hooper*, 119 Id. 281, 26 S. E. 143 (title to personalty; plaintiff claimed under a bill of sale from B.; the bill not required to be produced).

² 1881, *Smith v. Cox*, 9 Or. 327, 331 (production required of a void deed between third persons).

¹ They have accordingly been placed there (*ante*, §§ 1242-1250); while the precedents below include only those rulings which more or less definitely mean to recognize a real exception of the present sort; the precedents in those sections should therefore also be consulted on all of the states of facts dealt with in the citations below; compare also a few cases cited *post*, § 2143 (authentication of ancient copies of deeds); *Ala.*: 1831, *Sommerville v. Stephenson*, 3 Stew. 271, 278, *semble* (exception recognized); 1847, *Brown v. Isbell*, 11 Ala. 1009, 1020, *semble* (action on agreement to pay deficiency of amount of a bill if not paid out of

certain funds; bill's production not required); 1876, *Lewis v. Hadmon*, 56 Id. 186 (false representations as defence to action on premium note for policy; production of application required, as not collateral); 1877, *East v. Pace*, 57 Id. 521, 524 (conversion of a mule; process under which it was taken, not required to be produced, being an "incidental or collateral matter"); 1884, *Winslow v. State*, 76 Id. 42, 48 (exception recognized); 1885, *Jones v. Call*, 93 Id. 170, 179 (rule not applicable to "mere notices"); 1892, *Rodgers v. Crook*, 97 Id. 722, 725, 12 So. 108 (exception recognized); 1897, *Torrey v. Burney*, 113 Id. 496, 21 So. 348 (to show the reason for ill-feeling, evidence was offered that the person had read a newspaper clipping that would cause it; the clipping required to be produced); 1898, *Foxworth v. Brown*, 120 Id. 59, 24 So. 1 (to show notice, rule not applicable); 1901, *Griffin v. State*, 129 Id. 92, 29 So. 783 (assault on a person assisting a constable acting under a writ; writ not required to be produced, being collateral, and its contents not being in issue); 1901, *Zimmerman v. State*, — Id. —, 30 So. 18 (similar); 1901, *Costello v. State*, 130 Id. 143, 30 So. 376 (production not required of a written agreement which showed a witness' interest; compare § 1253, *post*); 1903, *Webb v. State*, — Id. —, 34 So. 1011 (rule not applied to a memorandum handed to witness by defendant); *Ark.*: 1848, *Hammond v. Freeman*, 9 Ark. 62, 67 (action

§ 1255. (2) **Party's Admission of Contents; Principle.** The proposition that production should be dispensed with where the opponent has already admitted the contents of a document to be as alleged, is a plausible one, and its denial seems at first sight a mere insistence on an unnecessary formality. The doctrine that production is in such a case exceptionally dispensed with owes its best defence and its common name to the following opinion of Baron Parke:

1840, *Parke, B., in Slatterie v. Pooley*, 6 M. & W. 664: "If such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be nearly insuperable. The reason why such parol statements are admissible, . . . is that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth arising from the very nature of the case where better evidence is withheld; whereas what a party himself admits to be true may reasonably be presumed to be so. The weight and value of such testimony is quite another question."

against maker by indorsee for money paid on note to subsequent indorsee; in proving the intermediate indorsement to plaintiff, production required as not collateral); 1900, *St. Louis & S. F. R. Co. v. Kilpatrick*, 67 id. 47, 54 S. W. 971 (expulsion by brakeman; placard on car not required to be produced, because "merely incidental"); *Cal.*: 1887, *Marriner v. Dennison*, 78 Cal. 202, 213, 20 Pac. 386 (action by promisee under contract to sell land, the promisor having persuaded him to accept other lands by representing that he had a prior contract to sell to S.; testimony of S. offered to show that his contract was in truth subsequent; production of it not required); *Ill.*: 1885, *Massey v. Bank*, 113 Ill. 334, 337 (whether a note in issue was a renewal note; incidental references to prior deed, mortgage, etc., allowed without production; see quotation *supra*); *Ind.*: 1890, *Coonrod v. Madden*, 126 Ind. 197, 25 N. E. 1102 (to prove a plea of payment, in an action on a note, the defendant produced a check said to have been given in payment; the plaintiff then offered to testify that it was another note that had been paid by this check, and to give the date, amount, etc., of the other note, to identify it with the check; the rule was not applied to the other note); 1896, *Lambert v. Woodard*, 144 Id. 333, 43 N. E. 302, *semble* (a lease bearing on the case in an undisclosed way; rule not applicable); *Mass.*: 1784, *Com. v. Fairfield, Dane's Abr.*, c. 84, art. 2, § 3 (that a witness owned land, as indicating his standing; provable by parol); 1898, *Smith v. Bank*, 171 Mass. 178, 50 N. E. 545 (covenant against incumbrances; report of engineer leading to sewer assessment, held collateral); *Mich.*: 1864, *Angell v. Rosenbury*, 12 Mich. 241, 258 (contents of a deed; rule applies equally to collateral issues); *N. J.*: 1861, *Gilbert v. Duncan*, 29 N. J. L. 133, 139 (whether the note sued on, or a different one, was agreed to be given up on receiving a third one; production of the different one not required, because the question was collateral, because "its contents are not material to the rights of the parties in the action," nor does the proponent "seek to

avail himself of its contents as proof of any fact stated in it or of any obligation created or discharged by it"); 1896, *New Jersey Zinc & I. Co. v. L. Z. & I. Co.*, 59 id. 189, 35 Atl. 915 (a contract recited by corporation minutes, the corporate action alone being material; rule not applicable); *N. Y.*: 1813, *Sonthwick v. Stevens*, 10 John. 443, 446 (that a defendant was State printer and president of a bank; provable without production in an action for libel, as "collateral matter"; "it is every day's practice to parol proof in such cases"); *N. C.*: 1884, *Crede v. Credle*, 91 N. C. 640, 646 (notice posted against buying R.'s cattle, with the killing of which the defendant was charged; production not required); 1887, *State v. Wilkerson*, 98 id. 696, 699, 3 S. E. 683 (false pretences in obtaining an order for money for an indigent pauper; production of the order not required); the matter being collateral); 1893, *McMillan v. Baxley*, 112 id. 578, 586, 16 S. E. 845 (notice of sale; rule not applicable); *S. C.*: 1831, *Lowry v. Pinson*, 2 Bail. 324, 328 (to show fraud by other voluntary conveyances at the same time, the latter, being collateral, need not be produced); 1845, *Gist v. McJunkin*, 2 Rich. 154 (to show fraud in a sale of land, evidence may be given of a prior deed, as a collateral circumstance, without producing it); 1898, *Hampton v. Ray*, 52 S. C. 74, 29 S. E. 537 (letter envelope held collateral, on the facts); 1901, *Elrod v. Cochran*, 59 id. 467, 38 S. E. 122 (resulting trust; production of the contract on which the money was paid, not required); *Tenn.*: 1809, *Stewart v. Massengale*, 1 Overt. 479 ("When records, or evidence of a higher nature, are referred to incidentally, which have no effect upon or connection with the point in dispute," it is not necessary to produce such testimony of "higher nature"; here, "what was said at a trial" was testified to orally in *sci. fac.* against bail); *Vt.*: 1797, *Graham v. Gordon*, D. Chlp. 115 (action on promise to pay, in consideration of forbearance to one on covenant of title broken by an ejectment; record of ejectment held not collateral, and required to be produced).

But there is much to be said against the recognition of such an exception; and the sum of these objections is found in the following passages:

1845, *Pennefather C. J.*, in *Lawless v. Queale*, 8 Ir. L. R. 382, 385: "I cannot subscribe to what was said by Parke, B., in that case. . . . The doctrine there laid down is a most dangerous proposition. By it a man might be deprived of an estate of £10,000 per annum, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, had mortgaged or otherwise incumbered it; and thus, by this facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty. It is said, it is evidence against the person himself who made this admission, and that there is no danger of untruth in what a man admits against himself. Supposing the admission to be proved, is there no danger of mistake or misconception of the terms of a written instrument? It may be long and difficult; one part or clause may explain or qualify another; an unprofessional or ignorant man may be led to believe it may be so-and-so, whereas the real and true meaning may be the very reverse or something very different. But, produce the deed or writing, *litera scripta manet*. On which side is the security, and why depart from the rule that, if you want to give evidence of the contents of a writing, the writing itself must be produced? Is there no danger of untruth or misrepresentation, when used against the party making the admission? That is the ground put by Parke, B., and in which I cannot agree, when I know by experience how easy it is to fabricate admissions, and how impossible to come prepared to detect the falsehood. Why are writings prepared at all but to prevent mistakes and misrepresentations? And why, having taken that precaution, with such writing at hand and capable of being produced, is the same to be laid aside and inferior and less satisfactory evidence resorted to?"

1850, *Maule, J.*, in *Boulter v. Peplow*, 9 C. B. 493, 501: "It [*Slatterie v. Pooley*] is certainly not very satisfactory in its reasons. . . . What the party himself says is not before the jury; but only the witness' representation of what he says."

Of the two arguments here offered in opposition, the first amounts to little. The possibility of error in an opponent's own understanding of the terms of a document is not great; and, so far as it exists, it can do little harm, because the opponent's extrajudicial admission is merely some evidence, and not conclusive (*ante*, § 1058); he may still prove the contents as he now knows them or may have the document produced. But the second argument—that it is easy to fabricate alleged oral admissions—is the real and serious objection to the doctrine. It may be conceded that the opponent's admission of contents is satisfactory evidence, *if* he made such an admission. But did he make it? Here we are left to choose between conflicting oral testimonies; and it does seem undesirable to leave the matter to depend on the credibility of this or the other witness when an inspection of the document itself would speedily settle the controversy. The proper solution of the dilemma would be this: When an admission of the contents is testified to, let production be dispensed with; but if the fact of the admission is *bona fide* disputed by the opponent and some testimony to that effect is put in by him, then let production be required or the document's absence be accounted for.

§ 1256. **Same: Forms of Rule in Various Jurisdictions.** The solution suggested in the preceding section does not seem yet to have been advanced by

any Court. The results so far in the various jurisdictions have been either the entire rejection of the rule, or its entire adoption, or its recognition in a confused form.

(a) In England the rulings fluctuated until 1840, when the decision in *Slatterie v. Pooley* laid down the rule authoritatively.¹ That authority has ever since been accepted and followed in that jurisdiction, though often with reluctance and usually with an absurd modification, to be noticed.² In an early Irish ruling and in many jurisdictions in Canada and the United States the rule has received express and full adoption.³

¹ Compare with the following the cases on duplicate originals (*ante*, § 1232): 1699, *Anon.*, 1 Lord Raym. 732 (admission of a decree, by the opponent's witness, held sufficient); 1791, *Breton v. Cope*, 1 *eaque* 30, *semble* (admission by opponent in a deed of the contents of a transfer-book of stock, held sufficient); 1793, *Burleigh v. Stubbs*, 5 T. R. 465 (action against a master on his indenture of apprenticeship; to prove the apprentice's execution of his part of the indenture, the defendant's recitals, admitting it, in his part were received); 1806, *Roe v. Davis*, 7 East 363, *semble* (acknowledgment by a lessee, in the landlord's counterpart of a lease, of the terms of the original, admitted as against an assignee of the lease); 1811, *Flinth v. Atkins*, 3 Camp 115 (the former handing of a copy of a foreign judgment by the plaintiff to the defendant in proof of his claim, held not sufficient to enable the defendant to use the copy); 1812, *Scott v. Clare*, 10. 236 (defence, a discharge in insolvency; the plaintiff's oral admission of it held insufficient "to prove a judicial act of this sort," as "the plaintiff might be mistaken"); 1822, *Summer-sett v. Adamson*, 1 Bing. 73 (admission of a discharge in insolvency, sufficient); 1824, *Sewell v. Stubbs*, 1 C. & P. 73 (contents of a note; admission sufficient); 1825, *Bloxam v. Kisie*, ib. 558, 563, Ry. & Mo. 187, *Abbott v. C. J.* (oral admission insufficient); 1828, *Paul v. Meek*, 2 Y. & J. 116 (counterpart of a lease; admission sufficient); 1833, *Earle v. Picken*, 5 C. & P. 542 (contract; admission sufficient); 1835, *R. v. Forbes*, 7 id. 224, *Coleridge, J.* ("strict proof" required; here a letter admitting a former forgery was received, though the other forged bill itself was not produced); 1836, *Ashmore v. Hardy*, ib. 501, 503 (admission of a deed in an answer in chancery, allowed); 1840, *Slatterie v. Pooley*, 6 M. & W. 664 (to prove a deed of composition with creditors — which could not be produced for want of the required stamp — the defendant's verbal admission of the contents of the instrument was received).

² 1840, *Newhall v. Hoyt*, 6 M. & W. 662 (account stated); 1841, *Howard v. Smith*, 3 Scott N. R. 574 (oral admission); *Wollaston v. Hake-will*, ib. 593, 617 (here there was notice to produce); 1848, *King v. Coie*, 2 Exch. 628, 632 ("admission, either verbal or in writing, of the contents of a deed," is sufficient); 1849, *Toil v. Lee*, 4 id. 230 (a certificate of a deed of transfer, admitted as an admission of the deed's contents); 1850, *Murray v. Gregory*, 5 id. 467 (oral admis-

sions of the contents and result of an award, received); 1850, *Boulter v. Lepiow*, 9 C. B. 493, 506 (*Williams, J.*: "It is impossible for us to overrule *Slatterie v. Pooley*, though we may think the reasoning not quite satisfactory"; here a written admission); 1851, *R. v. Basing-stoke*, 14 Q. B. 611 (support to a pauper; conduct held a sufficient admission of the contents of a certificate requiring such support); 1851, *Pritchard v. Bagshawe*, 11 C. B. 459, 463 (an abstract of deeds, received as an admission of contents); 1858, *Sanders v. Karneil*, 1 F. & F. 356 (*Chaunell, B.*: "The doctrine . . . is one not to be extended").

³ 1843, *Lord Trimblestown v. Kemmis*, 5 Ir. L. R. 380, 396 (abstract of title); 1854, *Doe v. Blanche*, 3 All. N. Br. 180, 182 (admissions received; following *Slatterie v. Pooley*); 1840, *Sally v. Capps*, 1 Ala. n. s. 121 (oral admission of the amount of a note, received; "the rule does not apply where the adversary has admitted the facts which are to be proved"); 1902, *Barrett v. Wilson*, 132 Ala. 375, 31 So. 521 (production of a copy admitted by opponent to be correct dispenses with the necessity of accounting for the original); 1893, *Morey v. Hoyt*, 62 Conn. 542, 556, 26 Atl. 127 (oral admission of contents of letter; *Slatterie v. Pooley* approved); 1847, *Gay v. Lloyd*, 1 Greene Ia. 78, 83 (oral admission by defendant of transcript of judgment, received); 1877, *Blackington v. Rockland*, 66 Me. 332, 335 (records of a city, received as admissions of a notice; approving *Slatterie v. Pooley*; yet not deciding more than that a written admission is receivable); 1850, *Smith v. Palmer*, 6 Cush. 513, 520 (oral admission of contents of a record of judgment, execution, etc., allowed); 1851, *Kellenberger v. Starrevant*, 7 id. 465 (same for acknowledgment in writing of a title to premises); 1857, *Loomie v. Wadhams*, 8 Gray 557, 562 (same for oral statement as to the contents of a deed); 1896, *Com. v. Wesley*, 166 Mass. 248, 44 N. E. 228 (same doctrine); 1899, *Clarke v. Warwick C. M. Co.*, 174 id. 434, 54 N. E. 887 ("Admissions are evidence . . . although they relate to the contents of a written paper"; here a written admission); 1847, *Anderson v. Root*, 8 Sm. & M. 362 (written receipt for a writing, sufficient to prove its contents); 1859, *Williams v. Brickell*, 27 Miss. 682, 686 (oral admission of contents of telegram, sufficient); 1878, *Edgar v. Richardson*, 33 Oh. St. 581, 592 (*Slatterie v. Pooley* approved; here, for admissions as to a record of divorce; *semble*, the record must be not obtainable); 1824, *North v.*

(b) In some later Irish rulings and in many jurisdictions in the United States, the rule is repudiated, though perhaps in some cases for *oral admissions* only, not for written admissions;⁴ and it should be noted that the second objection above mentioned is practically obviated where a written admission exists, — so far, at least, as that writing is proved by production or by the opponent's refusal to produce it.

(c) The limitation has been attempted, and possibly obtains, in England, that an admission of the opponent *made on the stand* in testifying (usually, on cross-examination) shall not suffice to excuse non-production; *i. e.* the precedent of *Slatterie v. Pooley* is confined to precisely its same state of facts, namely, an admission made out of court.⁵ An admission, however, made in testifying before judge and jury is authentic beyond dispute, and wholly escapes the above-described real objection to the doctrine, namely, the objection that testimony to the alleged admission might be easily fabricated. In other words, this proposed limitation involves the absurd result of excluding the admission in precisely the case where it might be received without danger and of admitting it in precisely the case where the danger exists.

(d) A fourth type of result, in favor in some American jurisdictions, is to allow the proof by admissions whenever the document is shown to be *lost* or

Drayton, Harp. Eq. 34, 36 (recital of bond in mortgage, sufficient); 1894, *Dunbar v. U. S.*, 156 U. S. 185, 196, 15 Sup. 325 (oral admission of sending a telegram, sufficient to allow a delivered copy to be used); 1871, *Taylor v. Peck*, 21 Gratt. 11, 19 (landlord's receipt for rent received to show a lease; *Slatterie v. Pooley* followed).

That the admissions need not be verbally precise or complete, see *post*, § 2105.

⁴ 1845, *Lord Gosford v. Robb*, 8 Ir. L. R. 217, *semble*; *Lawless v. Quale*, *ib.* 382 (positively decided; see quotation *supra*); 1849, *Parsons v. Purcell*, 12 *id.* 90 (admission in an answer in chancery of a release-deed); 1861, *Maliburton v. Fletcher*, 22 Ark. 453 (guardian's admissions of record of appointment, excluded); 1860, *Grimes v. Fall*, 15 Cal. 63, 65 (charging the defendant as assignee of a contract to do that which was a trespass; the defendant's oral admission that he was assignee, excluded; no authority cited); 1872, *Poornan v. Miller*, 44 *id.* 269, 275 (declarations by offeror's own predecessor, excluded; question not raised); 1824, *Buell v. Cook*, 5 Conn. 206, 208 (oral admission of written lease, excluded); 1871, *Plunkett v. Dillon*, 4 Del. Ch. 198, 205, *semble* (parol admissions by opponent, excluded, except, of course, where the writing is produced); 1839, *Bryan v. Smith*, 3 Ill. 47, 49 (oral admission of a tenancy in common under a deed, excluded); 1890, *Fox v. People*, 95 *id.* 71, 75 (forgery; former utterings are to be shown otherwise than by the defendant's admissions); 1843, *Clark v. Slidell*, 5 Rob. La. 330 (excluded); 1843, *Bogart v. Green*, 8 Mo. 115 (oral admission of summons, insufficient); 1875, *Cornet v. Bertelsmann*, 61 *id.* 118, 126 (whether a vendee had notice of an encumbrance; oral admissions held insufficient unless

corroborated); 1828, *Carroll v. Peake*, 1 Pet. 18, 22 (lease agreement; copy made by the defendant himself, admitted, without accounting for the original).

For the rulings in *New York* and elsewhere on the special subject of *title to land*, see § 1257, *post*.

⁵ 1856, *Darby v. Ouseley*, 1 H. & N. 1, 5, 10 (Pollock, C. B.: "If a party has chosen to talk about a particular matter, his statement is evidence against himself; . . . but it does not follow that the plaintiff could be compelled to make such an admission by asking him in the witness box, 'Have you executed a release?'; 1859, *Farrow v. Blomfield*, 1 F. & F. 653, Pollock, C. B. (allowing the opponent's admission on the stand to suffice without production, after *St.* 1854, c. 125, § 24; quoted *post*, § 1263); 1859, *Wolverhampton N. W. Co. v. Hawkford*, 5 C. B. n. s. 703 (interrogatories to opponent before trial as to contents of a document, allowed only on condition that they should not be used at the trial unless the document should be shown lost); 1862, *Henman v. Lester*, 12 *id.* 776 (question to a party as to the result of a former suit of his, admitted; Byles, J., *diss.*: "It can make no difference that the witness was a party to the suit; the doctrine laid down in *Slatterie v. Pooley* . . . cannot comprehend parol admissions extorted from parties under the pressure of cross-examination"; but Willes and Keating, J.J., thought that on a collateral matter touching credit only, the party's admission sufficed); 1857, *Lynch v. O'Hara*, 6 U. C. C. P. 259, 265 (a party's compulsory admissions on discovery do not suffice). There is nothing in the modern rules of privilege (*post*, §§ 1856, 2218) to account for this result.

*detained by the opponent.*⁶ But this is of course no longer a genuine exception; *i. e.* the admission as to contents does not serve to excuse the party from production; he is required to account for the non-production, and may then use the admissions, as he could any other evidence, to prove the contents.

(e) It has been suggested, though apparently nowhere accepted, that the exception should apply only to documents "collateral" to the issue.⁷

§ 1257. **Same: Related Rules (Dead-Recitals; Oral Disclaimer of Title; New York Rule).** (1) It is perfectly clear and well understood that, even where the rule of *Slatterie v. Pooley* is not accepted, a *judicial admission* (*post*, § 2588) — *i. e.* a formal admission for the purposes of trial — dispenses with the necessity of production; ¹ such an admission is a waiver of dispute, and suffices to concede any fact whatever in issue.

(2) In proving a *partnership*, the acting as partners may with reference to third persons be the source of liability irrespective of the written articles; ² or the acts of the partners as admissions of the terms of the partnership may be regarded, upon the principle of the preceding section, as dispensing with production of the articles; ³ or the fact of the partnership may be regarded as a net resultant fact independent of the articles, so that the rule of production is not applicable (*ante*, § 1249); it is generally difficult to ascertain the precise ground of rulings on this point.

(3) The rule that *recitals in a deed* are evidence, as between the parties to it or their successors, of the *contents of a former deed* recited, is in effect an application and recognition of the present exception. Its propriety from the present point of view has not been questioned.⁴ The controversy has been

⁶ 1850, *Flournoy v. Newton*, 8 Ga. 306, 310 ("You cannot ask the witness what the opposite party has said as to the contents of papers executed by him, without accounting for their non-production"); 1812, *Peart v. Taylor*, 2 Bibb 556, 558 (letter admitting contents of a deed, received, the deed being lost); 1817, *Clevinger v. Hill*, 4 id. 498 (oral admissions "perhaps" not admissible till the deed appears unavailable); 1832, *Griffith v. Huston*, 7 J. J. Marsh. 383, 387 (oral admissions of predecessor received after loss shown); 1832, *Thomas v. Harding*, 8 Greenl. 417, 419 (admitted where the opponent had failed to produce on notice); 1827, *Allen v. Parish*, 3 Oh. 107, 110 (admissions of opponent's grantor as to deed's contents, received as corroborative evidence, where the deed was lost).

⁷ 45, *Cranpton, J.*, in *Lawless v. Queale*, 8 Ir. L. R. 382, 390. Compare the majority's opinion in *Henman v. Lester*, *supra*, note 5.

Distinguish also the parol evidence rule (*post*, § 2465), as applied to title-deeds, that the parties' understanding is not to vary the terms, this may exclude admissions *contradicting* the deed: 1847, *Maloney v. Purden*, 3 Kerr N. Br. 515, 525 (predecessor's admissions, contradicting a deed, as to the land included).

¹ 1845, *Lord Gosford v. Robb*, 8 Ir. L. R. 217, 221, per *Crompton, J.*; 1851, *R. v. Basingstoke*, 19 L. J. M. C. 99 (*Patteson, J.*: "It is well put by Mr. Smith, in his 'Leading Cases,' II, 426,

that . . . 'the estoppel professes, not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted'").

² 1821, *Doane v. Farrow*, 10 Mart. La. 74, 78.

³ 1869, *Edwards v. Tracy*, 62 Pa. 375, 379 (admissions of a partnership, received; following *Widdifield v. Widdifield*, *ante*, § 1249).

⁴ *England*: 1697, *Sussex v. Temple*, 1 Ld. Raym. 310, 311 (answer in chancery, acknowledging a deed, held admissible against a defendant claiming title under the party answering); 1699, *Sherwood v. Adderley*, ib. 734 (recital of a will in the admittance to a copyhold, held admissible against the lord in favor of the devisee, without producing the will); 1704, *Ford v. Grey*, 1 Salk. 286, 6 Mod. 44 ("a recital of a lease in a deed of release is good evidence of such lease against the releasor and those that claim under him; but as to others [*i. e.* strangers], it is not, without proving that there was such a deed and it was lost or destroyed"; the latter use, *i. e.* as an exception to the Hearsay rule for ancient recitals in general, is considered *post*, § 1573; the point of the present case is accurately expounded by *Story, J.*, in *Carver v. Jackson*, *infra*; *Georgia*: 1846, *McCleskey v. Leadbetter*, 1 Ga. 551, 557 (recital of a lease, admitted against the grantor's

whether such recitals could be used, as hearsay evidence, against strangers to the deed (*post*, § 1573) and also whether such recitals were absolutely binding (*ante*, § 1058), and whether they were admissible if made by a predecessor in title (*ante*, § 1082).

(4) The rule of the Statute of Frauds forbidding proof of an *oral grant or disclaimer of title* is frequently difficult to distinguish from the question of the present rule. This convergence, and that of one or two other principles, is represented in a series of New York rulings, which have much influenced other Courts. Their results may be set forth as follows: (a) A declaration admitting that the declarant holds as *tenant only* may be used, if made by a predecessor in title, as an ordinary admission (on the principle of § 1082, *ante*); or, if made by a *deceased person*, though a stranger, as a declaration against interest (under the Hearsay exception, *post*, § 1458). (b) A declaration, by either the opponent's or the proponent's predecessor, *claiming or disclaiming title* may be used as a *verbal act* coloring the possession (on the principle of § 1778, *post*) where it is used in support of the proponent's title by *adverse possession*. (c) The admission, by an opponent or his predecessor, of the *contents of a deed* which the proponent wishes to prove in support of a documentary title, might be used under the exception to the production-rule in *Slatterie v. Pooley* (*ante*, § 1255), if that exception were recognized; but in New York that exception is recognized only in the modified form of par. (d) of the preceding section, *i. e.* such admissions may be used if the document is shown to be *lost* or in the *opponent's control*.⁵ (d) Where the opponent has *already shown a title by deed*, an *oral admission of non-title* (or, disclaimer of title), by himself or his predecessor, cannot be used against him to overthrow his proof of documentary title; for, though it is in one aspect merely an admission of the contents of some unspecified lost deed, yet

privies); 1856, *Horn v. Ross*, 20 id. 210, 220 (recitals, in a settlement deed, of an ante-nuptial contract, admitted against creditors by a subsequent debt); Pa.: 1811, *Penrose v. Griffith*, 4 Binn. 231, 235 (recital, in a deed, of a previous deed, admissible, against the grantor and privies, not otherwise); 1814, *Stoever v. Whitman*, 6 Binn. 416, 418 (recitals of a former deed, admitted against one claiming under the grantor); 1816, *Bell v. Wetherill*, 2 S. & R. 350 (recital of a deed in a predecessor's patent, not accompanied by possession, insufficient); 1816, *Stewart v. Butler*, ib. 381 (recital in a patent of a previous conveyance, received against one claiming under the grantor); 1816, *Dowling v. Gallagher*, ib. 435 (same; but only against those claiming after the former grant); 1818, *Whitmore v. Napier*, 4 id. 290 (recitals of title in a land patent, receivable against one claiming by possession, not title); 1852, *Gingrich v. Folts*, 19 Pa. St. 38, 40 (recitals in a land-patent as to previous warrant, etc., are evidence against one who relies on possession alone and shows no paper title, and also against one claiming under a right arising subsequent to the patent; but not against one claiming by right prior to the patent); U. S.: 1830, *Carver v. Jackson*, 4 Pet.

1, 83 (recital of lease in deed of release is "an estoppel, and binds parties and privies, — privies in blood, privies in estate, and privies in law; but it does not bind mere strangers, or those who claim by title paramount the deed; [*i. e.*], it does not bind persons claiming by an adverse title or person claiming from the parties by title anterior to the date of the reciting deed"); 1832, *Crane v. Morris*, 6 id. 598, 611 (same; conclusive as to contents and execution); Vt.: 1836, *Loel v. Bigelow*, 8 Vt. 445, 460 (legislative charter reciting former grant, admitted against privies); Va.: 1830, *Blow v. Marnari*, 2 Leigh 29, 49 (recital, in a post-nuptial settlement-deed, of an ante-nuptial contract not otherwise evidenced, is not binding on creditors); 1849, *Wiley v. Givens*, 6 Gratt. 277, 283 (recitals of an entry under a purchase from R.; not received against one claiming adversely by elder patent); 1852, *Walton v. Hale*, 9 id. 194, 198 (preceding case approved); 1852, *Hannon v. Hinnebb*, 146, 150 (recital of a former deed, admissible against "parties and privies in blood, in estate, and law").

⁵ See the rulings *infra*, in 13, 17, and 18 Johnson, 7, 8, and 14 Wendell, and 68 New York.

standing as it does by itself, and no actual defeasing deed having been shown to exist, such a declaration amounts virtually to an oral defeasance or conveyance, and thus violates the Statute of Frauds requiring conveyances to be in writing. It practically sets up a title in somebody else through the sole medium of the oral declaration.⁶ Were the existence of a specific defeasing deed to be shown, and were its loss or hostile control to be proved, then, under (c) *supra*, these admissions of this specific document's contents might be used. — With these more or less competing doctrines in view, the rulings are at least explainable, if not always reconcilable.⁷

⁶ This doctrine, which is in itself not connected with the subject of Evidence, and is noticed only in order to discriminate it, is expounded in the following cases, besides those cited from New York in the next note: 1856, *McMaster v. Stewart*, 11 La. An. 546 (title to a slave; opponent's verbal admissions cannot be used to perfect title); 1846, *Harrison v. James*, 7 Sm. & M. 111, 118 (oral admission "that he had conveyed all his interests to M.," not received to prove a deed).
⁷ The New York series of cases illustrating the above distinctions is here first given, those of other Courts then follow; the citations in the other sections named above (§§ 1082, 1458, 1778) may be compared: New York: 1809, *Jackson v. Bard*, 4 John. 230 (parties claiming under competing deeds from the same person; admissions of the defendant's intermediary vendor, as to his title, received); 1810, *Jackson v. Sherman*, 6 id. 19, 21 (the defendant's oral acknowledgments of the plaintiff's title, excluded as "counteracting the beneficial purposes of the statute of frauds"; yet good "to support a tenancy," or "to satisfy doubts in case of possession"); the two foregoing cases thus led into two lines of decisions, each more or less ignoring the precedents of the other: 1810, *Jenner v. Joliffe*, ib. 9 (oral admission of an attachment, not received; principle applicable to specialties and records); 1810, *Jackson v. Vosburgh*, 7 id. 185 (after proof of a chain of title, the oral disclaimers of the plaintiff's lessors were not received, following *Jackson v. Shearman*); 1813, *Hastbrouck v. Baker*, 10 id. 248 (oral admission of a subpoena's contents, insufficient, where the proponent had the document in his possession); 1815, *Jackson v. Belknap*, 12 id. 96 (oral admissions by a predecessor of the plaintiff's title, received); 1815, *Marks v. Pell*, 1 John. Ch. 594, 599 (oral admissions by a deceased grantee that the deed was taken as a mortgage, excluded, as counteracting the policy of the statute of frauds); 1816, *Mauri v. Heffernan*, 13 John. 58, 74 (oral and written admissions of the contents of a document made abroad and unobtainable, admitted); 1818, *Jackson v. M'Vey*, 15 id. 234, 237 (following the *Shearman* case); 1819, *Jackson v. Cary*, 16 id. 302, 306 (declarations disclaiming a larger title under certain deeds, excluded, as "parol proof to destroy or take away a title" contravening the statute of frauds); 1820, *Brandt v. Kleiu*, 17 id. 335, 339 (recitals in a deed of the contents of a will, admitted, the will being in the op-

ponent's possession); 1820, *Jackson v. M'Vey*, 18 id. 330, 333 (admissions of an opponent as to a deed, receivable, *semble*, under the same circumstances); 1823, *Jackson v. Cole*, 4 Cow. 587, 593 (oral admissions by the defendant that the land belonged to his wife, whose heir the plaintiff was, admitted; the cases of exclusion are (1) parol disclaimer of title, which is forbidden by the statute of frauds, (2) admissions of the terms of written conveyances, which violate the rule requiring production; citing the *Belknap* and the *M'Vey* cases); 1827, *Jackson v. Miller*, 6 id. 751, 756 (defendant's oral admissions of adverse possession, excluded, a patent title having been shown); s. c. on appeal, 6 Wend. 228 (lower Court's ruling affirmed; defendant's admissions of a conveyance by him to plaintiff's ancestor, said to be receivable if the plaintiff proved his inability to produce the original); 1830, *Jackson v. Denison*, 4 Wend. 558, 560 (like the *Cole* case; the same distinctions taken); 1831, *Jackson v. Livingston*, 7 id. 136, 139 (oral admissions of contents of a power of attorney, received, because the document was unavailable); 1831, *Jackson v. Vail*, ib. 125 (same, for a lost deed); 1832, *Welland Canal Co. v. Hathaway*, 8 id. 480, 486 (a written receipt admitting corporate organization, excluded; "the admissions of a party are competent evidence against himself only in cases where parol evidence would be admissible to establish the same facts," i. e. where the document is unavailable); 1834, *Jackson v. Myers*, 11 id. 533 (admissions of defendant's grantor, that he had received his deed from P. in fraud of P.'s creditors now claiming on execution sale, received; "the doctrine that parol declarations shall not be received to divest a legal title is not applicable in this case"; approving *Jackson v. Bard*); 1834, *Northrup v. Jackson*, 13 id. 85, *semble* (oral admission of a written contract, excluded); 1835, *Van Duyne v. Thayer*, 14 id. 235 (lost mortgage set up by defendant in an action of ejectment for dowerland; admissions of the plaintiff's husband during his lifetime, as to the mortgage, received; following *Jackson v. Bard* and *Jackson v. Myers*); 1835, *Corbin v. Jackson*, 14 id. 619, 623, 630 (oral admissions of the contents of a power of attorney, admitted, the loss of the document being proved by the same admissions; Tracy, Sen., dissenting, especially on the latter point); 1837, *Varick v. Briggs*, 6 Paige 323, 327 (predecessor's declaration as to a prior conveyance by him, admitted, the loss of the deed being shown); 1844, *Hunter v. Trustess*,

(5) Certain minor discriminations need occasionally to be made. For example, an admission of a document's execution is always receivable;⁶ an admission of *unspecified contents* is worthless;⁷ an admission, though improper under the preceding section, is sufficient if brought out by the opponent's own questions.⁸

6 Hill 407 (title to a burying-ground claimed by dedication; plaintiff's admissions of non-ownership, received, not to "affect his paper title," but to "give character to his possessory acts"); 1848, *Pitta v. Wilder*, 1 N. Y. 525, 527 (admission of defendant's predecessor, as to the title he claimed under, received); 1859, *Walker v. Dunsbaugh*, 30 Id. 170, 172 (defendant "showed no paper title," but offered admissions of the plaintiff that they "held under a conveyance for lives," with the defendant in remainder; held, "a party cannot make title to land by a parol admission of his adversary"); 1866, *Gilney v. Marchay*, 34 Id. 301 (declarations of defendant's predecessor in possession, admitting purchase of the land with trust funds, *semble*, held not admissible to overthrow a title "of record"); 1876, *Mandeville v. Reynolds*, 66 Id. 528, 536 (oral admissions by the defendant of the existence and contents of a judgment-roll, admissible, the roll being lost); 1901, *People v. Holmes*, 166 Id. 540, 60 N. E. 249 (grantor's oral admissions as to title, excluded where the issue was merely whether land was within the boundary of a certain lot).

ORIXA JURISDICTIONE: *N. Br.*: 1851, *Doe v. Todd*, 3 All. 261, 264 (oral admissions by the plaintiff's grantor, that he had conveyed to defendant's grantor, excluded; "it would entirely destroy the effect of the statute of frauds"); *N. Sc.*: 1681, *Fairbanks v. Knbn*, 14 N. Sc. 147, 154 (defendant's admissions of holding under a lease, not accounted for, the defendant having shown a title by deed, held not sufficient; *quære* whether admissible); *Ark.*: 1862, *Dorr v. School District*, 40 Ark. 237, 242 (testimony to acknowledgment of deed, used when offered "for a collateral purpose"); *Cal.*: 1877, *McFadden v. Ellmaker*, 52 Cal. 346, 350 (question expressly reserved); 1882, *People v. Blcas*, 60 Id. 497, 503, 511 (McKee and Ross, J., dissented on apparently the principle of oral disclaimer in the New York case; but the majority ignored the point); *Conn.*: 1837, *Deming v. Carrington*, 12 Conn. 1, 6, *semble* (plaintiff's predecessor's admissions that a deed to himself as sole grantee was for the benefit of defendant, said to be inadmissible); *Ia.*: 1902, *Walter v. Brown*, 115 Ia. 360, 68 N. W. 832 (admissible, when "not in contradiction of the record title"; here, as to knowledge of a mortgage); *Mass.*: 1841, *Proprietors v. Bullard*, 2 Metc. 363, 368 (admissions received, but here the title admitted was prescriptive merely); 1861, *Osgood v. Coates*, 1 All. 77, 79 (admissions received; point not raised); *Mich.*: 1878, *Cook v. Knowles*, 38 Mich. 316 (grantor's admissions that his deed was falsely antedated, received, in order to oust his record-title by notice of a prior title; Cooley, J., diss., following *Jackson v. Cole*, N. Y., and distinguishing between "receiving declarations

to overthrow a title by deed and a title where no deed or other writing is useful"); *N. H.*: 1849, *Cilly v. Bartlett*, 18 N. H. 312, 323 (defendant's admissions of plaintiff's title, held decisive, if believed; but here the plaintiff was grantee in the deed, and the defendant claimed as beneficiary); 1858, *Fellows v. Fellows*, 37 Id. 75, 65 (oral admissions of non-title, held receivable); 1860, *Huribart v. Wheeler*, 40 Id. 73, 76 (same); *N. J.*: 1856, *Ten Eyck v. Hunk*, 26 N. J. L. 513, 517 (admissions receivable so far as "the extent of the right does not appear on the face of the title-deeds"); *Pa.*: 1762, *Morris v. Vanderen*, 1 Dall. 64 (objection; defendant's oral admission that he was lessee only, received); 1832, *Gibbichouse v. Stoug*, 3 Rawle 436, 442 (declarations by a prior owner, that he had not paid the price but held in trust for another, admitted; *Huston, J.*, diss., approving *Jackson v. Shearman, N. Y.*, since here "the title of the plaintiff depended on facts and recorded deeds, and could not be affected by parol declarations of any prior owner"; yet declarations as to boundary would not be excluded by this rule); 1836, *Criswell v. Altomus*, 7 Watts 565, 578 (oral admissions of taking a lease, held sufficient as an admission of non-adverse possession); *U. S.*: 1873, *Smiths v. Shoemaker*, 17 Wall. 630, 636 (claim of title by gift of K; letters by the claimant in possession, acknowledging the title of J. C., received); 1876, *Dodge v. Freedman's S. & T. Co.*, 93 U. S. 379, 383 (predecessor's admissions are not receivable "to sustain or destroy the record title"; following *Jackson v. Miller*, N. Y.); *Utah*: 1902, *Scott v. Crouch*, 24 Utah 377, 67 Pac. 1068 (M.'s admission that he had given a deed to D, received against M.'s administrator); *Vt.*: 1841, *Carpenter v. Hollister*, 13 Vt. 552, 555 (defendant's grantor in possession and before grant; his oral admissions that his own grantor, plaintiff's intestate, was insane when granting, excluded, against an innocent purchaser for value; because one holding by title good as appears of record should not "be defeated by the private concessions of any previous owner"; allowable only when made by occupier as to "character and extent of possession," i. e. that he possessed as tenant or according to certain boundaries); 1842, *Hines v. Soule*, 14 Id. 99, 105 (*Carpenter v. Hollister* approved).

⁶ 1849, *Doe v. Biggers*, 6 Ga. 186, 201 (oral admissions of execution, received). See *post*, § 2132.

⁷ 1845, *Thompson v. Fry*, 7 Blackf. 608 (admission that the items in a book, not produced, were correct; insufficient). But the terms of the document need not be precisely given: *post*, § 2105.

⁸ 1831, *Pettigru v. Sanders*, 2 Bail. 549. Compare the English rule *supra*, § 1256.

§ 1258. (3) *Witness' Admission of Contents, on Voir Dire.* When the disqualification by interest prevailed (*ante*, § 576), it was well settled that, where the disqualifying fact was contained in a document, its terms might be established by the opponent's examination of the witness on *voir dire*. The reasons given for this exception are not always the same; but the traditional and the correct one seems to be that, since the person to be called as witness might not be known in advance to the opponent, it would be practically impossible for him to have the document at hand:

1840, *Weston, J.*, in *Miller v. Mariner's Church*, 7 Greenl. 51, 54: "An objection to the witness on the ground of interest is often unexpectedly made. Neither the witness, therefore, nor the party producing him can be reasonably required to have with them written papers or documents which may happen to be referred to upon such an inquiry."

1852, Counsel, arguing in *Macdonnell v. Evans*, 11 C. B. 930, 937: "The rule as to examinations on *voir dire* is thus stated in Russell [on Crimes, II, 987]: 'The party objecting could not know previously that the witness would be called, and consequently might not be prepared with the best evidence to establish his objection'; *Maule, J.*: 'In many cases witnesses are called whom the opposite party has no reason to expect to see: the reason, therefore, given in that book is not a good one. An examination on the *voir dire* is for the purpose of establishing something of which the Court is to be the judge, and not the jury. It may well be, therefore, that the rule there is not so exclusive as in the case of an examination going to a jury.'

That the reason above-named, rather than the reason suggested by Mr. J. Maule, in the passage just quoted, was the true reason, is indicated by a qualification, laid down in some cases, that if the incompetency was clear and could be noticed merely on objection made, and a document removing it must clearly have been known beforehand to the party offering the witness, then he could not prove the removal of the incompetency by a re-examination without producing the document — *e. g.* a release — removing it.¹ But the general rule, irrespective of this modification, was well settled.²

§ 1259. (4) *Witness' Admission of Contents, on Cross-Examination; Rule in The Queen's Case; Principle.* In the year 1820 an English decision, soon afterwards expressly annulled by legislation, but widely followed in this country in ignorance of its repudiation in the jurisdiction of origin, laid

¹ 1829, *Goodhay v. Hendry, M. & M.* 319. *Best, C. J.* (a bankrupt, desired to be shown discharged by his certificate); *Anon.*, *ib.* 321, note. *Tindal, C. J.* (same), *semble*. *Contra*: *Wandless v. Cawthorne*, *ib.* note, *Parke, B.*; 1839, *Lunniss v. Row*, 10 A. & E. 606 (objection to competency may be removed by oral evidence of a release-document, even though the objection was revealed to the party by the pleadings). So, too, the following variations: 1818, *Butler v. Carver*, 2 Stark. 433 (the witness having the document in court, production was held necessary).

² 1794, *Butchers' Company v. Jones*, 1 Esp. 160 (a question on the counter-examination allowed to show that a disqualification had ceased); *Botham v. Swingle*, *ib.* 164 (same); restoration to competency by oral evidence, allowed); 1811, *R. v. Gisburn*, 15 East 57 (a

witness for a township, allowed to be asked whether he was rated for taxes, without producing the rate-book); 1824, *Carlisle v. Eady*, 1 C. & P. 234 (a bankrupt allowed to be asked as to his certificate of discharge); 1837, *R. v. Murphy*, 8 *id.* 297, 304; 1852, *Cresswell and Maule, J.J.*, in *Macdonnell v. Evans*, 11 C. B. 930, 937; 1849, *Hermion v. Givens*, 16 Ala. 261, 268; 1849, *Robertson v. Allen*, *ib.* 106, 108 (even by another witness); 1824, *Stebbins v. Sackett*, 5 Conn. 258, 262; 1863, *Boheock v. Smith*, 31 Ill. 57, 61 (that a judgment had been obtained against him, allowed); 1830, *Miller v. Mariner's Church*, 7 Greenl. 51, 54; 1868, *Nutall v. Brannin*, 5 Bush 11, 18; 1844, *Oaks v. Weller*, 16 Vt. 63, 68 (where the witness is out of the State and his deposition is offered, another witness may testify to a release given to the deponent, without producing it).

down a rule which for unsoundness of principle, impropriety of policy, and practical inconvenience in trials, committed the most notable mistake that can be found among the rulings upon the present subject. The doctrine laid down in *The Queen's Case* professed to apply the rule now under consideration, namely, that when the terms of a document are to be established, the document must be produced or accounted for; and its application here took the following shape: When a witness is to be asked on cross-examination as to the terms of a document written or signed by him, the document must be at the time produced and shown or read aloud to him before he can be asked as to its contents; in other words, he cannot be asked whether or not he said such and such things in the document, but the supposed document must be first shown to him before any questions upon its contents are allowable:

1820, *The Queen's Case*, 2 B. & B. 286; the House of Lords put the following questions to the Judges: "First, whether, in the courts below, a party on cross-examination would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, *without having first shown* to the witness the letter, and having asked that witness whether the witness wrote that letter and his admitting that he wrote such letter? . . . Thirdly, whether, when a witness is cross-examined and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined, in the courts below, whether he did not in such letter make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein?" *Abbott, C. J.*, for the judges, answered the first question in the negative: "The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness; if the witness admits that it is of his handwriting, the cross-examining counsel may at his proper season read that letter as evidence"; the second question was answered thus: "The judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, enquire whether or no such statements are contained in the letter, but that the letter itself must be read to manifest whether such statements are or are not contained in that letter. . . . [The judges] found their opinion upon what in their judgment is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself and not by parol evidence."

1852, *Macdonnell v. Evans*, 11 C. B. 930; to show that the witness had been disgraced by a charge of forgery, he was asked: "Did you not write a letter [not in question] in answer to a letter charging you with forgery?" *Maule, J.*: "If you want the jury to know that there was a letter containing a charge of forgery, the proper way to do so is by producing the letter itself. . . . Suppose the witness had said, 'I did write this letter in answer to another, which is in court,' good sense obviously requires that the latter should be produced, if it is wished to get at its contents. . . . This seems to me to be just the sort of case where it is sought to give secondary evidence of the contents of a document in the power of a party who does not choose to produce it"; *Cresswell, J.*: "Shift it as you will, it was a mere attempt to get in evidence of the contents of a written document without putting in the document itself."¹

¹ In this case, note that the witness, by the same footing as his own, under the principle answering the first letter, put its contents on of § 2102, *post*.

It may be noted that this doctrine was a pure creation of this decision of 1820, and had never before been advanced;² though by the pronouncement of the Judges in the House of Lords it was followed thereafter by the Courts as the law of the land.³

§ 1260. **Same: Arguments against the Rule.** It cannot be denied that there is a certain plausibility in the doctrine as expounded in the above passages, and this will account for its easy acceptance in other jurisdictions; and yet there are so many arguments against it and they have been so thoroughly exploited that its perpetuation in this country is somewhat surprising.

(1) In the first place, then, let it be granted for argument's sake that by asking the witness without producing the document the rule of production is broken in upon. Why not recognize for such a case an exception to the rule? (a) There can be no case in which the contents of the document could be more trustworthily established. It is the witness' own document. No one can know better than himself what is in it. If its contents as a lost document were to be proved, this person would be the very one to be called. There can be no suspicion of misstatement, first, because the witness has been called for the other party, and, secondly, because the opponent now cross-examining is (in the usual case) desirous of discrediting the witness by the document, and the last thing to be feared is that the witness will misrepresent the document in favor of the cross-examiner. If the opponent is willing to take a hostile witness' statement of contents, who else needs to fear misrepresentation? (b) But the rule of production,— is it, then, indeed so sacred and inflexible? A number of instances have been noted in which production is dispensed with as a part of the rule itself. It has also been seen that there is a long-established exception for documents collaterally in issue (*ante*, § 1252); and where the witness (as in the usual case) is sought to be discredited by prior written statements, the principle of that exception is certainly satisfied.¹ It has also just been seen (*ante*, § 1258) that another exception is well-established for the case of a witness cross-examined to interest on the *voir dire*; there the effect of allowing proof by questions is much more radical, for it wholly excludes the witness, while

¹ 1754, *Canning's Trial*, 19 How. St. Tr. 487 (doctrine not recognized); 1816, *Graham v. Dyster*, 2 Stark. 21, *Ellenborough, L. C. J.* (where the documents were part of defendant's case but in plaintiff's possession, and the defendant was not allowed to ask contents on cross-examination; but the reason was merely that it was an improper stage of the case, and no views were expressed on the point in question); 1817, *Sidways v. Dyson*, *ib.* 49, *Ellenborough, L. C. J.* (same situation, but defendant offered another witness to the contents, as the basis of a cross-examination; rejected, the proper time not having been reached).
² 1837, *R. v. Murphy*, 8 C. & P. 297, 304 (questions as to an article in a newspaper written by the witness; rule applied); 1839, *R.*

v. Taylor, *ib.* 726 (rule applied); 1852, *Macdonnell v. Evans*, 11 C. B. 930 (quoted *supra*).

³ 1824, *Starkie, Evidence*, I, 203 ("It is a remarkable circumstance that the question was never, in the course of inquiry in the case which occasioned so much discussion on the subject, directly raised whether a cross-examination as to something written by the witness, for the purpose not of proving any fact in the cause but simply of trying the credit or ability of the witness, was subject to the same strict rules as governed examination for proving material facts. . . . The principle of the rule [that the best evidence should be adduced] is applicable only to evidence to prove a material fact, and is inapplicable where the object is merely to try the credit or ability of the witness"); so also *Phillips, Evidence*, 302.

here it merely discredits him. It has also been seen (*ante*, § 1255) that another exception exists for a party's admissions of contents; and the only risk which there exists — the possibility of fabricated testimony to the admission — is here entirely obviated by the witness' admission being made on the stand. With so many recognized limitations and analogous exceptions to the rule of production, it is pedantic to treat the present question as involving a novel inroad upon a hitherto inviolable and inflexible rule. (c) But, it is said, a witness' admissions are not admissions in the sense that a party's are.² Very true; what a party says out of court is evidence, but not what a witness says out of court (*ante*, § 1069). But this is not said out of court; it is said in court. It is testimony, not an admission in the common significance. Moreover, it is in the usual case (as above pointed out) decidedly trustworthy testimony, for it is against interest. (d) But, again it is said, there is no precedent for it. This, to be sure, is very little of an argument from a Court which in the same case upset the traditions of the Bar on another point by establishing another novelty already examined (*ante*, § 1026). But on this very point the Court itself in *The Queen's Case* cited no precedent in its own behalf; if there was no precedent for the present contention, there was at least no precedent against it. The Court alluded to the current practice as in harmony with its ruling; but (as above noted) the practice had before then not been in harmony with it, and the vigorous protests of Mr. Starkie, Mr. Phillipps, and other practitioners made shortly afterwards, indicate that the ruling was a surprise to the Bar. Moreover, the exceptions already pointed out, for a witness on *voir dire* and for collateral documents were close enough in principle to serve as precedents. In sum, then, such questions should be allowed as a matter of principle, even if their allowance involved a distinct exception to the rule of production.³

(2) But in any event, the principle is misapplied. Assuming that the rule of production should suffer no exception even where the document is only collaterally to be used and even where the witness' statement is trustworthy because made against his interest, nevertheless the rule in *The Queen's Case* is fallacious in that it does not correctly apply the principle it professes to invoke. The rule of production, with which our concern has been, calls for

² 1852, *Connel in Macdonnell v. Evans*, 11 C. B. 937 (quoting Taylor on Evidence, "As the parol admissions of parties are now receivable in evidence although they relate to the contents of deeds or records [citing *Slatler v. Pooley*], the same rule would seem to render the answers of a witness admissible in the case just put"; *Cresswell, J.*: "There is this striking difference between the two cases: a party is allowed to affect his own rights by parol admissions, but here the admission [by a witness only] would affect the parties in the cause").

³ The Judges in *The Queen's Case* also gave the following reason, based on the principle of Completeness (*post*, § 2102): "If the course which is here proposed should be followed, the cross-examining counsel may put the Court in

possession only of a part of the contents of the written paper; and thus the Court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part." But this objection is amply disposed of: (1) in the first place, the document itself may be produced by the witness' party, if it is in court or in his possession, to show the total effect of it; (2) the witness on re-examination may testify to any other terms of the document which counteract the possible wrong impression given by a part, under the ordinary principle of Completeness (*post*, § 2116); (3) the whole would have to be produced, in any case, when offered.

the exhibition of the document itself to judge and jury, in distinction from evidence about the document by a witness. The judge and the jury are supposed to ascertain its contents by inspection, as a source of proof superior to the assertions of witnesses. Now this *production to judge and jury* has nothing to do with a *showing to a witness*. It is not any witness that is to determine the contents of the document, but the tribunal (*ante*, § 1185). Yet the Judges' answer to the first question in *The Queen's Case* requires a showing to the witness, by virtue of the rule for production of documents.⁴ Such a showing has nothing whatever to do with that rule. There is no reason why the document should be shown to this witness rather than to any other witness in the case. It cannot be that the preliminary asking which is required in preparing to impeach by proving inconsistent statements (*ante*, § 1026) calls for such a showing; that requirement calls only for a fair warning as to the subject of the statement, and, in some jurisdictions, a further specification of time, place, and person; it was never supposed, nor do the Judges in *The Queen's Case* contend, that the showing of the document to the witness was any consequence of the rule as to impeachment by inconsistent statements. Observe, then, the fallacious and inconsequential nature of this rule that the document must be shown, as laid down by *The Queen's Case*: A certain principle about proving a document by production to judge and jury is said to involve a rule requiring the showing of the document to a witness; do, then, what this supposed rule dictates — namely, show the document to the witness — and thus satisfy the supposed rule; yet you are still no nearer than before to satisfying the above general principle about proving documents by production. In other words, if the cross-examiner were to show the document to the witness and put it in his pocket again, he would have satisfied the rule laid down by the first answer in *The Queen's Case*, and yet he would not have satisfied the general principle of production from which that answer professed to deduce that rule.⁵ This fallacy is worth noting, for it is fundamental. The showing to the witness for his perusal is precisely the thing which the cross-examiner (for tactical reasons noted later) wishes in the usual case to avoid, and this same showing is a process which is in no way properly involved in the general principle invoked in *The Queen's Case*.

(3) Hitherto, it has here been assumed that the principle of production does apply to require at least production, and that (as in (1) *supra*) the case may be met by establishing an exception to the general principle. But, in truth, in the usual case, that principle does *not* require production *at the time*

⁴ Their answer to the third question, it is true, does require merely a *reading* of the document, which is a legitimate way to satisfy the rule of production (*ante*, § 1185). But there is nothing in the correct rule which requires such a reading *at that stage of the case*, i. e. before the witness is asked; the reading could properly wait until the cross-examiner is ready to put in his own case; and this indeed the judges prescribe as the normal rule.

⁵ It may be said that the cross-examiner must in any case show it to the witness in order to get an admission of its execution. The answer to this is (1) it would be enough for this purpose to show the signature, (2) the cross-examiner might equally well prove the execution, if he pleased, by calling the same or some other witness when he came to put in his own case.

of asking the witness. Let us take, as the usual case, an attempt to impeach a witness by showing that he has at a former time in writing made an inconsistent statement on a material point or expressed a bias or a corrupt design against the opponent. The rule of impeachment applicable to such an attempt requires (*ante*, § 1025) that he shall be asked before leaving the stand whether he has made the statement subsequently to be proved against him. Now this asking, so far as it is a requirement, is not for the purpose of then and there proving the statement, but merely for the sake of fairly notifying him that the proof is to be offered; the requirement is satisfied by the mere asking, no matter what his answer (*ante*, §§ 1025, 1037). The cross-examiner, then, need not, if he does not choose, take an affirmative answer as proof; he has asked merely to satisfy the rule of fairness, and will in due time make the proof by producing the other witness (if it was an oral statement) or the document (if it was a written statement). Since, then, the asking is not done for the sake of proving the statement, the rule about proving a document's contents by production is not violated by the asking; the proof of the statement will be made later by the production of the document. This is clear enough, where the witness' answer is a denial of making the statement; but it is also true even where the witness' answer is an affirmative one; for the cross-examiner is not violating the documentary rule if he does not seek to accept the witness' answer in proof but proposes later during his own case to prove the statement and satisfy the documentary rule by producing the document. If then the cross-examiner does propose to prove the statement by the subsequent production of the document, and repudiates any desire to use the witness' affirmative answer as such proof (the asking, of course, is forced upon the cross-examiner by the impeachment-rule), he is not violating the documentary rule by not producing the document at that stage. Yet *The Queen's Case* erroneously assumes that he is. In other words, the impeachment-rule forces the cross-examiner to ask the question, and then *The Queen's Case* forbids him to ask it by conclusively imputing to him an intention to use a possible affirmative answer in a way in which he does not propose to use it even if it is given. Such is another of the incongruities of that rule.⁶

(4) The great objection, however, to the rule of showing, laid down in the first answer in *The Queen's Case* is one of practical policy. The circumstance which brought about such active opposition to it at the English Bar is that it abolished a most effective mode of discrediting a witness on cross-examination. Suppose, for example, that it is desired to show that the witness has in writing made a statement contrary to his present one, or has in writing shown bias or a corrupt intent; it is no doubt something accomplished to

⁶ It is to be noted that the above criticism is expressly made applicable to the "usual case," i. e. of attempting to discredit by proving an inconsistent or biased statement. Where, on the other hand, the attempt is to prove the con-

tents of a document material under the pleadings, it is clear that the rule of production does forbid this, and what is said in (3) above does not apply, although some of the considerations mentioned in (1) *supra* are still applicable.

prove this by producing the writing; but much more, perhaps the entire overthrow of the witness, can be achieved if it is also made to appear that he is ready to falsify upon the stand in denial of this statement, or that he cannot correctly remember what he then wrote. Almost every strongly-contested trial affords examples of such an exposure; and it was by the loss of this weapon that the great practitioners contemporary with *The Queen's Case* were most keenly touched. Their criticism was unsparing;⁷ and the following passages forcibly illustrate their objections:

1824, *Mr. Thomas Starkie*, *Evidence*, I, 203: "That the permitting such a cross-examination may frequently supply a desirable test for trying the memory and the credit of a witness admits of little doubt. If, for example, a witness profess to give a minute and detailed account of a transaction long past, such as the particulars of a conversation or the contents of a written document, and consequently where much depends upon the strength of his memory, it is most desirable to put that memory to the test by every fair and competent means. . . . If he either deny that he has made any representation on the subject, or be unable to recollect what statement he has made, the circumstance tends to impeach the faithfulness of his memory, even to a greater extent than if the representation had been merely oral, inasmuch as the act of writing is more deliberate and more likely to remain impressed on the memory than a mere oral communication. . . . A cross-examination of this nature affords no mean test for trying the integrity of the witness. An insincere witness, who is not aware that his adversary has it in his power to contradict him, will frequently deny having made declarations and used expressions which he is on cross-examination ultimately forced to avow; and it often happens that by his palpable and disingenuous attempts to conceal the truth he betrays his real character; and thus his denials, his manner and conduct, become of far greater importance, and much more strongly impeach his credit, than the answer itself does which he is at last reluctantly constrained to give. Where the party is confined to the mere production and reading of the paper, without previous cross-examination, all inferences of this nature are obviously excluded."

1828, Feb. 7, *Mr. Henry Brougham*, Speech on the Courts of Common Law, *Hans. Parl. Deb.*, 2d ser., XVIII, 213, 219: "If I wish to put a witness' memory to the test, I am not allowed to examine as to the contents of a letter or other paper which he has written. I must put the document into his hands before I ask him any questions upon it, though by so doing he at once becomes acquainted with its contents, and so defeats the object of my inquiry. That question was raised and decided in the *Queen's case*, after solemn argument, and, I humbly venture to think, upon a wrong ground, namely, that the writing is the best evidence and ought to be produced, though it is plain that the object is by no means to prove its contents. Neither am I, in like manner, allowed to apply the test to his veracity; and yet, how can a better means be found of sifting a person's credit, supposing his memory to be good, than examining him to the contents of a letter, written by him, and which he believes to be lost? . . . I shall not easily forget a case in which a gentleman of large fortune appeared before an able arbitrator, now filling an eminent judicial place, on some dispute of his own, arising out of an election. It was my lot to cross-examine him. I had got a large number of letters in a pile under my hand, but concealed from him by a desk. He was very eager to be heard in his own cause. I put the question to him: 'Did you never say so and so?' His answer was distinct and ready.—'Never.' I repeated the question in various forms, and with more particularity, and he repeated his answers, till he had denied most pointedly all he had ever written on the matter in controversy. This passed before the rules in evidence laid down in the

⁷ "Opposed as the answers were to the most elementary principles of evidence," said *Mr. Best*, for example.

Queen's case; consequently I could examine him without putting the letters into his hand. I then removed the desk, and said, 'Do you see what is now under my hand?' pointing to about fifty of his letters. 'I advise you to pause before you repeat your answer to the general question, whether or not all you have sworn is correct.' He rejected my advice, and not without indignation. Now, those letters of his contained matter in direct contradiction to all he had sworn. I do not say that he perjured himself,—far from it. I do not believe that he intentionally swore what was false; he only forgot what he had written some time before. Nevertheless he had committed himself, and was in my client's power."

1849, *Mr. W. M. Best, Evidence*, § 478: "By requiring the document containing the supposed contradiction to be put into the hands of the witness in the first instance, the great principle of cross-examination is sacrificed at once. When a man gives certain evidence, and the object is to show that he has on a former occasion given a different account, common sense tells us that the way of bringing about a contradiction is to ask him if he has ever done so. . . . Yet, according to the practice under the resolutions in Queen Caroline's Case, if the witness had taken the precaution to reduce his previous statement to writing, the writing must be put into his hands accompanied by the question whether he wrote it, thus giving him full warning of the danger he had to avoid and full opportunity of shaping his answers to meet it."^a

These criticisms expose the great fault in the ruling in *The Queen's Case*. It was unsound in principle because there is no reason why an adverse witness' testimony to contents on cross-examination should not—at least in the trial Court's discretion—be sufficient proof. But it also sinned against sound policy because it unnecessarily diminished the utility and effectiveness of that great instrument for the discovery of lies,—cross-examination. In the following passages from celebrated trials may be seen the efficiency of cross-examination, when unhampered by the rule, in exposing a falsifier:

1811, *Berkeley Peerage Trial*, *Sherwood's Abstract*, 120; Mrs. Jane Price, who had formerly lived as governess in the family of Lord Berkeley, was called to testify against the claim represented by Lady Berkeley; she had been asked: "Do you entertain any malice or ill-will towards Lady Berkeley, or any one of her family?" and had said, "Oh, none, upon my oath"; she was then asked as follows: "Did you not tell Lady Berkeley you would be her greatest enemy?" "Oh, never; Lady Berkeley cannot say it, for I never did." Afterwards the following paper was shown to the witness, and she was asked, "Is not the whole of this letter your handwriting?"—"Yes, the whole of this is mine." The same was then read, as follows: "Saturday, July 20th, 1799. Mrs. Price feels herself treated so unlike a gentlewoman in every respect in Lord Berkeley's family that she begs leave to say she wishes to be no longer engaged therein; though she does not mean to quit it without first informing her Ladyship, it is in Mrs. Price's power to be her greatest enemy."

1827, *M'Garahan v. Maguire*, *Mongan's Celebrated Trials in Ireland*, 16, 26; seduction of the plaintiff's daughter, the defendant being a priest; the case was shown by the evidence to be one of mere blackmail, but this was at the outset not apparent; the chief and first witness for the prosecution was Anne M'Garahan, the supposed victim of the defendant; and upon her cross-examination by Mr. Daniel O'Connell, the following passages took place: Mr. O'Connell: "Did you ever take a false oath about the business?" Witness: "Not that I recollect"; Mr. O'Connell: "Great God, is that a thing you could have forgotten?" Witness: "I believe I did not. I am sure I did not"; Mr. O'Connell: "Oh, I see I have wound you up. Perhaps, then, you will tell me now, did you

^a See also the following criticisms: 1853, *Report*, 20; 1820, *Mr. Denman*, arguing in *The Common Law Practice Commissioners*, Second Queen's Case, *Linn's ed.* I, 465.

ever swear it was false?" Witness: "I never took an oath that the charge against Mr. Maguire was false. I might have said it, but I never did swear it." . . . Mr. O'Connell: "Did you ever say that your family was offered £500 or £600 for prosecuting Mr. Maguire?" Witness: "I don't recollect"; . . . Mr. O'Connell: "Did you ever say that you would get £600 for prosecuting him?" Witness: "I never did"; Mr. O'Connell: "Or write it?" Witness: "Never"; Mr. O'Connell: "Is that your handwriting?" here a letter was handed to her; Witness: "It is"; Mr. O'Connell: "And yet you never wrote such a letter!" The letter read in part: "Dear Mr. Maguire, . . . I am the innocent cause of your present persecution. . . . Is there a magistrate in this county you can safely rely upon? If there is, let him call here as it were on a journey to feed his horse; let him have a strong affidavit of your innocence in his pocket; let me in the mean while know his name, that I may have a look out for him, and while his horse is feeding, I will slip down stairs and swear to the contents; I have already sworn to the same effect, but not before a magistrate. . . . £600 have been offered our family to prosecute you, but money shall never corrupt my heart." Witness: "I did not think when you were questioning me that you were alluding to this letter. I could not have supposed Mr. Maguire would have been so base as ever to have produced this letter, after swearing three solemn oaths that he would not. If I thought he would, I should have certainly told my counsel about it." After further questioning, "the witness seemed overcome; and she turned to the defendant, exclaiming, 'Oh, you villain! you villain!'"

1888, *Parnell Commission's Proceedings*, 54th day, *Times' Rep.* pt. 14, pp. 194, 195; this was virtually an action by Mr. Parnell and others, against the London "Times," for defamation, in charging among other things that Mr. Parnell had approved the Phoenix Park assassination; this charge was based on alleged letters of Mr. Parnell, plainly admitting complicity, sold to "The Times" by one Richard Pigott, an Irish editor, living in part by blackmail, who claimed to have procured them from other Irishmen. Pigott himself turned out to have forged them; but the case for their authenticity seemed sound, until Pigott was placed on the stand for "The Times" and came under the cross-examination of Sir Charles Russell. The object of the ensuing part of the cross-examination was to bring out Pigott's shiftiness in first selling the letters as genuine to "The Times," and then offering to the Parnell party for money to enable them to disprove the letters' genuineness. The letters had been first published in a series of articles entitled "Parnellism and Crime," beginning March 7, 1887, and bringing temporary obloquy to the Parnell party and causing the passing of the Coercion Act. Archbishop Walsh, mentioned in the examination, was an intimate friend of Mr. Parnell. Pigott, in his prior examination, had claimed that he had handed the letters to "The Times" merely for the latter's protection, to substantiate the articles, and that the publication of the letters "came upon me by surprise"; the falsehoods exposed in the following answers were in a sense partly immaterial, but they served all the more to show the man's thoroughly false character: Q. "You were aware of the intended publication of that correspondence?" A. "No, I was not at all aware." Q. "What?" A. "Certainly not." . . . Q. "You have already said that you were aware, although you did not know they were to appear in 'The Times,' that there were grave charges to be made against Mr. Parnell and the leading members of the Land League?" A. "I was not aware till the publication actually commenced." Q. "Do you swear that?" A. "I do." Q. "No mistake about that?" A. "No." Q. "Is that your letter (produced)? Don't trouble to read it." A. "Yes; I have no doubt about it." Q. "My Lords, that is from Anderton's Hotel, and is addressed by the witness to Dr. Walsh, Archbishop of Dublin. The date, my Lords, is March 4, 1887, three days before the first appearance of the first series of articles known as 'Parnellism and Crime.' (Reading.) 'Private and confidential. My Lord, — The importance of the matter about which I write will doubtless excuse this intrusion on your attention. Briefly, I wish to say that I have been made aware of the details of certain proceedings that are in preparation with the object of destroying the influ-

ence of the Parnellite party in Parliament.' (To witness.) What were these certain proceedings that were in preparation?" A. "I do not recollect." Q. "Turn to my Lord, Sir, and repeat that answer." A. "I do not recollect." Q. "Do you swear that, writing on the 4th of March and stating that you had been made aware of the details of certain proceedings that were in preparation with the object of destroying the influence of the Parnellite party in Parliament less than two years ago, you do not know what that referred to?" A. "I do not know really." Q. "May I suggest?" A. "Yes." . . . Q. "Did that passage refer to these letters, among other things?" A. "No, I rather fancy it had reference to the forthcoming articles." Q. "I thought you told us you did not know anything about the forthcoming articles?" A. "Yes, I did. I find now that I am mistaken, but I must have heard something about them." Q. "Try and not make the same mistake again, if you please. (Reading.) 'I cannot enter more fully into details than to state that the proceedings referred to consist in the publication of certain statements, purporting to prove the complicity of Mr. Parnell himself and some of his supporters with murders and outrages in Ireland, to be followed in all probability by the institution of criminal proceedings against these parties by the government.' Who told you that?" A. "I have no idea." Q. "Did that refer, among others, to the incriminatory letters?" A. "I do not recollect that it did." Q. "Do you swear it did not?" A. "I will not swear it did not." Q. "Do you think it did?" A. "No." Q. "Very well; did you think that these letters, if genuine, would prove, or would not prove, Mr. Parnell's complicity with crime?" A. "I thought they were very likely to prove it." Q. "Now, reminding you of that opinion, and the same with Mr. Egan, I ask you whether you did not intend to refer — I do not suggest solely, but among other things — to the letters as being the matter which would prove, or purport to prove, complicity?" A. "Yes, I may have had that in mind." Q. "You can hardly doubt that you had that in your mind?" A. "I suppose I must have had." Q. (Reading.) 'Your Grace may be assured that I speak with full knowledge, and am in a position to prove beyond all doubt or question the truth of what I say.' Was that true?" A. "It could hardly have been true." Q. "Then you wrote that which was false?" A. "I did not suppose his Lordship would give any strength to what I said. I do not think it was warranted by what I knew." Q. "Did you make an untrue statement in order to add strength to what you had said?" A. "Yes." Q. "A designedly untrue statement, was it?" A. "Not designedly." Q. "Try and keep your voice up." A. "I say, not designedly." Q. "Accidentally?" A. "Perhaps so." Q. "Do you believe these letters to be genuine?" A. "I do." Q. "And did at that time?" A. "Yes." Q. (Reading.) 'And I may further assure your Grace that I am also able to point out how the designs may be successfully combated and finally defeated.' (To witness.) Now if these documents were genuine documents, and you believed them to be such, how were you able to assure his Grace that you were able to point out how the designs might be successfully combated and finally defeated?" A. "Well, as I say, I had not the letters actually in my mind at that time, so far as I can remember. I do not recollect that letter at all." Q. "You told me a moment ago without hesitation that you had both in your mind?" A. "But, as I say, it had completely faded out of my memory." Q. "That I can understand." A. "I have not the slightest idea of what I referred to." Q. "Assuming the letters to be genuine, what were the means by which you were able to assure his Grace you could point out how the designs might be successfully combated and finally defeated?" A. "I do not know." Q. "Oh, you must think, Mr. Pigott, please. It is not two years ago, you know. Mr. Pigott, had you qualms of conscience at this time, and were you afraid of the consequences of what you had done?" A. "Not at all." Q. "Then what did you mean?" A. "I cannot tell you at all." Q. "Try." A. "I cannot." Q. "Try." A. "I really cannot." Q. "Try." A. "It is no use." Q. "Am I to take it, then, that the answer to my Lords is that you cannot give any explanation?" A. "I really cannot." . . . Q. "Now you knew these impending charges were serious?" A. "Yes." Q. "Did you believe them to be true?" A. "I cannot tell you whether I did or not, because, as I say,

I do not recollect." . . . Q. "First of all, you knew then that you had procured and paid for a number of letters?" A. "Yes." Q. "Which, if genuine, you have already told me would gravely implicate the parties from whom they were supposed to come?" A. "Yes, gravely implicate." Q. "You regard that as a serious charge?" A. "Yes." Q. "Did you believe that charge to be true or false?" A. "I believed that to be true." . . . Q. "Now I will read you this passage:—'P. S. I need hardly add that did I consider the parties really guilty of the things charged against them, I should not dream of suggesting that your Grace should take part in an effort to shield them. I only wish to impress on your Grace that the evidence is apparently convincing, and would probably be sufficient to secure conviction if submitted to an English jury.' What have you to say to that?" A. "I say nothing, except that I am sure I could not have had the letters in my mind when I said that, because I do not think the letters convey a sufficiently serious charge to warrant my writing that letter." Q. "But as far as you have yet told us the letters constituted the only part of the charge with which you had anything to do?" A. "Yes, that is why I say that I must have had something else in my mind which I cannot recollect. I must have had some other charges in my mind." Q. "Can you suggest anything that you had in your mind except the letters?" A. "No, I cannot." . . . [On the next day, when Pigott resumed his examination]: Q. "Then I may take it that since last night you have removed from your mind—I think your bosom was the expression you used—that this communication of yours [to the Archbishop] referred to some fearful charge, something not yet mentioned?" A. "No, I told you so last night, but I am sure that it is not so. I will tell you my reason." Q. "You need not trouble yourself." A. "I may say at once that the statements I made to the Archbishop were entirely unfounded." . . . Q. "Then in the letters I have up to this time read—or some of them—you deliberately sat down and wrote lies?" A. "Well, they were exaggerations; I would not say they were lies." Q. "Was the exaggeration such as that it left no truth?" A. "I think very little."

1888, *Parnell Commission's Proceedings*, 31st day, *Times*' Rep. pt. 8, p. 212; the "*Times*" had charged the Irish Land League and its leaders with complicity in crime and agrarian outrage; many of the witnesses to prove its case were suspected of offering testimony fabricated by themselves in the hope of finding a willing ear and obtaining a pleasant sojourn in London and good pay for their time; one Thomas O'Connor, who had presented on the stand a highly-colored story (which was claimed by the Land League to be an entire fabrication) was thus cross-examined by Sir Charles Russell: Q. "When you came over here to give your evidence did you expect any money?" A. "I expected to be sent back." Q. "Did you expect any money?" A. "Well, no; I expected that I should be sent back and paid for the time I should spend here." Q. "Anything more?" A. "Nothing more." Q. "You did not expect to make money out of *The Times*?" A. "No." Q. "Merely your bare expenses?" A. "Yes." Q. "You volunteered to come over solely in the interests of morality, truth, and justice?" A. "Yes, and in the hope of banishing the hell on earth that exists round my own place in Ireland." Q. "You had no thought of gain for yourself at all?" A. "I do not care about the gain." Q. "You had no thought of gain for yourself at all?" A. "No." Q. "Were you asked by anyone to make statements incriminating any of the popular leaders in Ireland?" A. "No." . . . Q. "Were you asked to tell queer things?" A. "Well, he told me to tell everything I knew." . . . Q. "Were you afraid that because you could not tell him the queer things he wanted you would not get the money which you expected?" A. "I was not afraid of that, because I did not expect any money." Q. "Take this letter in your hand. Do not read it, but look at the signature. Have you any doubt as to its being your signature?" A. "No, I have not." Sir C. Russell: "I will read this letter:—'Dear Pat,—I was here in London since yesterday morning. I was in Dublin two days. I got myself summoned for *The Times*. I thought I could make a few pounds in the transaction, but I find I cannot unless I would swear queer things. I am afraid they will send me to gaol, or at least give me nothing to carry

me home. I would not bother with it at all, but my health was not very good when I was at home, and I thought I would take a short voyage and see a doctor at their expense. But, instead of it doing me any good, it has made me worse a little. I will be examined to-morrow, Tuesday, the 4th.'"²

§ 1261. *Details of the Rule.* (1) The rule of showing and reading ceases, of course, to apply when the document is shown to be *lost or otherwise unavailable*; for then production is dispensed with, according to the principles already noticed.¹

(2) When the cross-examiner, in asking as to a prior inconsistent statement, asks merely whether the witness made such-and-such a statement, he must, if objection is made, *specify* either a statement made *orally* or a statement made *in writing*, so that the present rule can be enforced in the latter case.²

(3) The witness may be shown *only the signature* or some other part for the purpose of obtaining an admission of the execution of the document; but, for the purpose of proving the contents, the document's production at the proper time is necessary, and without it the questions as to contents cannot be asked.³

(4) *The proper time for reading* the letter to judge and jury is, in the absence of special considerations, the time when the cross-examiner comes to put in his own case.⁴

¹ The following are also illustrative: 1875, *Tilton v. Beecher*, N. Y., "Official" Report, III, 6-8; III, 6-8, 40-41, 109-113 (Mr. Beecher's cross-examination, by Mr. Fullerton); II, 174 (cross-examination of Mrs. S. C. D. Putnam, by Mr. Fullerton).

² 1820, *Abbott, C. J.*, in the answer to the first question, in *The Queen's Case*, *ante*, § 1259; *Starkie, Evidence*, I, 202; *Phillippa, Evidence*, I, 298; 1840, *Davies v. Davies*, 9 C. & P. 252 (an office-copy, admitted to be correct, of an affidavit in another Court; cross-examination on it allowed).

³ 1820, *The Queen's Case*, 2 B. & B. 292 (*Abbott, C. J.*: "A witness is often asked whether there is an agreement for a certain price for a certain article . . . or other matter of that kind, being a contract; and when a question of that kind has been asked at *nisi prius*, the ordinary course has been for the counsel on the other side . . . to ask the witness whether the agreement referred to in the question originally proposed by the counsel on the other side was or was not in writing; and if the witness answers that it was in writing, then the enquiry is stopped, because the writing itself must be produced").

⁴ 1820, *The Queen's Case*, 2 B. & B. 286; 1848, *Clapp v. Wilson*, 5 Den. 285, 287; 1903, *Treutham v. Binthenthal*, 118 Ga. 530, 45 S. E. 421.

⁵ 1820, *The Queen's Case*, 2 B. & B. 289 (*Abbott, C. J.*: "According to the ordinary rule of proceeding in the courts below, the letter is to be read as the evidence of the cross-examining counsel as part of his evidence

in his turn after he shall have opened his case; that is the ordinary course. But if the counsel who is cross-examining suggests to the Court that he wishes to have the letter read immediately in order that he may, after the contents of that letter shall have been made known to the Court, found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the courts below, and for the convenient administration of justice the letter is permitted to be read at the suggestion of the counsel," but as still his evidence); 1901, *St. Louis I. M. & S. R. Co. v. Falst*, 68 Ark. 587, 61 S. W. 374 (a writing may be read when cross-examining to lay the foundation, "if cross-examination upon the contents is desired and suggested to the Court"); 1902, *Hennessey v. Ins.* (Co., 74 Conn. 699, 52 Atl. 490 (whether it is to be put in evidence during the cross-examination is in the trial Court's discretion); 1898, *Peyton v. Morgan Park*, 172 Ill. 102, 49 N. E. 1003 (to be offered after cross-examination in the cross-examiner's case); 1872, *Haines v. Ins. Co.*, 52 N. H. 470, 471 ("such matters as the identity of the paper and of the witness, and the genuineness of the signature, are not usually in dispute; and it would be well to wait and see what objections will be made to the introduction of the deposition when it is offered at the proper time"; but "no absolute rule can be laid down, because it is a matter of fact and reasonableness"); 1872, *Romertze v. Bank*, 49 N. Y. 579 (document need not be offered till examiner's own case is put in; unless perhaps

§ 1262. **Same: Rule as applied to Prior Statements in Depositions.** When a witness' testimony is taken down at a preliminary hearing for committal by a magistrate, or is taken by a commissioner in the shape of a deposition, it seems to be generally conceded that the written report is preferred testimony to his statements, *i. e.* it must be produced or accounted for before testimony can be given of the witness' oral words (*post*, §§ 1326-1332). This is not the same as holding that the magistrate's report is the witness' testimony (instead of the witness' oral words), — though this may be so where the witness has signed the report, and it is always taken to be so in the case of a deposition (in the strict sense) taken by a commissioner. However, waiving these objections (dealt with *post*, § 1349, with reference to the theory of such examinations), and assuming that the magistrate's written report or the commissioner's certified deposition is a statement in writing by the examinee or deponent, the rule in The Queen's Case obviously applies; *i. e.* a witness upon the stand cannot be asked as to any statements made in a deposition or at a magistrate's examination without producing and showing the document. This is simple enough as to a *deposition*, strictly so called. But as to a *magistrate's report of an examination*, the rule requiring it to be used as preferred proof of the witness' answers (*post*, § 1326) does not make it a preferred proof where it has omitted to record the answer in question, or at least where the answer or remark was not made during the course of the examination and thus was not required to be recorded by the magistrate (*post*, § 1326). There may thus have been oral answers of which the magistrate's report cannot be expected to furnish the written proof. Hence it would not be proper to cross-examine a witness about these statements, until it has been made to appear that the question refers to statements which could not have been in the magistrate's report or which could have been, but in fact are not, there found.

Such was, in England, the principle and effect of the Resolutions of the Judges in 1837.¹ The question had not attracted attention before that time,² because by the Prisoners' Counsel Act,³ in 1836, a counsel's aid for the first time became available, for the purposes of cross-examination, to defendants accused of felony, and so such attempts to discredit a prosecuting witness by professional methods had just begun to be common. The bindingness of this rule was for a time disputed.⁴ The chief reason for the stand taken by the

in the Court's discretion, in order to allow explanations by the witness). Compare § 1284.

For the question whether the whole of the writing must be shown to the opponent's counsel on request, see *post*, §§ 1261, 2125.

¹ 1837, *circu* February, Resolutions of Judges, 7 C. & P. 676 ((1) The witness cannot be asked whether he made a statement in his deposition before the magistrate, without reading the deposition as a part of his evidence; (2) So for questions as to other statements before the magistrate; the deposition must first be read to see whether it contains them; (3) So for questions as to any self-contradictions whatever; the question must

specifically negative any reference to the deposition's statements); this last rule being established, as a logical consequence of the first two, by *R. v. Holden*, 3 C. & P. 609 (1838) and *R. v. Shellard*, 9 id. 279 (1840); but *R. v. Moir*, 4 Cox Cr. 279 (1850) is *contra* to this Rule 3.

² The following case dealt with a slightly different point: 1832, *Ridley v. Gyde*, 1 M. & Rob. 197, Tindal, C. J. (where the witness was asked whether he had mentioned a fact when examined before the bankruptcy commissioners; rule held not applicable).

³ St. 6 & 7 Wm. IV, c. 114.

⁴ In *R. v. Covey*, 8 C. & P. 31 (January,

Bar against them was the supposed absence of a right in the prosecuting counsel to address the jury in closing, if the defence had introduced no evidence of its own; for thus, if the defence could by mere cross-examination bring out these self-contradictions, the prosecution would have no right to make a closing address; while if the defence were obliged to put in the deposition as a part of its own case, the prosecution would gain the right to make a closing address. But it seems to have been settled soon afterwards that the prosecution had such a right in any case, though it had customarily not been exercised;⁵ and thus the chief reason for opposition ceasing to exist, the Resolutions received thereafter a general enforcement.⁶ Attempts to evade them by indirection were discountenanced. Thus, the rule was held to be violated where the witness was shown his deposition and asked to say, after reading it silently, whether he persevered in his statement just made on the stand; for in this way there is given to the jury an implication as to the contents of the deposition.⁷ But merely asking the witness to take the deposition and refresh his memory therefrom, and then to say whether after refreshing it he perseveres in his statement just made on the stand, does not necessarily convey such an implication, and would be allowable.⁸

It should, however, be noted that, irrespective of the rule in *The Queen's Case* (i. e. in jurisdictions where it is not in force), this use of a deposition to refresh memory raises three other and independent questions, (1) whether its use on cross-examination is dishonest under certain circumstances, as just mentioned (note 7, *supra*; and *ante*, § 764), (2) whether it may properly be done, the deposition not being a contemporary memorandum (*ante*, § 761), and (3) whether when done on re-direct examination it violates the rule against impeaching one's own witness (*ante*, § 904).

⁵ 1837, *Patteson, J.*, had allowed the question forbidden by Rule 1 to be asked and the affirmative answer to be taken as proof.

⁶ April, 1837, *R. v. Edwards*, 8 C. & P. 26, 29, Coleridge, J. A compromise was in this case suggested, by which the judge should follow, deposition in hand, the witness' testimony on the stand, if he chose to do so in his discretion. But even here, "if the judge should refer to the depositions, and so introduce new facts in evidence," by questioning the witness about discrepancies, Coleridge, J., was not sure that the right to reply was lost.

⁷ 1837, *R. v. Edwards*, 8 C. & P. 26, per Coleridge and Littledale, JJ.; at p. 31 is given a list of unreported rulings in which other judges affirmed the Resolutions. But they seem subsequently to have been confined to strict limits: 1861, *R. v. Maloney*, 9 Cox Cr. 26 (on cross-examination a question allowed as to what the witness had said before the coroner, without producing the deposition, because the judges' rules applied only to examinations before a magistrate).

⁸ 1850, *R. v. Newton*, 15 L. T. 26; 1851, *R. v. Ford*, 5 Cox Cr. 184; 1863, *R. v. Brewer*, 9 id. 409 (proposition to have the witness peruse the

deposition and then say whether he adhered to his answer, rejected; the deposition must be "put in in the regular way"; following *R. v. Ford*). The following ruling rests on the same principle: 1849, *R. v. Matthews*, 4 Cox Cr. 94 (the witness not being able to read, counsel offered to have a court-officer read his deposition aloud to him, so as to refresh his memory and see whether he adhered to it; excluded, because it would make the officer a witness to contradict). But even since the statutory abolition of the rule in *The Queen's Case*, *R. v. Ford* may still in another aspect be correct; i. e. though the witness' testimony to the fact of contradicting himself would be proper without reading the document itself, yet if the witness said that he did "persevere in his statement," the implication that he had formerly stated the contrary might be in fact unjust, — the result of the counsel's trick. On this point, see *ante*, § 764.

⁹ 1837, *R. v. Edwards*, 8 C. & P. 26, 31; 1850, *R. v. Barret*, 4 Cox Cr. 269.

For the American rulings on the subject of the above section, see the notes to the next section.

§ 1263. Same: Jurisdictions recognizing the Rule in The Queen's Case. In *England*, the rule laid down in The Queen's Case, so far as it applied to attempts to discredit a witness by cross-examining him to prior inconsistent or biased or corrupt utterances, was unanimously condemned by the Bar; and, when the general revision of common-law procedure took place in 1854, a statute was passed which (a) expressly abolished the really vicious and totally indefensible part of the rule, namely, the requirement that the document *must be shown* to the witness before asking him about it, and (b) by implication abolished the requirement of then producing and reading the document, and thus allowed any document's terms to be proved by testimony of the writer on cross-examination without subsequent production, though in case of the witness' denial, production would of course be necessary; and in any case whatever the statute authorizes a judicial discretion to order production.¹ The judicial construction of the statute seems to accept these consequences fully.²

In *Canada*, similar corrective statutes have been enacted, though they seem to have been by some Courts construed strictly.³

In the *United States*, the rule seems not to have existed before 1820; wherever it was advanced, it seems to have come directly by adoption of the ruling in The Queen's Case. The statutory abolition of the rule in *England*

¹ 1854, St. 17 & 18 Vict. c. 125, § 24 ("A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit"); extended in 1865 to criminal cases: 28 & 29 Vict. c. 18, § 5; 1874, Day, Common Law Procedure Acts, 4th ed., 277 ("The effect is this: the witness in the first instance may be asked whether he has made such and such a statement in writing without its being shown to him. If he denies that he has made it, the opposite party cannot put in the statement without first calling his attention to it (showing it, or at least reading it to him) and to any parts of it relied upon as a contradiction").

It does not appear from the statute whether "calling his attention" means "showing the writing." But this is immaterial; the important thing is that the witness' readiness to lie or inability to remember can be tested by asking him before showing the writing to him.

² 1858, *Slaiden v. Sergeant*, 1 F. & F. 322, *Willes, J.* (cross-examination on an affidavit made by the witness; production not necessary); 1858, *Ireland v. Stiff*, *ib.* 340 (*Willes, J.*: "Strictly, the course is, to ask first if he received

a letter of a certain date; then if he received a letter commencing, etc. It will come to the same thing [i. e., as here, where counsel asked if he had received a letter in the following terms]; it is only for the purpose of identification"); 1859, *Farrow v. Blomfield*, *ib.* 633 (*Pollock, C. B.*, allowing a question to the plaintiff on cross-examination as to the contents of a letter inconsistent with his testimony); "If a question arises as to the contents of a written instrument, and you can get a witness to come and swear that he heard the plaintiff say it contained such and such expressions, that is good evidence of the contents of the instrument without producing it. And if the plaintiff is himself in the box, you may ask him as to the contents of the document, and his answer will be as good evidence as any previous statement. . . . The judge might say that the document ought to be produced; I should do so myself in some cases"; see also *North Austr. T. Co. v. Goldborough*, 1893, 2 Ch. 381, 386.

³ *Dom. Crim. Code* 1892, § 700 (like Eng. St. 1854, c. 125, § 24; adding that a purporting deposition, if only produced, shall be presumed to have been signed by the witness); *B. C. Rev. St.* 1897, c. 71, § 30 (like Eng. St. 1854, c. 125, § 24); *N. Br. Consol. St.* 1877, c. 46, § 21 (like Eng. St. 1854, c. 125, § 24); 1859, *Lawton v. Chance*, 4 All. 411 (trial Court's discretion to order production under the statute, here exercised); 1862, *Campbell v. Gilbert*, 5 *id.* 420, 426 (trial Court's discretion exercised to require production of the original document being in *England*, not an office copy); 1880, *R. v. Tower*, 20 N. H. 168, 190, 198 (cross-examination under the statute, without offering the paper in evidence, not allowed where it did not appear that

did not become known in this country except in a few quarters.⁴ The singular spectacle was presented of many Courts in this country adopting a supposed rule which had been repudiated in its jurisdiction of origin a generation before. The question has not been passed upon in all of our jurisdictions; but the rule has been adopted in most courts where the objection has been raised, although there has been little attempt to develop its details, particularly as regards the use of questions upon depositions.⁵ The unfortu-

the witness himself had written, signed or seen the paper); *Newf. Consol. St.* 1892, c. 57, § 19 (like *Eng. St.* 1854, c. 125, § 24); *N. Sc. Rev. St.* 1900, c. 163, § 44 (like *Eng. St.* 1854, c. 125, § 24); *Ont. Rev. St.* 1897, c. 73, § 17 (like *Eng. St.* 1854, c. 125, § 24); *P. E. I. St.* 1889, c. 9, § 17 (like *Eng. St.* 1854, c. 125, § 24).

⁴ Probably because the learned author of *Greenleaf on Evidence* died in 1833, the year before the statute, and *The Queen's Case* remained elaborately treated as law in his text, while the statute was only noticed in an obscure corner of the editorial notes.

⁵ For depositions, the cases cited *ante*, §§ 761, 764, 904, must be compared: *Alabama*: 1883, *Wills v. State*, 74 Ala. 24 (writing must be shown and read; here, testimony before a committing magistrate); 1894, *Phoenix Ins. Co. v. Moog*, 78 id. 310 (same for deposition; here read aloud to witness, who could not read); 1884, *Floyd v. State*, 82 id. 22 (same rule; testimony before a committing magistrate); 1887, *Gunter v. State*, 83 id. 106 (same, preliminary examination of witness before justice of the peace); 1895, *Sanders v. State*, 105 id. 4, 16 So. 915 (cross-examination to former testimony reduced to writing, allowed without production); 1903, *United States F. & G. Co. v. Dampskibaktieselskabet Habil.* — id. —, 35 So. 344 (witness' memory of a contract tested without showing him the paper); *Alaska*: C. C. P. 1900, § 670 (like *Or. Annot. C.* 1892, § 841); *Arkansas*: *Stats.* 1894, § 2960 (if the statement: "is in writing, it must be shown to the witness, and he allowed to explain it"); *California*: C. C. P. 1872, § 2052 (impeachment by prior self-contradiction; "if the statements be in writing, they must be shown to the witness before any question is put to him concerning them"); § 2054 (quoted *post*, § 1861; it perhaps affects this point); 1872, *People v. Donovan*, 43 Cal. 162, 165, *semble* (writing must be shown to the witness); 1872, *People v. Devine*, 44 id. 452 (former testimony at inquest; after questions as to time and place, held proper to put in the deposition, though not shown or read to the witness; present point not considered); 1875, *Leonard v. Kingsley*, 50 id. 628, 630 (letters; "he should have called the attention of the witness to them"); 1882, *People v. Hong Ah Duck*, 61 id. 387, 394 (allowing contradiction by coroner's deposition; question not raised); 1887, *People v. Ching Hing Chang*, 74 id. 393, 16 Pac. 201 (testimony reduced to writing in foreign language must be translated); 1893, *People v. Kruger*, 100 id. 523, 35 Pac. 88 (question as to former statements, allowed, without reading over the writing); 1895, *People v. Dillwood*, — id. —, 39 Pac. 438 (testimony before magistrate;

must be read, and shown to him if required); 1898, *People v. Lambert*, 120 id. 170, 52 Pac. 307 (the reading over of a deposition, if asked for by the witness as a substitute for showing, should not be allowed to cover the whole deposition, but only the self-contradictory parts); *Florida*: 1893, *Simmons v. State*, 32 Fla. 387, 391, 13 So. 896 (former testimony, reduced to writing by magistrate, must be shown to witness); *Georgia*: *Code* 1895, § 5292 ("if in writing, the same should be shown to him, or read in his hearing, if in existence"); 1853, *Stamper v. Griffin*, 12 Ga. 454 (letter; the writing must be shown to the witness); but notice that since in this State the ruling for asking does not apply to prior sworn statements (*ante*, § 1035), the present rule also does not apply to them: 1900, *Taylor v. State*, 110 id. 150, 35 S. E. 161 (questions as to former testimony officially reported, allowed in order to test sincerity or memory, without production of report; but before proof of the former statements by the report, its contents should be "made known to her" and the report produced); *Hawaii*: *Civil Laws* 1897, § 1423 (like *Eng. St.* 1854, with "or prosecution" after the words "of the cause"); *Idaho*: *Rev. St.* 1887, § 6083 (like *Cal. C. P.*, § 2052); *Illinois*: 1893, *Atchison, T. & S. F. R. Co. v. Feehan*, 149 Ill. 202, 214, 36 N. E. 1066 (witness apparently not shown a deposition, and the deposition then excluded because the witness' admission on cross-examination sufficed); 1897, *Swift v. Madden*, 165 id. 41, 45 N. E. 979 (contents of deposition read to the witness; no ruling on the present point); 1898, *Peyton v. Morgan Park*, 172 id. 102, 49 N. E. 1003 (similar); 1902, *Moineux Stone Co. v. Groves*, 197 id. 88, 64 N. E. 335 (inquiry as to the contents of a written statement by the witness, held improper); *Iowa*: 1861, *Morrison v. Myers*, 11 Ia. 539 (letter; showing necessary); 1868, *Callanan v. Shaw*, 24 id. 454 ("the better, and probably the correct practice" is to show it); 1871, *State v. Collins*, 32 id. 41 ("his attention must first be drawn to the time, etc.," nothing said about showing the document); 1879, *Peck v. Parthen*, 52 id. 46, 52, 2 N. W. 597 (document must be shown); 1883, *Gloun v. Gleason*, 61 id. 28, 33, 15 N. W. 659 (the whole of a letter must be shown, and not merely parts required to be read; asking about the contents of a letter admitted genuine, held improper); *Kentucky*: C. C. P. 1895, § 598 ("if it [a different statement] be in writing, it must be shown to the witness, with opportunity to explain it"); § 604 (writing shown and proved must be read to jury before witness' testimony closed); 1901, *Hendrickson v. Com.*, — Ky. —, 64 S. W. 954 (rule in *The Queen's Case* applied); *Louisiana*:

nate rule should once and for all be disposed of by a statutory measure similar to the English provision; although correct common-law principles would amply suffice to prevent its establishment.

1889, *State v. Callegari*, 41 La. An. 580, 7 So. 130 (testimony at a preliminary examination, reduced to writing; showing required); 1902, *State v. Cain*, 106 La. 708, 31 So. 300 (rule repudiated, no authority cited); *Massachusetts*: 1873, *Com. v. Kelley*, 112 Mass. 452 (a constable, sought to be discredited by the contents of his oath made in getting a search-warrant; writing must be shown); *Michigan*: 1868, *Lightfoot v. People*, 16 Mich. 513 (deposition; "If a party desires to cross-examine the witness on the subject of his former statements, he should read the entire deposition in evidence before doing so. If he does not desire to cross-examine on that topic, it is sufficient to read it at any time"); 1881, *DeMay v. Roberts*, 46 id. 160, 163, 9 N. W. 146 (rule applied to an affidavit); 1888, *Toohy v. Plummer*, 69 id. 345, 349, 37 N. W. 297 (minutes of former testimony by a stenographer, not called, read over in part to the witness; reading of the whole not required, the supposed contradiction not being in truth in writing; "the minutes are not like a deposition read to the witness and then signed by him"); 1892, *Maxted v. Fowler*, 94 id. 106, 111, 53 N. W. 921 (showing required); 1892, *Anstrian v. Springer*, ib. 343, 353, 54 N. W. 50 (questions on cross-examination about contents of a letter, allowed without producing); *Minnesota*: 1893, *O'Riley v. Clampet*, 53 Minn. 539, 55 N. W. 740 (must be not only shown but introduced in evidence); *Mississippi*: 1876, *Scarborough v. Smith*, 52 Miss. 517, 522 (mere questioning, apparently enough; nothing said about showing the paper; here, a memorandum of former testimony); 1879, *Cavanah v. State*, 56 id. 299, 307 (written report of former testimony must be shown to the witness); 1878, *Mitchell v. Savings Inst.*, 56 id. 444, 448 (letter; the witness' attention should have been directed to it"); 1891, *Story v. State*, 68 id. 609, 630, 10 So. 47 (cross-examination as to a telegram sent by the witness; the telegram required to be shown to him); *Missouri*: 1865, *Gregory v. Cheatham*, 36 Mo. 161 (letter; showing required); 1875, *Prewitt v. Martin*, 59 id. 334 (showing required); 1877, *Spoonmore v. Cable*, 66 id. 579 (affidavit containing a contradiction, shown to the witness); 1883, *State v. Grant*, 79 id. 113, 132 (affidavit to contradict one testifying by deposition; must be produced and asked about); 1883, *State v. Stein*, ib. 330 (letter required to be shown); 1885, *State v. Matthews*, 88 id. 121, 124 (after the witness' admission of genuineness, the whole writing must be read, and not merely particular passages be read and inquired about); 1889, *State v. Young*, 99 id. 666, 681, 12 S. W. 879 (defendant's statement before coroner reduced to writing; attention must be called); *Montana*: C. C. P. 1895, § 3380 (like Cal. C. C. P. § 2052); 1896, *State v. O'Brien*, 18 Mont. 1, 43 Pac. 1091 (statute applied); *Nebraska*: 1879, *Crosey v. Averill*, 8 Nebr. 151, 157 (deposition must first be proved and read before cross-examination); 1901, *Omaha L. & T. Co. v. Douglas Co.*, 62 id. 1, 86 N. W. 936 (rule applied); *New Hampshire*: 1872, *Haines v. Ins. Co.*, 52 N. H. 467, 470 (cross-examination upon a deposition for the purpose of impeaching or showing any inconsistency is not allowable; asking questions to prove the signature or to identify the deposition is a matter within the discretion of the trial Court as to the time of doing so, and "no absolute rule can be laid down"); *New Mexico*: Comp. L. 1897, § 3023 (like Eng. St. 1854, without the proviso); *New York*: 1832, *Bellinger v. People*, 8 Wend. 599 (a former examination before a magistrate, to show self-contradiction; the document must be shown or read); 1848, *Clapp v. Wilson*, 5 Den. 286, 288 (need not call attention to a particular passage, but must merely show the whole paper and get an admission of genuineness; but a deposition need not be shown to a witness to call his attention, "being a sworn statement in writing"); 1862, *Newcomb v. Griswold*, 24 N. Y. 301 (a former affidavit, whether as cross-examiner's own evidence or as a contradictory statement does not appear; documents must be shown or read); 1872, *Komertze v. Bank*, 49 id. 578 (a deposition *de bene*, used to show self-contradiction; must be shown or read; but particular passages need not be called attention to); 1872, *Gaffney v. People*, 50 id. 423 (must first be shown); *Oregon*: C. C. P. 1892 § 841 (like Cal. C. C. P. § 2052); 1868, *State v. Taylor*, 3 Or. 10 (former testimony; the writing must be shown, even though the words asked about are in fact not in it); 1896, *State v. Steeves*, 29 id. 85, 43 Pac. 947 (statute applied); *Pennsylvania*: St. 1887, Pub. L. 158, § 3, P. & L. Dig. Witnesses, § 6 (former testimony to contradict a witness in criminal cases "may be orally proved"); *Tennessee*: 1872, *Titus v. State*, 7 Baxt. 132, 136 (deposition taken by magistrate need not be shown to witness before offering, because it is not the witness' writing; but a letter said to be the witness' must be shown); *United States*: 1884, *The Charles Morgan*, 115 U. S. 69, 77, 5 Sup. 1172 (must be shown to witness, "except under special circumstances"; "all that the law requires is that the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if he can and desires to do so"; the trial Court to determine this); 1890, *Chicago M. & S. P. R. Co. v. Artery*, 137 id. 520, 11 Sup. 129 (The Queen's Case mentioned with approval, but on another point); 1892, *Toplitz v. Hedden*, 146 id. 254, 13 Snp. 70 (the plaintiff was asked whether in a former suit he had made a certain claim; an objection that the record should be produced was overruled; "if he wished to appeal to the prior record, to refresh his recollections he could call for it and do so; but the evidence as offered was competent, irrespectively of the record"); *Vermont*: 1862, *Randolph v. Woodstock*, 35 Vt. 295 (letter need not be shown; "the plaintiffs were bound to first ask the witness before they would be allowed to contradict him, even by producing the letter. The plaintiffs

D. RULES ABOUT SECONDARY EVIDENCE OF CONTENTS (COPIES, DEGREES OF EVIDENCE, ETC.).

§ 1264. **In General.** When the rule under consideration is satisfied, by accounting for the non-production of the document itself, the function and effect of the rule ends. The rule itself says nothing about the ways of evidencing a document not produced. The rule requires that as a preferred source of proof, the document itself be produced for autoptic inspection, and recognizes certain exemptions from production. Any rules that may obtain as to the mode of proving an unproduced document, by testimony of one sort or another, rest upon some other principle of evidence. Nevertheless, for the sake of practical convenience, such of them as can adequately be examined apart from those other general principles will be here considered, with references to the general principles under which they properly belong.

1. Rules Preferring One Kind of Testimony above Another (Degrees of Evidence, etc.).

§ 1265. **General Principle.** Under another head (§§ 1285-1339) it will be seen that a group of rules is recognized in our law by which one kind of witness to a certain fact is preferred above another; *i. e.* the former witness' testimony must be obtained if it is available, and the latter's may be used only when the former's appears to be unavailable. By one variety of such rules — less common — the one witness' testimony is absolutely preferred, *i. e.* it is the only kind that can be used, and the other will not be received even though the former is unavailable. The rules of this sort do not form a systematic group or a single body of doctrine; each of them owes its existence to the peculiar circumstances of some given situation making a particular kind of testimony highly desirable. It is feasible, without doing violence to the exposition of those rules in their proper place, to consider here such of them as deal with evidence of the contents of documents by preferring one kind of testimony to contents above another. The general notion underlying the group of rules as a whole is elsewhere considered (*post*, § 1285); but in the present place will be examined all the rules and precedents specifically dealing with testimony to the contents of a document.

These rules of preference deal with four general questions: 1. When is testimony by copy preferred to testimony by oral recollection? 2. When is testimony by official copy preferred to testimony by private copy? 3. When

must of course take the witness' statements as to what he wrote, unless they were prepared to contradict him by producing the letter, and could not prove its contents by witnesses without showing its loss"); 1898, *Billings v. Ins. Co.*, 70 Vt. 477, 41 Atl. 516 (rule repudiated); *Virginia*: St. 1899-1900, c. 117, § 3 (like Eng. St. 1854, c. 125, except that after the words "contradicting him," the words are added "and the said writing shall be shown to him"; this in-

sertion, unless very liberally construed, is likely to have the absurd and perverse effect of nullifying the only value of the statute, by requiring precisely what the original statute was intended to abolish; the framers of this legislation seem hardly to have appreciated the real problem at issue; *Wisconsin*: 1880, *Kalk v. Fielding*, 50 Wis. 339, 342 (letter received by opponent; cross-examination to contents, allowed without production; Taylor, J., diss.).

is one kind of recollection-testimony preferred to another? 4. When is testimony by direct copy preferred to testimony by copy of a copy?

§ 1266. **Nature of Copy-Testimony, as distinguished from Recollection-Testimony.** What is a copy, as distinguished from other testimony to contents? This is a fundamental inquiry; for a correct notion of the significance of a copy will enable us to form a just idea of the reasons for making rules of preference. A person who is qualified to testify to the contents of a document may present his knowledge in one of two ways: (1) He may, having at some time perused the document, summon up his recollection on the stand, and repeat the document's terms as furnished by that recollection. (2) Or, having in the same way perused the document, (a) he may have written down its words at the time of perusal, in successive stages, by writing the few words that he can carry precisely in his mind for the moment, and so on until the whole is transcribed; (b) or (as merely a variety of this method) he may have taken an alleged copy already made by another or by himself, and compared the original and this other, word for word or clause for clause; the only difference between these two sub-varieties (a and b) being that in the latter he has not had to carry any words in his mind during the time of transcribing, and has thus gained a greater probability of accuracy by reducing the necessary time of recollection to a minimum. Now between these two modes, (1) and (2), there is obviously a great difference in trustworthiness. By the former mode, the memory has had to be trusted for a considerable length of time, — perhaps for a day, perhaps for ten years. This recollection of the precise words of the document is sure to fade and to become less accurate than at the first moment after the perusal of each word or clause. The increasing degree of untrustworthiness (assuming the honesty and intelligence to be alike in the same witness for all kinds of testimony) will depend partly on the length of the document, partly on the circumstances likely to emphasize the words in his memory, and partly on the space of time that has elapsed between his perusal and his testimony on the stand. Thus his recollection-testimony may be highly trustworthy, and yet may be worthless. But his copy-testimony eliminates all these elements of untrustworthiness; the length of the document, the emphasis of words, the lapse of time, are all immaterial, for he transcribed or examined the copy word for word at such a time that there was practically no demand made upon his powers of memory; the transcription then permanently made in writing (and adopted on the stand as a record of past knowledge; *ante*, §§ 734, 739) preserves the words without any of the risk of change or disappearance that attends the operations of memory; moreover, the fact of a change, if it has occurred, is made known by the appearance of the writing.

Such being the difference in trustworthiness between copy-testimony and recollection-testimony, does the law establish any rule of preference for the former over the latter? It is common to refer to this question by contrasting "oral evidence," or "parol evidence," with a copy; but the former terms are so loose and ambiguous (*post*, § 2400) that their further employment for

purposes of discussion would be unpardonable. The proper contrast is between copy-testimony and testimony by present recollection.

§ 1267. **Is a Written Copy the Exclusive Form of Testimony? Proof of a Lost Record, Will, etc., by Recollection.** Is this relative untrustworthiness of recollection-testimony so great that such testimony will never be received to prove the contents of a document, even where copy-testimony is not available? In other words, is the latter absolutely preferred (*post*, § 1345) to the exclusion of the former? Such a doctrine has never been suggested for ordinary writings. But it has often been urged as proper in application to judicial records, deeds, and wills. It is to be noted that the question is whether recollection-testimony is to be used, or else no evidence at all; for, by hypothesis, the original cannot be had, and copy-testimony is not available. Thus the question to be considered is whether the dangers of inaccuracy that may attend the reception of recollection-testimony are sufficiently great to over-balance the dangers attending the entire failure of evidence of the contents of lost or destroyed records and the like. On this point, it is clear that the answer must be in the negative; the considerations are well expounded in the following passage:

1790, *Haywood, J.*, note to *Haggett v.* —, 2 Hayw. 243: "When there is no record or deed, nor any copy, parol evidence will in general relate the fact truly, and is as much better than no evidence at all as records and deeds are superior to itself. It ought to be received upon the same principle as they are, not because there is absolute certainty either in the one or in the other (for a record or deed may be altered, corrupted, substituted, or the like), but because, in choosing probabilities, it is wise to take the best that offers. To require the production of a record or deed, when there is undoubted proof of its destruction, is to require an impossibility, and *lex neminem cogit ad impossibilia*. To say his right shall be lost with the record or deed that proves, though destroyed by invincible calamity, is to inflict punishment for the acts of Heaven, and *actus Dei nemini facit injuriam*. It were far better to abolish the institution of deeds and records altogether than to admit the position under consideration as a consequence of them. . . . If it be argued that the party should take and preserve a copy of the record amongst his other evidences, and then the loss of the record would not prejudice him, and that it is his own fault if he neglects to do so and the record becomes extinct, the answer is, [Firstly] that in contemplation of law he is not bound to take a copy till his occasions require it, for the law itself has undertaken to keep and preserve the record for him, to the end he may have a copy when he wants it, and therefore the not taking or not keeping a copy cannot be imputed to his negligence; Secondly, if he take a copy, that as well as the record may be lost; yet according to the controverted position, he cannot be let into parol evidence."

1850, *Scott, J.*, in *Davies v. Pettit*, 11 Ark. 349, 352: "It is known that not only the existence and loss but also the contents of lost bonds, bills, notes, and other memorials of contracts and various other written instruments, from time immemorial have been allowed to be proven by parol evidence; and that many of these relate to the most important transactions among men, and that they are in general executed in privacy and comparatively but few of them are ever submitted to the public gaze. And yet the inquest of centuries has failed to present this rule to the Legislature as a public grievance in promoting perjury, and for this reason to demand its eradication from our judicial regulations. If, then, the morals, and safety of society have received no serious injury from its operation in a wide field of temptation, where the suborned are for the most part unchecked by the public eye, can it be possible that the admission of parol evidence of the loss and the effect of judgments at law, which are not produced in private like these private instru-

ments of evidence, but are the result of the united action of the judge, jury, officers of Court, parties, their attorneys and witnesses, all under the eye of the bystanders, can be productive of the great evils apprehended from this source? On the contrary, is it not certain that of all the cases of the proof, by parol, of the contents of lost instruments of evidence, that of lost judgments, from the circumstances to which we have alluded, is most secured against the crime of perjury? — But it is supposed that a disastrous blow would be stricken against the sanctity of records, and in this that public policy would be greatly outraged. If records, while they existed, were allowed to be contradicted or established by parol, this would not fail to be the result. But how this is to result from the establishment of their tenor and effect when destroyed is not altogether clear. Surely judicial records are not so sacred that their very ashes must not be disturbed, and that, to minister to their quiet, the most important rights of men must be sacrificed, with Pagan superstition, to their manes. Such a doctrine would have better befitted the days of the old barons of England, when chirography was so much esteemed that it was an indulgence for crime, than in our own times; and it is by no means certain that it obtained even in those days. Shall personal liberty be sacrificed at this altar, and a man be twice put in jeopardy of life or limb because his plea of former acquittal cannot be established by the ashes of a conflagrated record? Shall a man be twice punished for the same offence because the record of his former conviction, under which he was punished, from its destruction, cannot be produced to protect him from a second prosecution? Or shall the convicted forger be delivered from the penitentiary and set at large upon society because the same incendiary flame that destroyed the record of his conviction at the same time consumed the material evidence of his guilt? But these and many other startling consequences are by no means the only result of this supposed doctrine; for, let it be distinctly understood that the destruction of judicial records is the end of the public and private rights depending upon them while they exist, and at once a high premium for vice and crime is held out by the law, under the influence of which just fears might be apprehended for the safety of judicial records. . . . The law would be placed in the singular predicament of openly permitting the rule hand of crime to seize upon her highest muniments of truth and right, apply the incendiary torch, and hold the blazing sacrifice in the very face of justice. We cannot think that such a scene can be enacted under the auspices of the common law, whose oracles have ever claimed for it a capacity to afford a remedy for every wrong. On the contrary, we think that its recuperative energies are fully equal to the work of setting up, by the legitimate operation of its harmonious rules, every landmark of truth and right that may be at any time prostrated, either by the hand of crime, the inevitable accidents incident to men, or by the onward wear of time."

Such has been the rule unanimously accepted by the Courts. Since the time (*ante*, § 1177) when the rule of production has been conceded to be subject to certain excuses and exemptions, the proof of unproduced documents has been allowed to be made by recollection-testimony (in the absence of such copy-testimony as is otherwise required, under the rules shortly to be noticed). The proposed doctrine, that such recollection-testimony should be absolutely excluded, has been repudiated for *judicial* and *official records*,¹

¹ In some of the following cases the thing admitted was a copy, but the rule is laid down in general terms for "parol" or "oral" evidence: *Eng.*: 1774, *Kingston v. Horner*, II. Cowper 102, 109 (Lord Mansfield, C. J.: "If a foundation can be laid that a record or a deed existed and was afterwards lost, it may be supplied by the next best evidence to be had"); *Cal.*: 1859, *Ames v. Hoy*, 12 Cal. 11, 20 (judgment); 1863, *Warfield's Will*, 22 id. 51, 64 (probate petition); *Colo.*: 1878, *Hittson v. Davenport*, 4 Colo. 169,

174; *Conn.*: 1839, *Davidson v. Murphy*, 13 Conn. 212, 219; *Del.*: 1852, *Polite v. Jefferson*, 5 Harringt. 388; *Fla.*: 1895, *Edwards v. Rives*, 35 Fla. 89, 17 So. 416 (must be clearly proved); *Ill.*: 1864, *Aulger v. Smith*, 34 Ill. 534 (lost deposition; recollection-evidence admitted); 1897, *Gage v. Eddy*, 167 id. 102, 47 N. E. 200 (deposition lost after filing; offeror may prove contents, without re-taking the deposition); *Ind.*: 1829, *Jackson v. Cullum*, 2 Blackf. 228 (judgment, etc.); 1853, *Schwartz v. Osthimer*, 4 Ind. 109

although it was for a time adopted in one jurisdiction;² here distinguish the impropriety of proving an oral judicial act (*post*, § 2450) from the propriety of proving a written judicial record by "oral" evidence. It has been repudiated for *deeds*;³ note that this permission to prove a written conveyance

(plea); 1881, *Johnson v. State*, 80 Id. 220, 221 (summons); 1886, *McCullough v. Davis*, 108 Id. 292, 296, 9 N. E. 276 (title-records; "much latitude is allowable"); 1886, *McFadden v. Fritz*, 110 Id. 1, 5, 10 N. E. 120 (writ); *Id.*: 1859, *Higgins v. Reed*, 8 Ia. 298; 1864, *Davis v. Strohm*, 17 Id. 421, 424, 427 (bond); *Ky.*: 1840, *Hawkins v. Cralg*, 1 B. Mour. 27 (writ); *La.*: 1841, *Childress v. Allin*, 17 La. 37; 1893, *Landry v. Landry*, 45 La. An. 1113, 13 So. 672 (completing a partly burnt deed by oral evidence); *Me.*: 1843, *Gore v. Elwell*, 9 Shepl. 442; 1848, *Wing v. Abbott*, 15 Id. 367, 373; *Mass.*: 1815, *Stockbridge v. W. Stockbridge*, 12 Mass. 399, 402 (act of incorporation of town); 1816, *Sturtevaut v. Rubinsau*, 18 Pick. 175, 179 (admitting a copy of a *scire facias* writ, loss being shown; "it would be as correct to say that the loss of an original deed should affect the grantee's title to land" as to exclude such proof); 1839, *Pruleu v. Allen*, 23 Id. 184, 187 (admitting a copy of a license of sale shown to be lost); 1842, *Sayles v. Briggs*, 4 Metc. 421, 423; 1842, *Eaton v. Hall*, 5 Id. 287, 291 (an order of Court directing reference to arbitrators; a copy admitted, on proof of loss; "the consideration that a particular document constitutes the basis of the jurisdiction of a Court does not essentially vary the rule in regard to secondary evidence, though it may require more care and vigilance in its application"); 1851, *Com. v. Roark*, 8 Cush. 210, 212 (complaint and warrant); 1854, *Tillotson v. Warner*, 3 Gray, 574, 577; *Mich.*: 1857, *People v. Denuis*, 4 Mich. 609, 617 (indictment); 1874, *Millar v. Babcock*, 29 Id. 526, 527 (attachment); 1878, *Drake v. Kinsell*, 38 Id. 232, 234; 1886, *People v. Coffman*, 59 Id. 1, 6, 26 N. W. 207; 1886, *Blanchard v. DeGraff*, 60 Id. 107, 111, 26 N. W. 849; 1888, *Cilley v. Van Patten*, 68 Id. 80, 83, 35 N. W. 831; *Minn.*: 1866, *Winona v. Huff*, 11 Minn. 119, 128; *Miss.*: 1850, *Scott v. Loomis*, 13 Sm. & M. 633, 641 (justice's docket); 1863, *Martin v. Williams*, 42 Miss. 210, 218, *semble*; *Mo.*: 1827, *Ravenscroft v. Giboney*, 2 Mo. 1 ("though the record may not have been very ancient"); 1871, *Fouk v. Colburn*, 48 Id. 225, 230; 1873, *Compton v. Arnold*, 54 Id. 147; 1884, *State v. Schooley*, 84 Id. 447, 454 (tax-books); 1899, *Crane v. Dameron*, 98 Id. 567, 570, 12 S. W. 251; *N. J.*: 1849, *Browning v. Flanagan*, 22 N. J. L. 567, 571 (record); *N. C.*: 1813, *Stuart v. Fitzgerald*, 2 Mnph. 255 (*capias*); 1835, *Kello v. Maget*, 1 Dev. & B. 414, 424; 1878, *Rollins v. Henry*, 78 N. C. 342, 347; 1887, *Mobley v. Watts*, 98 Id. 294, 287, 3 S. E. 677; *Pa.*: 1792, *Morris v. Vanderen*, 1 Dall. 64, 65 (lost survey); 1793, *Todd v. Ockerman*, 1 Yeates 295, 297 (same); 1821, *Wolverton v. Com.*, 7 S. & R. 273, 276; 1847, *Farmers' Bank v. Gilson*, 6 Pa. 51, 57; *Tenn.*: 1816, *Read v. Staton*, 3 Hayw. 159 (judgment); *U. S.*: 1806, *U. S. v. Lambell*, 1 Cr. C. C. 312 (warrant); *Vt.*: 1852, *Spear v.*

Tilson, 24 Vt. 420, 423 (grand list of assessment); 1855, *Brown v. Richmond*, 27 Id. 583 (attachment); *Va.*: 1832, *Newcomb v. Drummond*, 4 Leigh 57, 60; *Wis.*: 1880, *Wambold v. Vick*, 50 Wis. 456, 458, 7 N. W. 438, *semble*.

² 1799, *Margett v. —*, 2 Hayw. 76 (*Moo v. J.*: "It is better to suffer a private mischief than a public inconvenience"; copy admissible; but oral evidence of a lost record's contents excluded); 1839, *Smith v. Dudley*, 2 Ark. 60, 63 (lost or destroyed record may not be proved by parol when it "constitutes the sole foundation of the proceeding or cause of action"; but only by "authenticated or sworn copy"); 1842, *Williams v. Brummel*, 4 Id. 129, 137 (judicial record, not by parol, but only by certified copy); 1842, *Fowler v. More*, ib. 570, 573 (lost record may be proved by copy; at least "such portions as process and the like"); 1843, *Bailey v. Palmer*, 5 Id. 208 (same); 1847, *Alexander v. Foreman*, 7 Id. 252 (same); 1843, *Wallace v. Collins*, 5 Id. 41, 48 (execution; if no objection is taken, any evidence admissible); 1849, *Phelan v. Bonham*, 9 Id. 388, 391 (same for a notice); 1850, *Davies v. Pettit*, 11 Id. 349, 351 (lost or destroyed judicial record may be established by parol; see quotation *supra*, overruling *Smith v. Dudley*, and the intervening cases); 1860, *Gracie v. Morris*, 22 Id. 415, 418 (preceding case ignored; but copy of lost record allowed); 1870, *Mason v. Bull*, 26 Id. 164, 167 (*Davies v. Pettit* approved); 1878, *Gates v. Bennett*, 33 Id. 475, 489 (same); 1881, *Miller v. State*, 40 Ark. 488, 495 (indictment destroyed, and record not restored; secondary evidence allowed; *Eakin, J., diss.*); 1886, *Hallum v. Dickinson*, 47 Id. 120, 125, 14 S. W. 477 (*Davies v. Pettit* approved).

³ This result was (as might be inferred from the historical development noted *ante*, § 1177) at first not accepted in *England*; but by the end of the 1700s it was fully established: 1711, *Seymour's Case*, 10 Mod. 8 ("The Court seemed of opinion that in case a deed was lost by some inevitable accident, that there it might be proved by a copy; but in case there was no copy, the contents of it could not be proved from the memory of those that knew the deed; and though it were hard for a man that had no copy, to lose the benefit of his deed, yet the inconveniences of admitting that sort of evidence would be greater"; but otherwise if the defendant had the deed, "for that in this case the danger of allowing this sort of evidence was none at all; for if the defendant was wronged by the parol evidence, it was in his power to set all right by producing the deed"); 1721, *Dalston v. Coatsworth*, 1 P. Wms. 731 (burnt deed supplied by parol testimony); 1768, *Illinckstone, Commentaries*, III, 368 (an "attested copy may be produced or parol evidence be given of its contents"); and the citations in note 1, *supra*.

In the *United States* the propriety of such evidence is everywhere conceded: 1859, *Shorter*

by "parol" evidence of its contents is a different thing from proving an oral or "parol" conveyance forbidden by the statute of frauds or by the "parol evidence" rule (*post*, § 2437);⁴ distinguish also the requirement as to the completeness of detail with which the deed's contents must be proved (*post*, § 2105), and the degree of positiveness which the proof must reach (*post*, § 2498). A missing *negotiable instrument* may also be proved by recollection-evidence.⁵ In the case of a missing *will*, it is equally well settled that recollection-testimony is admissible;⁶ but here certain other requirements apply which must be distinguished, namely, the number of witnesses by which the contents or the execution must be proved (*post*, § 2052), the degree of positiveness or clearness which the evidence must attain in order to suffice (*post*, § 2498), the completeness of the details of the contents as

v. Sheppard, 33 Ala. 648, 653; *Conl. C. C. P.* 1872, § 1937 (of private writings, "by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness"); 1794, *Kelley v. Riggs*, 2 Root 126, 128; 1837, *St. Peter's Church v. Beach*, 26 Conn. 355, 359, 365; 1887, *Bush v. Stanley*, 122 Ill. 406, 416, 13 N. E. 349; 1847, *Chisholm v. Ben*, 7 B. Monr. 408, 414 (but for the mere loss of a will, as distinguished from fraudulent suppression, circumstantial evidence does not suffice); 1885, *Lane v. Cameron*, 37 La. An. 250; 1901, *Willett v. Andrews*, 106 La. 319, 30 So. 883; 1889, *Wakofield v. Day*, 41 Minn. 344, 347, 43 N. W. 71; 1827, *Colby v. Keunlston*, 4 N. H. 262, 265; 1844, *New Boston v. Dunharton*, 15 id. 201, 205 (charter); 1844, *Downing v. Pickering*, lb. 344; 1850, *Forsaith v. Clark*, 21 id. 409, 417 (proprietary charter); 1852, *Neally v. Greenough*, 25 id. 325, 330 ("Generally the party who is driven by the loss or destruction of a paper . . . to resort to secondary evidence is confined to no particular species of evidence; it may be more or less direct, or merely circumstantial"); 1831, *Jackson v. Livingston*, 7 Wend. 136, 140; 1861, *Miltimore v. Miltimore*, 40 Pa. 151, 154 (abstract); 1798, *Frost v. Brown*, 2 Bay 135, 138 ("It is very clear that the existence and loss of a deed may be presumed by a jury from circumstances"); 1895, *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 347 (lost deed established by statements against interest in a chancery answer).

⁴ 1861, *Jenkins, J.*, in *Roe & McDowell v. Doe & Irwin*, 32 Ga. 39, 51 ("It is not evidence of a conveyance by parol. It is parol evidence of a conveyance by deed, the loss or destruction of which has been proven"). Here compare the New York cases (*ante*, § 1257) excluding certain admissions of parties as amounting to an oral conveyance.

⁵ 1809, *Jones v. Falles*, 5 Mass. 101 (promissory notes); see the citations *ante*, § 1197.

The following ruling is peculiar: 1869, *Austin v. People*, 51 Ill. 236, 239 (copy of a confession, made two years afterward from recollection alone, excluded).

⁶ *Eng.*: 1824, *Davis v. Davis*, 2 Add. Eccl. 223, 224, 228; 1864, *Wharram v. Wharram*, 3 Sw. & Tr. 301 (pointing out the dangers of such evidence, but concluding that "at any rate" it "ought to be of a very cogent character"); 1858,

Brown v. Brown, 8 E. & B. 876 (Lord Campbell, C. J.: "It was the common case of a lost instrument; and parol evidence of the contents of a lost instrument may be received as much when it is a will as if it were any other"); 1876, *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 238 (Jessel, M. R.: "Can we admit, as a matter of course, secondary evidence in proof of a will? I should have thought that there could be but one answer to that question, and had it not been for the doubt thrown out by a very eminent judge in the case of *Wharram v. Wharram*, I should have thought it impossible to argue the question. . . . The whole theory of secondary evidence depends upon this, that the primary evidence is lost, and that it is against justice that the accident of the loss should deprive a man of the rights to which he would otherwise be entitled. I am at a loss to discover any reason whatever for distinguishing between the loss of a will and the loss of a deed"); 1890, *Harris v. Knight*, L. R. 15 id. 170, 179; *U. S.*: 1884, *Jacques v. Horton*, 76 Ala. 238, 245; 1886, *Skiggs v. Horton*, 82 id. 353, 2 So. 110; 1882, *Anderson v. Irwin*, 101 Ill. 411, 415; *Me. Pub. St.* 1883, c. 64, § 7 (a lost will may be proved by a copy and subscribing witnesses' testimony, or by "any other evidence competent"); 1825, *Clark v. Wright*, 3 Pick. 66, 68; 1844, *Davis v. Sigonruoy*, 8 Metc. 487; *Minn. Gen. St.* 1894, § 4442 (a will lost or destroyed or on of the State and unproducible is provable by "parol or other evidence"); 1834, *Graham v. O'Fallon*, 3 Mo. 507; 4 id. 601, 607; 1843, *Kearns v. Kearns*, 4 Harringt. 83; 1863, *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401, 405; 1898, *Coddington v. Jenner*, 57 N. J. Eq. 528, 41 Atl. 874; 1805, *Jackson v. Lucett*, 2 Cal. 363, 367; 1863, *Harris v. Harris*, 26 N. Y. 433; 1878, *Foster's Appeal*, 87 Pa. 67, 75 ("Its loss or accidental destruction differs not from the loss or destruction of any other solemn instrument, such as a deed, note or bond, or a record"); 1795, *Potts v. Cogdell*, 1 De Suss. 454; 1795, *Legare v. Ashe*, 1 Bay 464; 1818, *Reeves v. Reeves*, 2 Mill Const. 394; *Tenn. Code*, 1896, § 3911 (if the original is lost or mislaid, the trial may proceed upon a supposed copy); 1897, *McNeely v. Pearson*, — *Tenn.* —, 42 S. W. 165; 1842, *Minkler v. Minkler*, 14 Vt. 125, 127; 1868, *Dudley v. Wardner*, 41 id. 59.

thus evidenced (*post*, § 2106), the admissibility of circumstantial evidence, including the testator's belief as to the contents (*ante*, § 271), the admissibility of the testator's declarations (*post*, § 1734), and the conditional preference for a copy, if available, over recollection-testimony (*post*, § 1268).

§ 1268. *Is a Written Copy conditionally preferred to Recollection? Admissibility of Recollection before showing Copy unavailable.* Whether a copy must be offered, if available, *i. e.* whether a copy is conditionally preferred to recollection-testimony, is a question that is difficult to answer, both upon principle and upon precedent. There are strong reasons on both sides of the question, and there has been little consistency of rulings even within single jurisdictions. The following passages expound the reasons for requiring such a preference:

1839, *Anon.*, in 4 Monthly Law Magazine, 265, 267: "The argument relied on to show that a distinction exists among the various species of secondary evidence is a supposed equitable extension of the principle which postpones all secondary evidence until the non-production of the primary is accounted for. . . . Does it not follow, [in the claim on this behalf,] as a necessary corollary from this proposition, that if certain species of secondary evidence be manifestly better and more likely to contain a true account of what was in the original than others, a party ought not to be allowed to resort to the latter until his incapacity to produce the former be demonstrated? . . . [The argument is that] a copy, the correctness of which is sworn to by a witness who has compared it with the original is far more to be relied on than the mere memory of that witness as to the contents of the latter, — both on account of the comparative imperfection of all verbal testimony, when compared with written, and also that in such a case the utmost which any witness under ordinary circumstances can be expected to remember of the contents of a writing in which he is not interested is that he shall have a general recollection of its leading features, but that he is not likely to remember conditions, limitations, or particular words used in it, which might however have a most material effect in altering or qualifying its meaning; so that . . . [only when counterpart, copy, and abstract fail] he may then, but not till then, be allowed to resort to the dangerous and unsatisfactory proof deduced from the memory of a witness."

1849, *Nisbet, J.*, in *Doe v. Biggers*, 6 Ga. 188, 199: "Now the highest degree of secondary evidence is not required. The rule upon that point is this: When 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."

1856, *Goldthwaite, C. J.*, in *Harvey v. Thorpe*, 28 Ala. 250, 262: "[The American weight of authority requires that] the best kind of that character of evidence which appears to be in the power of the party to produce must be offered. We confess that the American rule appears to us more reasonable than the English; and we see great propriety, if there was an examined copy of an instrument in the possession of a party, in refusing to allow him to prove it by the uncertain memory of witnesses. A copy of a letter, taken by a copying press, would unquestionably be better evidence of the original than the recollection of its contents by a witness; and the same reasons which would require the production of the original if in the control of the party, would operate in favor of the production of the facsimile or of the examined copy. But in all these cases the strength of the proposition consists in the fact that there is secondary evidence in its nature and character better than that which the party offers, and that it is in his power to produce it."

The arguments against making any such distinction are thus set forth :

1840, *Abinger, L. C. B.*, in *Doe v. Ross*, 7 M. & W. 102 (the question was whether an attested copy of a deed was to be preferred to the testimony of one who had read it): "Upon examination of the cases, and upon principle, we think there are no degrees of secondary evidence. The rule is that if you cannot produce the original, you may give parol evidence of its contents. If indeed the party giving such parol evidence appears to have better secondary evidence in his power which he does not produce, that is a fact to go to the jury, from which they might sometimes presume that the evidence kept back would be adverse to the party withholding it. But the law makes no distinction between one class of secondary evidence and another;" *Alderson, B.*: "The objection [to secondary evidence] must arise from the nature of the evidence itself. If you produce a copy, which shows that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case; the existence of an original does not show the existence of any copy; nor does parol evidence of the contents of a deed show the existence of anything except the deed itself. If one species of secondary evidence is to exclude another, a party tendering parol evidence of a deed must account for all the secondary evidence that has existed. He may know of nothing but the original, and the other side at the trial may defeat him by showing a copy, the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all."

1842, Professor *Simon Greenleaf*, *Evidence*, § 84, note: "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 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.¹ . . . The American doctrine, as deduced from various authorities, seems to be this; that if, from the nature of the case itself, . . . 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."

1849, *Lipcomb, J.*, in *Lewis v. San Antonio*, 7 Tex. 288, 315: "It is believed that the rule sanctioned by Greenleaf is more philosophical and harmonizes better with the progress of the more enlightened jurisprudence of the age on the subject of the admissibility of evidence, — that is, to curtail and limit the objections to the competency and let the evidence in, to go to the jury to judge of its weight or credibility. In every case where a party kept back a more satisfactory kind of evidence that was in his power to have produced and with his knowledge, it would operate strongly against such as he had offered, of less certainty, with the jury. This would prevent embarrassing discussions that would often arise suddenly, at the moment when testimony would be offered, whether it was most satisfactory and carried the most weight of any that could be offered."

¹ See these arguments more fully set forth *supra*, where the author of the article concludes in the article in 4 Monthly Law Magazine 265, strongly against a rule of preference.

The only question should be whether it was admissible and legal; the party offering it would take the risk of its being satisfactory to prove the fact for which it was offered to the jury."

It will be seen that the conflict of arguments is due on the one hand to the conceded desirability of employing a copy as better than mere recollection, and, on the other hand, to the hardship of exacting this invariably of a proponent who may be put to excessive trouble to obtain such a copy. A simple solution, giving effect to some extent to both of these considerations, is the following: Let the proponent of recollection-testimony be required, before using it, to show that he has not within his control a copy; if he has not, then he may offer recollection-testimony; and the opponent may then, if there is any real dispute on his part as to the contents, put in a copy if one is available. This rule procures the benefit of a copy without putting an undue burden upon the proponent; for if a copy is available at all, elsewhere than in the proponent's own control, it is fitter that the opponent should have the risk and the trouble of procuring it. The rule then, briefly, would be: The party offering to prove the contents of an unavailable original document, must offer a copy, if he has one in his control, in preference to recollection-testimony.

Coming to the rule of law as judicially enforced, it may first be noted that a fallacious definiteness has often been given to the question by referring (as in the passage above quoted) to the "English" rule as distinguished from the "American" rule. There is no such distinction. The English precedents are divided, though the ruling in *Doe v. Ross* (quoted above) finally established a rule for one class of cases; and the American jurisdictions are also divided. Moreover, any such generality as "there are no degrees of secondary evidence"² is of no value, because it is not correct; for there are at least two or three settled distinctions in that category (as the precedents in the ensuing sections indicate); such general remarks cannot safely be trusted and must be construed merely with reference to the distinction then before the Court.

As to the state of the precedents, it is clear that the orthodox English doctrine did for *deeds* prefer a copy before recollection-testimony;³ and the same preference has been recognized in proving *various kinds of documents*, in

² 1833, *Brown v. Woodman*, 6 C. & P. 206 (Parke, J.: "There are no degrees in secondary evidence," except perhaps for duplicate originals); 1858, *Fitzgerald v. Williams*, 24 Ga. 343, 345 (there are no degrees); 1869, *Goodrich v. Weston*, 102 Mass. 353, *semble* (in general, "there are no degrees of legal distinction"); 1873, *Elliott v. Van Buren*, 33 Mich. 49, 52 ("There are no degrees of evidence, except where some document [must be produced in the original]"); 1873, *Cornett v. Williams*, 20 Wall. 226, 246 ("This Court has not yet gone the length of the English adjudications, which hold without qualification, that there are no degrees in secondary evidence").

³ 1773, Lord Mansfield, C. J., in *Ludlam's*

Will, Loft 362 ("If you cannot prove a deed by producing it, you may produce the counterpart; if you can't produce the counterpart, you may produce a copy, even if you cannot prove it to be a true copy; if a copy cannot be produced, you may go into parol evidence of the deed"); 1740, *Villiers v. Villiers*, 2 Atk. 71 (Lord Hardwicke, L. C., places counterpart, copy, and parol evidence in this order); 1744, *Omichund v. Barker*, 1 id. 21, 49 (Lord Hardwicke, L. C., places a copy before "witnesses who have heard the deed; and yet it is a thing the law abhors to admit the memory of man for evidence"). For the rule requiring first a counterpart as equivalent to the original, see *ante*, § 1233.

rulings both English and American, although it does not usually appear clearly whether the preference is conditional on the copy being anywhere available or merely on its being in the proponent's control, nor whether it is for the opponent to show that such a copy is available or for the proponent to show that it is not available.⁴ On the other hand, it is clear that by the ruling in *Doe v. Ross* the English rule has been changed, and no preference is now accorded to a copy, for proving deeds and other private documents; and this result has been accepted in not more than a minority of the American Courts that have ruled upon the question;⁵ although it is to be remembered (as appears in § 1269, *post*) that such rulings must be understood as applying usually to private documents only, and that any general principle enunciated in them cannot ordinarily be construed to mean more than that.

In determining what is a copy, for the purposes of the present rule, an alleged copy submitted to the witness and verified by him as correct, though not made nor previously seen by him, would perhaps be treated as a copy;⁶

⁴ *England*: 1791, *Breton v. Cope*, Peake 30 (Bank of England stock-books; written copy required); 1810, *Rhind v. Wilkinson*, 2 Taunt. 237 (license to trade during war; the register of licenses at the Secretary of State's office held a preferable source to the captain's recollection); *United States*: 1849, *Doe v. Biggers*, 3 Ga. 188, 199 (copy preferred conditionally; see quotation *supra*; circumstantial proof of contents here allowed); 1867, *Williams v. Waters*, 36 id. 454, 458 (certified copies of contract, preferred to oral testimony); 1900, *Shedden v. Hearl*, 110 id. 461, 35 S. E. 707 (use of a copy of insurance application excludes recollection-testimony of contents); Ill. Rev. St. 1874, c. 118, § 28 (where an original conveyance, etc., is shown lost or out of the party's power, and the record is destroyed, "the Court shall receive all such evidence as may have a bearing on the case to establish the execution or contents" of the conveyance, record, etc.); 1899, *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538, 58 N. E. 63 (after fruitless search for a record of a lost deed, memoranda, etc., showing the contents are admissible); 1858, *Madison I. & P. R. Co. v. Whitesel*, 11 Ind. 55, 57 (certified copy of corporation-records, preferred to oral testimony); 1861, *Indianapolis & C. R. Co. v. Jewett*, 18 id. 273 (sworn copy of corporation-records not preferred to oral testimony, where the secretary had refused to produce the original or to furnish a copy); 1875, *Day v. Backus*, 31 Mich. 241, 245 (whether fresh copies of a letter are preferable to oral testimony, not decided); 1900, *Phillips v. U. S. Benevolent Soc'y*, 125 id. 168, 84 N. W. 57 (insurance application filed in Canada; sworn or certified copy preferred; *Montgomery, C. J., and Hooker, J., diss.*); 1832, *Smith v. Axtell*, 1 N. J. L. 494, 498 (copy of written agreement preferred to oral testimony); 1862, *Stevenson v. Hoy*, 43 Pa. 191, 193, 198 (facsimile press copy preferred to copy from recollection); 1822, *U. S. v. Britton*, 2 Mason 464, 468 (examined copy, "if any such exist and can be found," preferred to oral testimony; here applied to a forged document); 1823, *Riggs v.*

Taylor, 9 Wheat. 483, 488 ("[He] may read a counterpart, or if there is no counterpart, an examined copy, or if there should not be an examined copy, he may give parol evidence of its contents"); 1882, *Stebbins v. Dunham*, 108 U. S. 32, 43, 2 Sup. 313 (following *Riggs v. Taylor*, as to order of preference, and admitting oral testimony of contents of a deed by one who verified a certified copy not made by himself); 1899, *Lloyd v. Supreme Lodge*, 38 C. C. A. 654, 98 Fed. 66 (certified copy of lodge by-law, preferred to oral testimony); 1885, *Cleveland v. Barnham*, 64 Wis. 347, 357, 359, 25 N. W. 407 (bank-books: certain stock-certificates held better evidence than oral testimony).

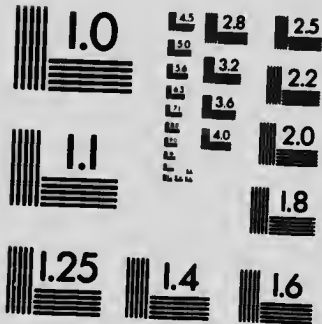
⁵ *England*: 1807, *Kensington v. Ingle*, 8 East 273, 279, 289 in memorandum book of trading licenses, kept by a governor's secretary, not preferred to his oral statement of a licensee's contents); 1808, *Fisher v. Samuda*, 1 Camp. 193 (letter; copy not preferred to recollection); 1834, *Doe v. Cole*, 6 C. & P. 359 (tablet on a church; oral description allowed); 1840, *Doe v. Ross*, 7 M. & W. 102 (as between an attested copy of a deed and the testimony of one who had read the deed, no preference was given to the former; see quotation *supra*); 1884, *Jaques v. Horton*, 78 Ala. 238, 248 (copy of a lost will, not preferable to oral testimony); 1858, *Carpenter v. Dame*, 10 Ind. 125, 132 (sworn copy of a bond, not preferred to oral testimony by recollection; no degrees "as a general rule" in secondary evidence; *Coman v. State*, 4 Blackf. 241, repudiated); 1873, *Eslow v. Mitchell*, 26 Mich. 500, 502 (copy not preferred to oral testimony, for private writings not existing in counterpart); 1893, *Minneapolis T. Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546 (supposed copy of notice not preferred to sender's recollection); 1805, *Jackson v. Lucett*, 2 Chi. 363, 367 (deed is provable orally or by copy); 1805, *Tower v. Wilson*, 3 id. 174 (notice served; no copy having been kept, it was proved orally).

⁶ 1833, *R. v. Fursey*, 3 C. & P. 81, 84 (in notice, *Parke, J.*: "The usual way in such cases is to give a copy to the witness and ask if



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though obviously it is not, since the witness is dependent upon his memory for verifying the correctness of the alleged copy, and his testimony is open to nearly all the possibilities of error to which ordinary recollection-testimony is open.

§ 1269. **Same:** (a) **Copy preferred for proving Public Records.** It has been noted (*ante*, § 1268) that the particular hardship of a rule of preference for copies lay in the circumstance that it imposed upon the proponent the burden of searching in possible places and of proving that a copy was not to be had. Such a hardship disappears when the original is kept in a known public office, whence copies may be obtained by any one upon request. This is apparently the reason for a distinction well settled in all jurisdictions, namely, that *judicial records*, if in existence, must be proved by copy in preference to recollection-testimony.¹ It would seem that upon the same principle a copy would be preferred for proving a document of any sort in public *official custody*; this is the result accepted in a majority of jurisdictions;² though the contrary view finds some support.³ Certainly some limi-

it is a copy of what he saw. I do not say that parol evidence is inadmissible"; see other cases *post*, § 1280, where the admissibility of such a copy is considered.

¹ See the cases cited *ante*, § 1215, and § 1244, where this is assumed, and also the citations in § 1267, and the following cases: 1810, *Brush v. Taggart*, 7 John. 19 (sworn copy of a writ of *certiorari* preferred to oral evidence) 1815, *Foster v. Trull*, 12 id. 456 (same, for writ of arrest); 1886, *Otto v. Trump*, 115 Pa. 425, 429, 8 Atl. 786 (contents of a foreign record; a copy preferred to parol).

But when a copy has been offered, the opponent may well be allowed to *dispute its correctness* by recollection-testimony without endeavoring to obtain another copy; 1866, *Estes v. Farnham*, 11 Minn. 423, 437 (lost pleadings; incorrectness of a supposed copy may be shown by parol, where better evidence is not disclosed by the ease). *Contra*, 1900, *Shedden v. Heard*, Ga., *semble*, cited *ante*, § 1268.

² *A/n.*: 1881, *Miller v. Boykin*, 70 Ala. 469, 478 (postmaster's register of mail-arrivals, etc.; not allowed to testify from memoranda of the register; a sworn or a certified copy indispensable); Ark.: 1896, *Jones v. Melindy*, 62 Ark. 203, 204, 36 S. W. 22 (register of mortgages testifying to contents of record not lost, excluded; proof must be by examined or certified copy); 1898, *Redd v. State*, 65 id. 475, 47 S. W. 119 (certified copy of pardon, if available, preferred to oral testimony of it); Cal.: C. C. P. 1872, § 1855 (for public or recorded documents,

³ 1835, *Draper v. Clemens*, 4 Mo. 52, 54 (copy of notary's register not preferred to the protest or to his testimony); 1866, *Wells v. J. I. Mfg. Co.*, 47 N. H. 235, 256 (record in a town clerk's office; provable by parol, "where the case from its nature does not disclose the existence of other and better evidence"; here refusing to have a record made up anew); 1837, *Blackburn v. Blackburn*, 8 Oh. 81, 83 (lost deed;

a copy is necessary; for documents lost or in the opponent's possession, "either a copy or oral evidence"); 1856, *Brotherton v. Mart*, 6 Cal. 488 (recorded deed; record copy preferred to other evidence); Ga.: Code 1835, § 5220 (on loss of record and original document, any evidence admissible "which does not disclose the existence of other and better evidence"); compare also § 5173 (examined copy preferred to oral evidence); 1873, *Mobley v. Breed*, 48 Ga. 44, 47 (sworn copy of assessment-proceedings, preferred to oral testimony); 1895, *Bowden v. Achor*, 95 id. 254, 22 S. E. 254 (document in another State; oral testimony sufficient, unless a certified copy were obtainable, as in the case of an official document); *Id.*: Rev. St. 1887, § 5999 (for public records, or other documents in custody of a public officer, or recorded, a copy must be produced; for others, "either a copy or oral evidence of the contents"); Ill.: 1844, *Williams v. Jarrot*, 6 Ill. 120, 129 (clerk's certificate of letters of administration, preferred to oral evidence of appointment); 1848, *Mariner v. Saunders*, 10 id. 113, 121 (sworn or certified copy of a recorded deed, if available, preferred to recollection); *Id.*: 1859, *Higgins v. Reed*, 8 Ia. 298, 300 (copy of a public record preferred to oral evidence); 1861, *Horseman v. Todhunter*, 12 id. 230, 234 (certified copy of recorded mortgage preferred to oral evidence); Mass.: 1829, *Poignand v. Smith*, 8 Pick. 272, 279 (registry-copy of a mortgage preferred to oral testimony); 1832, *Sheldon v. Frank*, 12 id. 567 (oral testimony of a record's

certified copy of record not preferred to oral recollection); 1832, *U. S. v. Reylburn*, 6 Pet. 352, 367 (privateer's commission by Government of Buenos Ayres; sworn or certified copy from the record, not preferred to testimony of one who had seen the commission, on the facts).

Distinguish the principle of § 1244, *ante*, where the object of proof is not the terms of the record, but its net effect.

tations to such a general rule may well obtain, and there should be a judicial discretion to make exceptions.

Where the judicial or official record is no longer in existence at the time of trial, the reason for the rule falls away, and it should be enough to require the proponent to show, before using recollection-testimony, that he has no copy within his control;⁴ but the fact that the record is in another jurisdiction would not exempt from the requirement of a copy,⁵ because a copy is obtainable and because the procuring a copy is no more difficult than the procuring a perusal for recollection-testimony.

§ 1270. *Same: (b) Copy of Record of Conviction, as preferred to Convict's Testimony on Cross-Examination.* When it is desired to prove against a witness his conviction of crime, for the purpose either of excluding him as incompetent by infamy (*ante*, § 519) or of discrediting him by the conviction (*ante*, § 980), the object of the proof is the contents of the record embodying the judgment of conviction. A strict application, therefore, of the foregoing principle (*ante*, § 1269) would require the record's contents to be proved by a copy of it, and not by recollection-testimony:

1806, *Ellenborough, L. C. J.*, in *R. v. Castell Careinion*, 8 East 77, 79: "It cannot seriously be argued that a record can be proved by the admission of any witness. He may have mistaken what passed in court, and may have been ordered on his knees for a misdemeanor. This can only be known by the record."

1822, *Com. v. Green*, 17 Mass. 514, 537: "If anything short of a record should be admitted to impeach the competency of a witness, it would be easy for parties accused to protect themselves from punishment; and it would be in most cases impossible for the witness attacked without previous notice to defend his reputation."¹

But, while it may be conceded that such should be the rule as against the recollection-testimony of a second witness called for the purpose of proving

contents; a certified transcript preferred); *Mich.*: 1873, *Platt v. Haner*, 27 Mich. 167 (exemplification of U. S. land-patent, preferred to oral testimony); *Mont.*: 1878, *Belk v. Meagher*, 3 Mont. T. 65, 72 (official copy of original title-records, preferred to recollection of witnesses as to location); *N. H.*: 1827, *Colby v. Kenniston*, 4 N. H. 262, 265, *semble* (record of lost deed, preferred to oral testimony); *N. C.*: 1835, *Kello v. Maget*, 1 Dev. & B. 414, 424 (for bonds, records, etc.; order of preference is a copy, an abstract, recollection); *Or.*: C. C. P. 1892, § 691 (like Cal. C. C. P. § 1855); *Tenn.*: 1808, *Hampton v. Mc'Ginnis*, 1 Overt. 286, 294 (official list of land-entries in lost books, preferred to oral evidence of the entries); 1809, *Reid v. Dodson*, *ib.* 395, 402 (copy of recorded plat, preferred to surveyor's testimony, to prove an alteration); *Tex.*: 1849, *Lewis v. San Antonio*, 7 Tex. 288, 311 (whether a certified or sworn copy of a lost recorded original is preferred to oral testimony; discussed but not decided); 1863, *Werbiskie v. McManus*, 31 *id.* 116, 122, *semble* (certified copy of letters of administration, preferred to clerk's testimony on the stand); *Utah Rev. St.* 1898, § 3410, par. 5 (like Cal. C. C. P. § 1855); *Wis.*: 1861, *Sex-*

smith v. Jones, 13 Wis. 565, 568 (certified copy of record of lost mortgage preferred to oral testimony); 1881, *Johnson v. Ashland L. Co.*, 52 *id.* 458, 463, 9 N. W. 464, *semble* (same).

For cases preferring the official custodian's testimony to the *absence of a record*, see *ante*, § 1244.

⁴ 1878, *Hittson v. Davenport*, 4 Colo. 169, 174 (burnt judicial records; contents proved orally, the existence of better evidence not appearing); 1890, *Conway v. John*, 14 *id.* 30, 23 Pac. 170 (lost files, proved orally); 1895, *Hobbs v. Beard*, 43 S. C. 370, 21 S. E. 305 (oral evidence of lost record's contents, admitted where no copy appeared to be in offeror's power).

⁵ *Otto v. Trump, Pa.*, *Bowden v. Achor, Ga.*, in notes 1, 2, *supra*. *Contra*: 1803, *Young v. Gregorie*, 3 Call 446, 452 (record in a foreign country may be proved by depositions, etc., without producing a copy of the record); 1809, *Hadfield v. Jameson*, 2 Munf. 53, 70, 76, 78 (preceding case approved).

¹ This, however, was said only of testimony by a second witness, and not of the first witness' cross-examination.

the conviction, it is surely a straining of technical requirements to forbid proof by the testimony of the impeached witness himself, given on cross-examination. Lord Ellenborough's sober suggestion that the witness "may have mistaken what passed in court" is a refinement of apprehension, and borders nearly on the ridiculous. That there is any real risk of reaching an erroneous result by taking the witness' own admission against his credit, extracted on cross-examination, is impossible; there is in such a case no need to insist upon a copy:

1869, *Cooley, C. J.*, in *Clemens v. Conrad*, 19 Mich. 175: "We think the reasons for requiring record evidence of conviction have very little application to a case where the party convicted is himself upon the stand and is questioned concerning it with a view to sifting his character upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight that it may almost be looked upon as purely imaginary; while the danger that worthless characters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent."

Such, at least, was the earlier rule, when on the *voir dire* a witness' infamy could be proved by his own admissions.² But, by the end of the 1700s, the English Courts were discouraging, in every technical way possible, objections based on the outworn rules of incompetency; and thus it came about that, while the incompetency of infamy still existed, the absolute rule was enforced that proof must be made by a copy of the record.³ The rule thus established was usually made applicable also (except where statute had expressly intervened) for the purposes of discrediting a witness, after the statutory reforms under which infamy ceased to disqualify; though the reasons for treating with disfavor such a method of excluding a witness had little force for the mere process of discrediting him.⁴

The result is that three types of rule now obtain in the different jurisdictions: (1) the requirement of a copy in all cases; (2) the allowance of an admission on cross-examination of the witness to be impeached, but the requirement of a copy or an abstract when proof is made by another witness, — this rarely by common-law decision, but widely by statute; (3) the allowance of recollection-testimony either from the witness to be impeached or from another, — this rarely, and by statute only. The second form is the only proper one, and now obtains in the majority of jurisdictions.⁵

² 1787, *R. v. Priddle*, Leach Cr. L. 3d ed., I, 382 ("being examined on the *voir dire*, he acknowledged" a conviction, and was excluded); 1791, *R. v. Edwards*, 4 T. R. 440 ("whether he had not stood in the pillory for perjury"; allowed, and witness rejected). There had been an earlier case to the contrary: 1699, *R. v. Warden of the Fleet*, 12 Mod. 337, 341.

³ 1763, Buller, *Trials at Nisi Prius*, 292 ("Note: the party who would take advantage of this exception to a witness must have a copy of the record of conviction ready to produce in Court"); 1806, *R. v. Castell Careinion*, 8 East 77; 1817, *Ellenborough, L. C. J.*, in *R. v. Watson*,

² Stark. 116, 151 ("When a crime is imputed to a witness of which he may be convicted by due course of law, the Court know but one medium of proof, — the record of conviction"); 1852, *Cresswell, J.*, in *Macdonnell v. Evans*, 11 C. B. 930, 935.

⁴ In some Courts, however, the distinction is made; see the cases *infra* in Arkansas and Tennessee.

⁵ In the following list the various statutes and decisions are collected; rulings dealing with such quibbling and evasive questions as "whether he had been in jail" are included here; statutes not here quoted (though cited)

Where, for the purpose of discrediting, a judgment in a civil suit could be proved, it would seem that a similar rule should by analogy apply.⁶

are quoted *ante*, § 488; the statutes which allow a clerk's certificate, summarizing the record, involve the principles of §§ 1678, 2110, *post*, but are noted here: ENGLAND: 1851, St. 14 & 15 Vict. c. 99, § 13 (record of conviction or acquittal is provable by the clerk's certified abstract); 1854, St. 17 & 18 Vict. c. 123, § 25 ("A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence," signed by the clerk or other custodian, shall suffice, "upon proof of the identity of the person"); 1865, St. 28 Vict. c. 8, §§ 1, 6 (extended to criminal cases); CANADA: the following statutes are like the English St. 1854, varying only as to the kind of crime (*ante*, § 946) thus provable: *Dom. Crim. Code* 1892, § 695 (substituting "any offence"); *B. C. Rev. St.* 1897, c. 71, § 32; *N. Br. Consol. St.* 1877, c. 46, § 22; *Newf. Consol. St.* 1892, c. 57, § 20; *N. Sc. Rev. St.* 1900, c. 163, § 45; *Ont. Rev. St.* 1897, c. 73, § 19 (substituting "crime" for "felony or misdemeanor"); *P. E. I. St.* 1889, c. 9, § 18; UNITED STATES: *Ala. Code* 1897, § 1796 ("A witness may be examined touching his conviction for crime, and his answers may be contradicted by other evidence"); 1882, *Baker v. Trotter*, 73 Ala. 277, 281 (question not allowed); 1893, *Thompson v. State*, 100 id. 70, 72 (same); 1895, *Murphy v. State*, 108 id. 10, 18 So. 557 (record required); *Alaska C. C. P.* 1900, § 669 (like Or. Annot. C. 1892, § 840); *Ark. Stats.* 1894, § 2959 (a conviction "may be shown by the examination of a witness or record of a judgment"); 1886, *Scott v. State*, 49 Ark. 156, 158, 4 S. W. 750 (objection to competency; judge's report of convictions, excluded); 1893, *Southern Ins. Co. v. White*, 58 id. 277, 279, 24 S. W. 425 (objection to competency; production required); 1899, *Cash v. Cash*, 67 id. 278, 54 S. W. 744 (witness' admission on the stand, sufficient); 1902, *Vance v. State*, 70 Ark. 272, 68 S. W. 37 (to prove disqualification, and not merely impeachment of credit, the record-copy must be produced, the witness' admission not sufficing; the statute not applying to proof of a disqualifying crime; *Riddick, J., diss.*); *Cal. C. C. P.* 1872, § 2051 ("it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony"); 1870, *People v. Reinhart*, 39 Cal. 449 (question not allowed); 1870, *People v. McDonald*, ib. 697 (same); 1874, *People v. Manning*, 48 id. 335, 338 (rule not applicable to a question about an arrest); 1886, *People v. Rodrigo*, 69 id. 606, 11 Pac. 481 (question allowed); 1895, *People v. Dillwood*, — id. —, 39 Pac. 439 (question allowed); *Colo. Annot. St.* 1891, § 4822 (quoted *ante*, § 488); § 2065 ("a witness must answer as to the fact of his previous conviction for felony"); *D. C. Code* 1901, § 1067 (a conviction may be proved "either upon the cross-examination of the witness or by evidence *ultra*"); "it shall not be necessary to produce the whole record of the proceedings containing such conviction, but the certificate, under seal, of the clerk of the court wherein such proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient"; *Fla. Rev. St.* 1892, §§ 1096, 1097 (quoted *ante*, § 488); 1900, *Squires v. State*, 42 Fla. 251, 27 So. 864 (allowed, on cross-examination); *St.* 1901, c. 4966 ("such conviction may be proved by questioning the proposed witness, or if he deny it, by producing a record of his conviction"); *Gu.*: 1873, *Johnson v. State*, 46 Ga. 118 (record-copy required); 1888, *Doggett v. Simms*, 79 id. 257, 4 S. E. 909 (the transcript must include the accusation or indictment); 1896, *Killian v. R. Co.*, 97 id. 727, 25 S. E. 384 (record required); 1898, *Huff v. State*, 104 id. 384, 30 S. E. 868 (indictment; record required); *Haw. Civil Laws* 1897, § 1420 ("A witness may be questioned as to whether he has been convicted of any indictable or other offence"; the remainder substantially like Eng. St. 1854, c. 125); *Ida. Rev. St.* 1887, § 6082 (like Cal. C. C. P. § 2051); *Ill. Rev. St.* 1874, c. 51, § 1 (quoted *ante*, § 488; applies only to civil proceedings); r. 38, § 426 (conviction of crime "may be shown" in criminal cases; no method stated); 1882, *Bartholomew v. People*, 104 Ill. 601, 606 (copy required in criminal cases; "at least the caption, returning of the indictment into open court by the grand jury, the indictment and arraignment," are essential; thus, a mittimus with a copy of the judgment, given to the jailer, are insufficient); 1897, *Gage v. Eddy*, 167 id. 102, 47 N. E. 200 (testimony by another witness, allowed); *Ind.*: 1877, *Farley v. State*, 57 Ind. 333 (excluded on cross-examination; yet left doubtful); *Ind. T.*: 1898, *Williams v. U. S.*, 1 Ind. Terr. 560, 45 S. W. 116 (record required); *Ia. Code* 1897, § 4613 ("A witness may be interrogated as to his previous conviction for a felony. But no other proof is competent except the record thereof"); *Kan.*: 1886, *State v. Pfefferle*, 36 Kan. 90, 92, 12 Pac. 406 (record not necessary); 1891, *State v. Probasco*, 46 id. 310, 26 Pac. 749 (cross-examination allowed); *Ky. C. C. P.* 1895, § 597 (conviction may be shown "by the examination of a witness or record of a judgment"); 1892, *Burdette v. Com.*, 93 Ky. 78, 18 S. W. 1011 ("previous

⁶ 1862, *Henman v. Lester*, 12 C. B. n. s. 776 (question to party to discredit him as to losing a former civil suit; Byles, J., was for exclusion, because the record should be produced, the statute not affecting this sort of case; Willes & Keating, JJ., were for admission both in this

case and that of a prior conviction, because either the person admits the judgment, which should suffice, or he denies it, when, apart from statute, he cannot be contradicted upon a collateral matter). Compare the rules *ante*, §§ 1244 and 1256.

§ 1271. **Same: (c) Copy of Foreign Statutory Law, as proffered to Recollection-Testimony.** The process of proving a foreign law raises a number

conviction could not be more safely and satisfactorily shown by record evidence than by admission of the person himself who was convicted"); 1901, *Wilson v. Com.*, — id. —, 64 S. W. 437 (allowed on cross-examination, in criminal cases); 1901, *Mitchell v. Com.*, — id. —, 64 S. W. 751 (same); *Lo.*: 1824, *Castellano v. Peillon*, 2 Mart. N. S. 466 (outside testimony excluded); 1900, *State v. Robinson*, 52 La. An. 541, 27 So. 129 (question to the witness himself, allowable); 1901, *State v. McCoy*, 109 La. 682, 33 So. 730 (whether he had been convicted and sent to the penitentiary, allowed); *Md.* Pnb. Gen. L. 1888, Art. 35, § 5 (the whole record need not be produced, but only a certificate of clerk under seal); 1885, *Smith v. State*, 64 Md. 25 (whether he had ever been confined in jail, allowed); 1894, *McLaughlin v. Mencke*, 80 id. 83, 30 Atl. 603 (question as to conviction, allowed); 1902, *Jambrill v. Schooley*, 95 id. 260, 52 Atl. 500 (allowed, on cross-examination); *Miss.*: 1769, *Advoc. General v. Hancock*, 1 Quiney 461 (record required); 1822, *Com. v. Green*, 17 Mass. 514, 537 (see quotation *supra*); 1855, *Com. v. Quin*, 5 Gray 479 (record required); 1868, *Com. v. Gorham*, 99 Mass. 420, 421 (the record must include the final judgment, because the verdict may have been set aside); 1894, *Com. v. Sullivan*, 161 id. 59, 36 N. E. 583 (whether he had been in jail in Essex County; excluded); 1900, *O'Brien v. Keefe*, 175 id. 274, 56 N. E. 588 (upon a promise of later producing the record, the witness may be asked *de bene*, to identify him); *Mich.*: 1867, *Wilbur v. Flood*, 16 Mich. 44 (copy necessary for outside witness, but not for cross-examination; followed in ensuing cases); 1869, *Clemens v. Conrad*, 19 id. 170, 174 (see quotation *supra*); 1870, *Dickinson v. Dustin*, 21 id. 565 (here the record of an attorney's disbarment was technically defective); 1892, *Driscoll v. People*, 47 id. 416, 11 N. W. 221; 1836, *People v. Mansaman*, 60 id. 15, 21, 26 N. W. 797; 1890, *Helwig v. Lasowski*, 82 id. 621, 46 N. W. 1033; *Comp. L.* 1897, § 1046 (justice's certificate of conviction, admissible); 1903, *Pratt v. Wickham*, — id. —, 94 N. W. 1059 (allowed on cross-examination); *Minn.* Gen. St. 1894, § 6841 (quoted *ante*, § 488); 1889, *State v. Curtis*, 39 Minn. 359, 40 N. W. 263 (statute applied); *Miss.*: Annot. C. 1892, § 1746 (cross-examination allowable; quoted *ante*, § 987); 1897, *Jackson v. State*, 75 Miss. 145, 21 So. 707 (question allowed); *Mo.*: 1854, *State v. Edwards*, 19 Mo. 675, 676 (record required); 1878, *State v. Rangan*, 68 id. 214 (same); 1883, *State v. Lewis*, 80 id. 110, 111 (that the witness had been seen in the penitentiary as a convict, excluded); 1885, *State v. Rockett*, 87 id. 666, 669 (the record is the only evidence); 1890, *State v. Brent*, 100 id. 531, 13 S. W. 874 (excluded, on cross-examination); 1890, *State v. Miller*, 100 id. 606, 621, 13 S. W. 1051 (whether he had been in the penitentiary; record not required; preceding rulings ignored); 1893, *State v. Taylor*, 118 Mo. 153, 24 S. W. 449 (cross-examination allowed, "for the purpose of honestly

discrediting him"); 1894, *State v. Pratt*, 121 id. 566, 26 S. W. 556 (similar); 1894, *State v. Martin*, 124 id. 514, 28 S. W. 12 (question as to number of times in jail; record not required); *Laws* 1895, p. 284, *Rev. St.* 1899, § 4680 (conviction is provable "either by the record or by his own cross-examination"; quoted *ante*, § 488); *Mont.* C. C. P. 1895, § 3379 (like Cal. C. C. P. § 2051); P. C. § 1242 (conviction may be proved by the record "or by his examination as such witness"); 1895, *State v. Black*, — *Mont.* —, 38 Pac. 674 (undecided); *Nebr.* Comp. St. 1899, § 5912 (like Ia. Code § 4613); 1902, *Leo v. State*, 61 Nebr. 723, 89 N. W. 303 (questions held improper on the facts, because of abuse of the rule); *N. H.*: 1862, *Smith v. Smith*, 43 N. H. 536, 538 (whether a witness had been bound over to appear on a charge of perjury; not allowed); *N. J.* Gen. St. 1896, *Evid.* § 9 (conviction may be proved by "examination of such witness or otherwise," and he may be contradicted); *St.* 1900, c. 150, § 7 (re-enacting the terms of Gen. St. *Evid.* § 9); 1899, *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811 (statute applied); *N. M.* Comp. L. 1897, § 3025 (substantially like Eng. St. 1854); *N. Y.*: 1816, *People v. Herriek*, 13 John. 82, 84 (question not allowed, but chiefly on account of the privilege against self-disgrace); 1817, *Hills v. Colvin*, 14 id. 182, 184 (even where the record has been burnt, oral evidence is inadmissible where a certificate of its tenor was required by law to be filed in the court of Exchequer); 1862, *Newcomb v. Griswold*, 24 N. Y. 299 (record necessary); 1870, *Real v. People*, 42 id. 275, 281 (whether he has been "in jail, the penitentiary, or the State prison," admissible; but as to whether he has been convicted, "a different rule may perhaps apply"); 1877, C. C. P. § 839 (in civil or criminal cases, the conviction may be proved "either by the record or by his cross-examination"); 1881, *Ferry v. People*, 86 N. Y. 353, 358 (oral question as to conviction improper; but if not objected to because the record should be produced, the answer is receivable); 1881, *Pen. C.* § 714 ("[The conviction may be proved] either by the record, or his cross-examination"); 1883, *People v. Noelke*, 94 N. Y. 137, 144 (question on cross-examination allowed); 1889, *Spiegel v. Hays*, 118 id. 660, 22 N. E. 1105 (same); *Oh.*: 1870, *Wroe v. State*, 20 Oh. St. 471 (left undecided); *Okl.*: 1898, *Asher v. Terr.*, 7 Okl. 188, 54 Pac. 445 (whether the witness had been in jail, allowed); 1899, *Hyde v. Terr.*, 8 id. 69, 56 Pac. 851 (allowed on cross-examination); *Or.* C. C. P. 1892, § 840 (like Cal. C. C. P. § 2051); *R. I.*: 1892, *State v. Ellwood*, 17 R. I. 761, 768, 24 Atl. 782 (allowable on cross-examination); *S. C.*: 1903, *State v. Williamson*, 65 S. C. 242, 43 S. E. 671 (Clemens v. Conrad, Mich., followed; here applied to a question about an indictment); *Tenn.*: 1895, *Boyd v. State*, 94 Tenn. 505, 29 S. W. 901 (record required, where the witness is to be excluded, not merely discredited); 1896, *Moore v. State*, 96 id. 209, 31 S. W. 1046 (record required); *U. S.*: 1834, *U. S. v. Woods*, 4

of interesting questions of principle, not always sufficiently discriminated. Some of these have already been noticed, — the experiential qualifications necessary for a witness (*ante*, § 564), the necessity of personal knowledge by the witness (*ante*, §§ 668, 690), and the exemption from the rule requiring production of the original (*ante*, §§ 1213, 1218). Others involve subsequent principles, — the admissibility, under exceptions to the Hearsay rule, of certified copies (*post*, § 1680), of official printed volumes (*post*, § 1684), of private reports of cases (*post*, § 1703), and of legal treatises (*post*, § 1697), the effect of the Opinion rule (*post*, § 1953), the presumption as to the nature of an unproved foreign law (*post*, § 2536), and the part of the tribunal — judge or jury — to whom evidence is to be offered (*post*, § 2558).

The particular question here is whether the evidence of a foreign "written law" should be presented in the shape of a copy or merely by recollection-testimony of one qualified to know it. That the "unwritten law," *i. e.* a customary law or a judicial decision, may be proved by the latter mode has never been questioned. But, on the principle already noted (*ante*, § 1269), when the law to be proved is a statute, the preferred mode of proof would be a *copy of the literal terms of the official record*. Is there any reason why the principle should suffer any modification in the present class of cases? The argument in the negative is presented in the following passage:

1814, *Patteson, J.*, in *Baron de Bole's Case, infra*: "I quite agree that a witness conversant with the law of a foreign country may be asked what in his opinion the law of that country is. But I cannot help thinking that, as soon as it appears that he is going to speak of a written law, his mouth is closed. . . . The general rule is not denied, that when the contents of a written instrument are to be proved, the instrument itself should be produced, or, when the instrument from its nature is provable by an examined copy, then such examined copy. I cannot see why the rule should not be the same in the case of a foreign written law. . . . I think the rule would be just the same if the question related to the French code as existing at this moment. If a witness were asked what the law now is with respect to a bill of exchange in France, and were immediately cross-examined as to whether that law was not in writing, and answered that it was, I think a copy of the law must be produced."

But the answer to this is clear. It may be conceded that, if the question were purely and simply directed to the contents of a specific statute, the proof should be by copy of its terms. But in the usual case this is not the question; the inquiry is as to the state of the law at the present time or at

Cr. C. C. 484, 486 (allowed on cross-examination, but not by other testimony); 1853, *Baltimore & O. R. Co. v. Rambo*, 8 C. C. A. 6, 59 Fed. 75 (proof of the oral plea of guilty by one present in court at the time, excluded); *Utah Rev. St.* 1898, § 3431 (like Cal. C. C. P. § 2065); *W.*: 1897, *State v. Slack*, 69 Vt. 486, 38 Ad. 311, *semble* (record required); 1902, *McGovern v. Smith*, — *id.* —, 53 Ail. 326 (allowed on cross-examination); *Wash.*: 1893, *State v. Payne*, 6 Wash. 563, 568 (record required); *W. Va.*: 1902, *State v. Hill*, — *W. Va.* —, 43 S. E. 160 (conviction may be proved by the witness' answer; in any case, the fact of having been in the penitentiary may be proved without the record-copy); *Wis.* Stats 1898, § 4073 (quoted *ante*, § 488); 1859, *Kirschner v. State*, 9 Wis. 140, 144 (record required); 1879, *Ingalls v. State*, 48 *id.* 647, 654, 4 N. W. 785 (same); 1881, *McKesson v. Sherman*, 51 *id.* 303, 311, 8 N. W. 200, *semble* (same); 1900, *Shafer v. Fau Claire*, 105 *id.* 239, 81 N. W. 409 (allowed on cross-examination, but the time and place must be specified; this is merely a perversion of the rule of § 1025, *ante*); 1902, *Cullen v. Hanisch*, 114 *id.* 24, 89 N. W. 900 (question as to the mere fact of being in jail, excluded); 1903, *Paulson v. State*, — *id.* —, 94 N. W. 771 (oral testimony to conviction is under the statute allowed only on cross-examination).

a given time past. This inquiry can be answered only by taking into consideration the appropriate statute, if any, the pre-existing rule of custom or judicial precedent as affected by the statute, the validity of the statute under some possible constitution, and the actual effect of the statute as determined by prior and subsequent judicial application of the constitution and by judicial construction of the statutory words. In short, an answer as to the state of the law at a given moment can never be a mere reproduction, offered in place of a copy, of statutory words; it is a statement (*ante*, § 1242) of a net fact separate from the words of a statute, and involving many considerations in which the words of a statute are but a single element. The acceptance of a mere copy of the statute, far from securing greater accuracy, would on the contrary tend rather to mislead, by ignoring these other material elements. This view of the question was expounded in masterly opinions in *Baron de Bode's Case* :

1844, *Baron de Bode's Case*, 8 Q. B. 250; *Denman*, L. C. J. : "The form of the question [as to the state of the law in France in 1789] is immaterial; in effect the witness is asked to speak to the decree. It is objected that this is a violation of the general principle that the contents of a written instrument can be shown only by producing the instrument or accounting for the non-production. But there is another general rule, that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men; and I think it is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law. . . . When Pothier states the law of France as rising out of an ordonnance made in a particular year, can we exclude that as being merely his account of the contents of a written instrument? I cannot conceive that in any civilized country a statement from Blackstone's Commentaries would be rejected, which set forth what the law was, when altered, and up to what time continued. Such a statement would not relate merely to the contents of the statute referred to, but to the state of the law before or after its passing"; *Coleridge*, J. : "What, then, do we mean by a knowledge of the law? That question seems to me to go to the foundation of the whole matter; and it must be determined, with reference to the particular question before us, by a little subdivision. We must first inquire as to the sources of our knowledge, and, secondly, as to the time over which we are to range for our knowledge. Now, with regard to the sources of the knowledge, we are to find it partly in the actual documents, the writings first existing as laws, . . . [and where these are wanting,] from text-books, reported decisions, records, and local customs prevailing in particular districts. . . . Then, next, as to the time over which our knowledge is to range. When we talk of a man having a knowledge of the law, do we mean a knowledge of the law only as it exists in the courts of justice at the present day, or do we mean that knowledge of the law and the changes it has undergone which he has acquired in the course of study that gives him the character of a scientific witness? I apprehend we clearly mean the latter. . . . The question for us is, not what the language of the written law is, but what the law is altogether, as shown by exposition, interpretation, and adjudication. How many errors might result if a foreign Court attempted to collect the law from the language of some of our statutes which declare instruments in certain cases to be 'null and void to all intents and purposes,' while an English lawyer would state that they were good against the grantor and that the Courts have so expounded the statutes!"

1844, *Lord Brougham*, in *Sussex Peerage Case*, 11 Cl. & F. 85, 115: "It is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it."

1846, *Erle, J.*, *Cocks v. Purday*, 2 C. & K. 270: "The proper course, to ascertain the law of a foreign country, is to call a witness expert in it, and ask him on his responsibility what that law is, and not to read any fragments of a code, which would only mislead."

This solution is so plain that it is singular that judicial opinion waited so long to expound it. The opposite solution had been sanctioned by English common-law Courts on a few occasions before and after the year 1800;¹ but, in spite of these rulings, the overwhelming weight of English authority of that period, representing the original tradition, did not require proof by copy.² About the year 1845, the decisions quoted above removed for England the previous uncertainty of precedent.³

But in the meantime, in the United States, the just proportion of the minority of the English rulings not being perceived, some of them served to

¹ In the following cases a copy was required: 1776, *Sir G. Hay*, in *Harford v. Morris*, 2 Hag. Cons. 430 ("not by the opinions of lawyers, which is the most uncertain way in the world, but by certificates"); 1800, *Boehlinck v. Schneider*, 3 Esp. 58 (on argument that the unwritten law, though not the written, could be proved orally, *Kenyon, L. C. J.*, still insisted, for proof of the Russian law about stoppage *in transitu*, upon "an authenticated document of the laws"; and the *K. B.* concurred); 1812, *Ellenborough, L. C. J.*, in *Clegg v. Levy*, 3 Camp. 166 (but here the witness was probably incompetent); 1815, *Gibbs, C. J.*, in *Millar v. Heinrick*, 4 Camp. 155 (Russian admiralty regulations). In the following cases the ruling is obscure: 1797, *Alves v. Hodgson*, 7 T. R. 241, *Kenyon, L. C. J.*; 1800, *Mule v. Roberts*, 3 Esp. 164, *Eldon, L. C. J.*; 1801, *Inglis v. Usherwood*, 1 East 520, *K. B.*

² The following cases are to that effect, though some of them do not expressly apply the doctrine of a statute: 1744, *Hardwicke, L. C.*, in *Gage v. Bulkeley*, *Ridgw. cons. temp. Hardw.* 276; 1774, *Mostyn v. Fabrigas*, *Cowp.* 161, 174 (*Mansfield, L. C. J.*: "The way of knowing foreign laws is by admitting them to be proved as facts, and the Court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement, the construction of which depends upon the custom of Paris, witnesses must be received to explain what the custom is; as evidence is received of customs in respect to trade"; no discrimination made on the present point); 1789, *Kenyon, L. C. J.*, in *Walpole v. Ewer*, *Ridgw.* 276, note, *semble*: 1791, *Kenyon, L. C. J.*, in *Gauer v. Lady Laneborough*, *Penke* 18 (the fact of a Jewish divorce, according to custom in Leghorn, proved orally); 1791, *Kenyon, L. C. J.*, in *Chaurand v. Angerstein*, *ib.* 44; 1802, *Sir W. Wynne*, in *Middleton v. Janverin*, 2 Hag. Cons. 443 (written and unwritten laws); 1806, *Ellenborough, L. C. J.*, in *Picton's Trial*, 30

How. St. Tr. 509 (written laws); 1807, *Ellenborough, L. C. J.*, in *Richardson v. Anderson*, 1 Camp. 66, *semble*; 1807, *Buchanan v. Rucker*, *ib.* 63 (mode of service of process in Tobago; the written law not required); 1812, *Abbott, C. J.*, in *Lacon v. Ilggins*, 3 Stark. 178, *Dowl. & R. N. P.* 44 (where also a text was offered); 1828, *Trotter v. Trotter*, 4 Blyth N. S. 504, *House of Lords*; 1834, *Trimby v. Viguier*, 4 Moore & S. 703 (by consent; *Tindal, C. J.*, and *Ct. of C. P.*); 1834, *Alivon v. Farnival*, 1 C. M. & R. 291, *Parke, B.*, and the *Ct. of Exch.*

³ *England*: 1844, *Sussex Peerage Case*, 11 Cl. & F. 85, 114 (expert allowed to state the law of marriage in Rome, and to refresh his memory by looking at law-books at the same time); 1845, *Baron de Bode's Case*, 8 Q. B. 208, 246 (expert opinion as to the law of inheritance at a particular time in Alsace, that feudal law had been there ended by a decree of the French Assembly of Aug. 4, 1789, allowed without producing a copy of the decree; *Patteson, J.*, *diss.*); 1845, *Nelson v. Bridport*, 8 Beav. 527, 539 (expert opinion of Sicilian law "upon several points," admitted); 1846, *Cocks v. Purday*, 2 C. & K. 269 (whether a parol transfer sufficed in Bohemian law, allowed); 1852, *R. v. Newman*, 3 C. & K. 252, 262, *Lord Campbell, C. J.* (proof of foreign Court's jurisdiction made by parol); 1863, *Di Sora v. Philipps*, 10 Il. L. C. 624, 633 (expert opinion as to legal effect of marriage contract in Italian law, admitted without requiring copies); *Canada: Ont.*: 1850, *Short v. Kingsmill*, 7 U. C. Q. B. 354; 1852, *Arnold v. Higgins*, 11 *id.* 446; *Man. Rev. St.* 1902, c. 57, § 32 (for the purpose of ascertaining foreign law judicially noticed, the judge may require "evidence upon oath," "oral or written, or by certificate or otherwise, as may seem proper").

For the British statutes providing for the use of a judicial certificate of the law as obtaining in a foreign country or in some other part of the British Dominions, see *post*, § 1674.

establish the erroneous view in a few early rulings in our Courts. Thus, unfortunately, in a majority of our jurisdictions the erroneous doctrine came to prevail (though later legislation has in some jurisdictions corrected it) that wherever a statute was in any way involved, a copy of the statute was the preferred evidence required.⁴

⁴ The cases on both sides, with the statutes, are as follows: *Ala.*: 1840, *Inzerarity v. Milnia*, 1 Ala. 666 (oral evidence of statute inadmissible); *Ark.*: 1850, *Harkness v. Hopkins*, 11 Ark. 168, *semble* (oral evidence of statute admissible); 1856, *McNeill v. Arnold*, 17 id. 154, 164 (oral testimony to registry-statutes, excluded); 1878, *Bowles v. Eddy*, 33 id. 645, 649 (same; usury statutes); 1884, *Blackwell v. Glass*, 43 id. 209, 211 (oral testimony to usage as to sufficiency of return, admitted); *Cal.*: C. C. P. 1872, § 1902 ("The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of a sister State or foreign country"; this by implication preserves the erroneous rule); *Del.* Rev. St. 1893, c. 107, § 8 ("The existence and the tenor or effect of all foreign laws may be proved as facts by parole evidence; but if it shall appear that the law in question is contained in a written statute or code, the Court may, in its discretion, reject any evidence of such law which is not accompanied by a copy of such code or statute"); *Fla.* Rev. St. 1892, § 1108 (like Del. Rev. St. c. 107, § 8); *Ida.* Rev. St. 1897, § 5971 (like Cal. C. C. P. § 1902; inserting "Territory"); *Ill.*: 1858, *Merritt v. Merritt*, 20 Ill. 65, 80 (oral testimony to unwritten law, admissible); 1858, *Hoes v. Van Alstyne*, ib. 201 (specific statute not provable orally); 1868, *Merritt v. Merritt*, 45 id. 80, *semble* (same); 1873, *McDeed v. McDeed*, 67 id. 545, 548 (common-law provable orally); 1874, *Milwaukee & S. P. R. Co. v. Smith*, 74 id. 197, 199 (same); *Ind.* Rev. St. 1897, §§ 489, 490 (like Del. Rev. St. c. 107, § 8, for "the laws of any foreign country"); 1840, *Comparet v. Jernegan*, 5 Blackf. 376 (oral evidence of statute, inadmissible); 1854, *Heberd v. Myers*, 5 Ind. 94 (like next case); 1860, *Line v. Mack*, 14 id. 330 (statute of domestic State, oral testimony excluded, but for foreign States, the Court has a discretion); *Ia.* Code 1897, § 4652 ("unwritten or common law" provable by parole evidence); 1855, *Lattouret v. Cook*, 1 Ia. 1, 8 (deposition to statute excluded); 1859, *Greasons v. Davis*, 9 id. 223 (oral evidence of common law, admissible); 1874, *Crafts v. Clark*, 38 id. 241 (same); 1885, *State v. Cross*, 68 id. 180, 195, 26 N. W. 62 (statute as to notaries; expert testimony excluded); *Kan.* Gen. St. 1897, c. 97, § 18 (like Ia. Code, § 4652); 1882, *Brenner v. Luth*, 28 Kan. 588 (oral evidence of the law, admitted; its nature does not appear); *Ky.* Stats. 1899, § 1640 (the unwritten law of another of U. S. is provable by "parole evidence of persons learned in the law"; remainder substantially like Del. Rev. St. c. 107, § 8); 1831, *Talbot v. Peoples*, 6 J. J. M. 200 (statute as to legal rate of interest; oral evidence excluded); 1847, *Tyler v. Trabue*, 8 B. Monr. 306 (whether a note was negotiable; depositions allowed); *La.*: 1843, *Rosine v. Bonnabel*, 5 Rob.

163, 166 (foreign law in general; provable orally); 1847, *Isabella v. Pecot*, 2 La. An. 387, 391 (statute not provable orally); *Me.* Pub. St. 1883, c. 82, § 109 (parole evidence of foreign law which "appears to be existing in a written statute or code," may be rejected unless accompanied by copy); 1838, *Owen v. Hoyle*, 15 Me. 149, *semble* (statute not provable orally); *Md.*: 1857, *Wilson v. Caruso*, 12 Md. 75, *semble* (U. S. State statute provable orally); 1867, *Baltimore & O. R. Co. v. Glenn*, 28 id. 323 (U. S. State statute; not provable orally); 1869, *Zimmerman v. Heiser*, 32 id. 278 (same; both erroneously go upon *Gardner v. Lewis*, 7 Gill 394); *Mass.* Pub. St. 1882, c. 169, § 72, Rev. L. 1902, c. 175, § 76 (foreign law provable in all cases by parole, except that the Court may in discretion require also a copy of a written statute); 1811, *Legg v. Legg*, 8 Mass. 99, *semble* (foreign law not provable orally); 1817, *Frith v. Sprague*, 14 id. 455, *semble* (*contra*); 1825, *Raynham v. Canton*, 3 Pick. 293, 296 (statute provable orally; "to require [an exemplification, etc.] would put the citizens to an unnecessary burdea and expense"; but statute-book preferred to oral testimony); 1829, *Havea v. Foster*, 9 id. 112, 130 ("if written, it must be proved by documentary evidence"); 1868, *Kline v. Baker*, 99 Mass. 254, *semble* (expert may testify to statute); *Bowditch v. Soltvyk*, lb. 138, *semble* (same); *Mich.*: 1858, *People v. Lambert*, 5 Mich. 349, 360 (foreign statute not provable orally); 1863, *Kermott v. Aver*, 11 id. 184 (statute not provable orally; that the law is statutory, not assumed, at least where the consequence would be the reversal of a judgment otherwise good); 1880, *Kopke v. People*, 43 id. 43, 4 N. W. 551, *semble* (statute not provable orally); *Minn.* Gen. St. 1894, § 5716 (unwritten or common law of any State or Territory of the U. S., provable "as facts by parole evidence"); § 5718 (like Del. Rev. St. c. 107, § 8); *Miss.*: 1852, *Stewart v. Swanson*, 23 Miss. 502 (statute not provable orally); *Mo.*: 1857, *Charlotte v. Chouteau*, 25 Mo. 465, 473 (statute not provable orally); *Mont.* C. C. P. 1895, § 3190 (like Cal. C. C. P. § 1902); *Nebr.* Comp. St. 1899, § 5970 ("the unwritten or common law" is provable by parole evidence); § 5994 (same); *N. H.*: 1851, *Watson v. Walker*, 23 N. H. 471, 496 (oral testimony excluded for written law, *semble*, even where it does not appear whether the law was written); 1854, *Emery v. Berry*, 28 id. 473, 485 (of a foreign State, only by an exemplified copy under the seal of State or by a sworn copy; of a domestic State, also by official printed copy; but not orally); 1868, *Hall v. Costello*, 48 N. H. 176, 179 (expert testimony to British enlistment statute, admitted); *N. Y.*: 1806, *Kenay v. Clarkson*, 1 Johns. 394 (statute not provable orally); 1829, *Chanoine v. Fowler*, 3 Wend. 177 (same); 1830, *Hill v. Packard*, 5

The provision, in most of the reforming statutes, that the Court may in its discretion require that testimony from an expert be accompanied by a copy of the statute in question, is a wise one. It may be noted, finally, that, on the one hand, oral testimony merely to the words of a statute and to nothing more has never been claimed to be proper;⁵ while, on the other hand, expert testimony to the technical construction of the words or phrases of a statute whose terms are otherwise properly proved is on all hands considered to be receivable.⁶

§ 1272. **Preferences as between Recollection-Witnesses.** Where no preference for a copy applies, and recollection-testimony is allowable, no further rule of preference can properly be laid down as between different kinds of recollection-witnesses, — for example, a rule preferring the writer of a lost document to a witness who had read it.¹

Id. 375, 384, *semble* (same); 1831, *Lincoln v. Battelle*, 6 id. 475, 482 (same); 1840, *Re Roberts' Will*, 8 Paige Ch. 448, *semble* (same); 1880, *Hynes v. McDermott*, 82 N. Y. 52 (same); N. C. Code 1887, § 1338 (the unwritten or common law may be proved "by oral evidence"); N. D. Rev. C. 1895, § 5690 (same as Okl. Stats. § 4260); Okl. Rev. St. 1898, § 5244 (unwritten law is provable by parol evidence); Okl. Stats. 1893, § 4260 ("The unwritten or common law of any other State, Territory, or foreign government, may be proved as facts by parol evidence"); Or. C. C. P. 1892, § 727 (like Cal. C. C. P. § 1902); Pa.: 1826, *Doughert, v. Swett*, 15 S. & R. 87 (statute not provable orally; but law will not be assumed to be statutory); 1840, *Phillips v. Gregg*, 10 Watts 161, 169 (the difficulty of obtaining information as to the Spanish or other laws in the early Louisiana territory was regarded as sufficient to admit parol evidence); R. I.: 1870, *Brown v. Downs*, 9 R. I. 446 (statute provable orally; following the arguments of Baron de Holo's Case and Sussex Peerage Case); S. C. Gen. St. 1882, c. 86, § 2218, Rev. St. 1893, § 2553, Code 1902, § 2890 (printed copies of foreign written law receivable; unwritten or common law "may be proved as facts by parol evidence"); S. D. Stats. 1899, § 6533 (like N. D. Rev. C. § 5690); Tex.: 1847, *Bryant v. Kelton*, 1 Tex. 436, *semble* (statute not provable orally); 1854, *Martin v. Payne*, 11 id. 292, 295 (oral testimony as to rate of interest, excluded); U. S.: 1804, *Church v. Hubbard*, 2 Cr. 238, *semble* (statute not provable orally); 1810, *Livingston v. Ins. Co.*, 6 id. 274, 280 (foreign trade regulations not shown to be in writing, provable by parol); 1807, *Robinson v. Clifford*, 2 Wash. C. C. 1 (statute not provable orally); 1808, *Seton v. Ins. Co.*, ib. 175 (same); 1808, *Jaffray v. Dennis*, ib. 253 (same); 1816, *Consequa v. Willings*, 1 Pet. C. C. 229 (same); 1843, *Wilcocks v. Phillips' Ex'rs*, 1 Wall. Jr. 49, 53 (same; though here the difficulty of getting a copy of a law of China was allowed to exempt from the rule); 1852, *Ennis v. Smith*, 14 How. 426, *semble* (general rule as above); 1882, *Pierce v. Insdeth*, 106 U. S. 551, 1 Sup. 418, *semble* (same); 1901, *Herbst v.*

Asiatic Prince, 47 C. C. A. 328, 108 Fed. 289 (law of Brazil, as to delivery of goods under the customs law, proved by a lawyer's testimony); 1902, *Mexican N. R. Co. v. Slater*, 53 C. C. A. 239, 110 Fed. 593, 606 (expert testimony "as to the proper construction of a statute of a foreign country and written in a foreign tongue," the terms of the statute having been proved by copy, held admissible); 1903, *Badische A. & S. F. v. Klipstein*, 125 Fed. 543 (testimony of German lawyers, that certain records of incorporation in Baden, proved by copy, were legally sufficient to incorporate, admitted); *Utah Rev. St. 1898*, § 3381 (like Cal. C. C. P. § 1902, adding "Territory"); 17.: 1803, *Woodbridge v. Anstin*, 2 Tyl. 364, 366 ("if a written law, it must be produced"); 1827, *Dunforth v. State*, 1 Vt. 259, 260, 266 (testimony that a deposition-caption was according to the statute of Massachusetts, received); 1853, *Smith v. Potter*, 27 id. 304, 307, 309 (statute not provable orally); W. Va. Code 1891, c. 13, § 4 (in noticing the law, "statutory or other," of the U. S. or any other State or country, the judge "may consult any printed book purporting to contain, state, or explain the same, and consider any testimony, information, or argument that is offered on the subject"); Wis. Stats. 1898, §§ 4138, 4139 (the common law of the U. S., a State or Territory is provable by parol; remainder substantially like Del. Rev. St. c. 107, § 8); Wyo. Rev. St. 1887, § 2592 (like Oh. Rev. St. § 5244).

⁵ This seems to have been assumed without decision.

⁶ 1857, *Bremer v. Freeman*, 10 Moore P. C. 362; 1857, *Walker v. Forbes*, 31 Ala. 10; 1837, *Dyer v. Smith*, 12 Conn. 334, 390; 1898, *Chualar v. People*, 177 Ill. 219, 52 N. E. 310; 1902, *Mexican N. R. Co. v. Slater*, C. C. A., *supra*. Compare the *opinion rule* (*post*, § 1953).

¹ 1816, *Liebman v. Poolcy*, 1 Stark. 167 (writer of original not preferred to another who had seen it, in giving parol evidence of contents); 1869, *Huls v. Kimball*, 52 Ill. 390, 395 (maker of mortgage not preferred to mortgagee); 1816, *Las Caygas v. Lariondn*, 4 Mart. La. 283, 287 (official certificate of a notary's office and signature, not preferred to ordinary

§ 1273. **Preference as between Different Kinds of Written Copies; Certified and Sworn Copies.** Every copy (except the sort mentioned *post*, § 1272 par. (2)), is in strictness an "examined" copy, in the sense that the original and the copy have been examined or compared together by the witness either in his own act of transcription or by taking some one else's transcription and comparing it with the original (*ante*, § 1265). But the term "examined copy" has by tradition come to be associated with a copy made by a private person not the official custodian of the document. Thus the terms "examined" or "sworn" are used for copies sworn to upon the stand as correct, in distinction from "certified" or "attested" or "office" copies, *i. e.* copies made in the public office by the official custodian, where the document is an official one. This distinction, however, had its origin and maintains its importance in a very different field of the law, namely, the Hearsay rule; for, under the exception for Official Statements (*post*, § 1677) the question arises how far such official (or "certified," "attested," "office") copies are receivable; and whenever their admission, under that exception, is not justifiable, the copy must be verified by a witness on the stand, *i. e.* must be a "sworn" or "examined" copy. Thus, under that exception to the Hearsay rule, but there only, the distinction between certified and sworn or examined copies is a solid one.

It is because of this distinction, created and maintained under another principle of the law of evidence, that there has been a tendency to recognize some distinction, for the present principle also, between the two kinds of copies, and to require a *certified in preference to a sworn copy*, in proving the contents of official documents. Such a distinction has no support, either in orthodox tradition or in reasons of policy. So far as the traditional practice is concerned, the sworn copy was in England for a long time almost the exclusive mode of proving official documents other than judicial records, because the Hearsay exception allowing the use of certified copies was there recognized (until statutory changes occurred) to only a limited extent (*post*, § 1677). In the United States, however, owing to the broader scope given to this common-law exception, and owing to its liberal expansion by statute at an early date, the certified copy came into more general, if not almost exclusive use; so that the youngest generation of practitioners in many jurisdictions seldom use or even see a sworn copy of an official document. Added to this that the statutes enlarging the exception to the Hearsay rule and making all kinds of official documents in almost all jurisdictions provable by certified copy have sometimes been misapprehended by the Courts; *i. e.*

witness); 1843, *Roshe v. Bonnabel*, 5 Rob. La. 163, 166 (same); 1883, *Johnson v. Skipworth*, 59 Tex. 473, 475 (last custodian of a lost record, not preferred to other witnesses); 1896, *Brown v. Stanton*, 69 Vt. 53, 37 Atl. 280 (the town clerk is not the exclusive witness of the contents of the town records; any one who has examined them may testify to the absence of a certain record). *Contra*: 1895, *Hines v. Johnston*, 95 Ga. 629, 23 S. E. 470 (deed-register's clerk is

alone competent to prove existence and content of his record, though any person may prove absence of a conveyance in record; a distinction indefensible); 1843, *Whiteford v. Burckover*, 1 Gill 127, 141 (the addressee of a letter, held a preferred witness to its contents); 1903, *Sykes v. Beck*, — N. D. —, 96 N. W. 844 (cited *ante*, § 1244, note 4); 1903, *Fisher v. Betts*, — id. —, 96 N. W. 132 (similar). Compare also the cases cited *post*, § 1278.

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provision intended merely to enable such a copy to be used where it could not be used before has sometimes been ignorantly treated as though nothing not specified in the statute could be used as a copy, and thus as if the statute provided an exclusive mode (*ante*, § 1186; *post*, § 1655). In some such ways as these the notion has been sanctioned in a few jurisdictions that a certified copy should be preferred to a sworn copy. That this notion is wholly unfounded, the following passages indicate:

Ante 1720, Chief Baron *Gilbert*, *Evidence*, 15: "Objection. But if exemplifications under the Broad Seal are the highest evidence that the nature of the thing is capable of, then why are any proofs admitted but them? . . . Answer. [The rule does not mean] that nothing under the highest assurance possible should have been given in evidence to prove any matter in question. To strain the rule to that height would be to create an endless charge and perplexity, for there are almost infinite degrees of probability, one under the other; . . . a contract attested by two witnesses gains more credit than a contract attested by one, and therefore by the same argument one witness would be no good proof of a contract; and all these are plainly as good reasonings as to say that the sworn copy of a record ought not to be admitted because a copy under the Broad Seal is a stronger evidence."

1885, *Peters, C. J.*, in *State v. Lynde*, 77 Me. 631, 502, 1 Atl. 687: "Examined copies are in England resorted to as the most usual mode of proving records. The mode . . . seems to have prevailed in many of the States, including Pennsylvania and New York. It was at an early date adopted in some of the Federal Courts. It is not an unknown mode of proof in New England. . . . Why not admissible? The evidence is as satisfactory certainly as a certified copy. In the latter case we depend upon the honor and integrity of an official, and in the former upon the oath of a competent witness. In either case, an error or fraud is easily detectible. Probably the reason why such a mode of proof has not been much known, if known at all, in our practice, is that it is cheaper and easier to produce [certified] copies; and if a witness comes instead, it is more satisfactory to have [as here] the officer who controls the records bring them into court."

With reference, then, to any rules of preference as between different kinds of copies, the precedents fall under the following heads:

(1) There is properly no preference for a *certified* or office copy over a *sworn* or examined copy; ¹ though a few jurisdictions recognize such a preference in some instances.²

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¹ N. Br. Consol. St. 1877, c. 46, § 7 (record or document recorded or deposited "in any public office in this province" may be proved by an examined copy); 1876, *Blackman v. Dowling*, 57 Ala. 78, 80 (statutory certified copy not preferred to examined copy); Ill. Rev. St. 1874, c. 51, § 18 (records, etc., provable by certified copy, "may be proved by copies examined and sworn to by credible witnesses"); 1887, *Union R. & T. Co. v. Shacklet*, 119 Ill. 232, 240, 10 N. E. 896 (foreign administrator's appointment; certified copy not preferred to examined copy); 1837, *Harris v. Doe*, 4 Blackf. 369, 376 (certified copy of land-petition not preferred to sworn copy on the facts); 1842, *Kawley v. Doe*, 6 id. 142, 145 (similar); 1881, *Hall v. Bishop*, 78 Ind. 370, 371 (tax-list; certified copy not preferred); 1820, *Bowman v. Bartlett*, 3 A. K. Marsh. 86, 89 (certified copy of probate of a will, not preferred); 1885, *State v. Lynde*, 77 Me. 631,

1 Atl. 687 (see quotation *supra*); 1895, *State v. Collins*, 68 N. H. 299, 44 Atl. 495 (internal revenue record; certified copy not preferred); 1881, *Mauney v. Crowell*, 84 N. C. 314 (certified copy of registered lost contract for title, not preferred to a sworn copy); 1886, *Otto v. Trump*, 115 Pa. 425, 429, 8 Atl. 786 (certified copy under Federal statute about foreign records, not preferred to examined copy); 1887, *Harvey v. Cummings*, 68 Tex. 599, 602, 5 S. W. 513 (certified copy of judicial record, not preferred to examined copy). So, too, for proof of execution of the document; 1840, *McCannel v. Reed*, 3 Ill. 371 (certified copy of recorded deed, not preferred).

Add all the jurisdictions *ante*, § 1268, not preferring a copy to recollection-testimony; they would probably also not prefer a certified to a sworn copy.

² Cal. C. C. P. 1872, § 1907 (examined or sworn copy of foreign judicial record, receivable

(2) There is no preference for a copy *judicially established* under statutes³ providing a mode for establishing a record of the contents of a lost or destroyed document.⁴

(3) There is no preference for the *transcriber personally* over any other person competent to verify the copy.⁵

(4) There is probably, and ought to be, a preference for a *copy* over an *abstract, i. e.* a copy ought to be shown unavailable before an abstract can be used.⁶

(5) A few other miscellaneous instances of preference are now and then recognized.⁷

only when also attested by the proved seal of the Court, or if none, or if not the record of a Court, by the legal keeper's proved signature); Conn. Gen. St. 1887, § 1093 (examined copy of proceedings of any Court, community, corporation, society, or public board, admissible when clerk is absent or disabled); 1846, *Bryant v. Owen*, 1 Ga. 355, 369 (certified copy of probate-bond, preferred to copy established *instantly*); 1895, *Hines v. Johnston*, 95 id. 629, 23 S. E. 470 (cited *ante*, § 1272; the astonishing rule is laid down that while any person who has examined the records may testify that a particular conveyance is *not* there, yet in showing the existence and contents of a record "this fact could not be proven by any witness other than the clerk; nor by him, except by a certified copy of such record under his hand and seal"); 1877, *Donellan v. Hardy*, 57 Ind. 393, 402 (a certified transcript of judgment, preferred to an official printed report of decision); 1880, *Jones v. Levi*, 72 id. 586, 590 (a sworn copy of record ranks next to an attested copy); 1836, *Davidson v. Slocumb*, 18 Pick. 464, 466 (the records of a justice of the peace may be proved by sworn copies, but only where the magistrate's certified copies are unavailable); 1824, *State v. Isham*, 3 Hawks 185 (record of another Court provable by exemplified copy, where the Court seal's indistinctness prevented the copy from being considered); 1832, *Thomson v. Gaillard*, 3 Rich. 438, 425 (certificate of the clerk of a Legislative body, preferred, in proving the contents of the journal, to the testimony of another person); 1877, *State v. Carlins*, 47 Tex. 250, 290 (certified copy of Mexican archives, preferred to other copies, on the facts); 1886, *Clayton v. Rheim*, 67 id. 52, 2 S. W. 45 (certified copy of a tax-roll in the comptroller's office, preferred to other copies in the assessor's hands); 1824, *Renner v. Bank*, 9 Wheat. 581, 597 (notarial copy of a note, not preferred, where the offeror is not shown to have one). Compare the North Dakota cases cited *ante*, § 1244, note 4.

³ For these statutes, see *post*, §§ 1660, 1682, where also are examined certain other questions arising under them.

⁴ 1878, *Jernigan v. Carter*, 60 Ga. 131, 133; 1880, *Cross v. Johnson*, 65 id. 717, 719; 1897, *Haug v. Riley*, 101 id. 372, 29 S. E. 44; 1898, *Forsyth v. Vehmeyer*, 176 Ill. 359, 52 N. E. 55; 1873, *Nason v. Jordan*, 62 Me. 480, 484 (oral evidence of a burned record of partition, not made secondary to a copy authorized to be

recorded in place of the burnt record); 1878, *Drake v. Kinsell*, 38 Mich. 232, 235; 1874, *Parry v. Walser*, 57 Mo. 169, 172; 1887, *Mabley v. Watts*, 98 N. C. 284, 289, 3 S. E. 677; 1893, *Varner v. Johnston*, 112 id. 570, 576, 17 S. E. 483 (will probated and records burnt); 1893, *Williams v. Kerr*, 113 id. 306, 310, 18 S. E. 501 (foreclosure, record); 1899, *Cox v. Beaufort C. L. Co.*, 124 id. 78, 32 S. E. 381; 1883, *Johnson v. Skipworth*, 59 Tex. 473, 475. Compare the cases cited *post*, § 1347.

⁵ See the citations *post*, § 1278.

⁶ 1836, *Doe v. Wainwright*, 1 Nev. & P. S. 12 (*Patteson, J.*: "It is certainly laid down in the books that a counterpart is the next best evidence, — that a copy is the next. The abstract of a deed is the next best evidence after the copy has been accounted for"; but whether, if a copy had been shown to exist, it would have been preferred to the abstract, was expressly left undecided); 1874 *Illinois Land & L. Co. v. Bonzer*, 75 Ill. 315, 323 (copy of lost will, sent to the proponent, preferred to an abstract).

For abstracts, as violating the principle of completeness, see *post*, §§ 2105, 2307; for statutes allowing the use of *abstracts of burnt records*, see the same place, and also the Hearsay exception, *post*, § 1705. An *abstract* should not be preferred to an *extract*; 1892, *Converse v. Wend*, 142 Ill. 132, 136, 31 N. E. 314 (under Burnt Records Act of 1887, abstracts are not preferred to extracts or minutes in the sense that the former must first be shown unavailable).

⁷ 1705, *Stillingleet v. Parker*, 6 Md. 248 (a copy of the enrolment of a lease, required to be enrolled, preferred to a copy in an ancient book of leases); 1849, *Schley v. Lyon*, 6 Ga. 530, 539 (newspaper publisher's sworn copy of his files, preferred to copy by another person); N. Y. C. C. P. 1877, § 931 (examined copy of foreign corporation's books preferred; details of verification by witness, specified).

For the question whether the *recitals of a sheriff's deed* are admissible instead of a copy of the judgment recited, see *post*, § 1664.

For the question whether a *printed volume of statutes* is receivable instead of a certified copy of the statute, see *post*, § 1684.

For the question whether *letters of administration* or *letters testamentary* are preferred to a copy of the probate record, see *ante*, § 1248.

The preference as between *clerk's docket-entries* or *minutes* and other evidence of a judicial record involves, not a rule of evidence,

§ 1274. **Discriminations against a Copy of a Copy; (1) in General.** The phrase "copy of a copy" has long been used¹ as in itself implying some sort of disparagement. This has in some quarters given rise to the loose notion that a copy of a copy (or "mediate copy," as it may better be termed, in contrast to an immediate copy) is in itself and always an improper mode of proof of contents.² This notion, indeed, finds some countenance in a passage of an early writer, which, however, probably did not mean any more than that a mediate copy was inferior to an immediate one:

1726, Chief Baron *Gilbert*, Evidence, 8: "A copy of a copy is no evidence; for the rule demands the best evidence that the nature of the thing admits, and a copy of a copy cannot be the best evidence; for the farther off a thing lies from the first original truth, so much the weaker must the evidence be."

Certainly there is in the nature of a mediate copy nothing that makes it *per se* defective. When paper A is copied into paper B and this into paper C, the last is in theory as accurate a reproduction as B is. There is merely the possibility that an error may have occurred in the second transcription; but this possibility exists for the first also; there is merely one chance more to be added to the total number of chances. It must be concluded, then, that the discrimination, if any, against a mediate copy, is merely in the nature of a rule of preference, requiring first the use of an immediate copy, if one is available. This view is emphasized in Mr. Justice Story's classical utterance:

1835, *Story, J.*, in *Winn v. Patterson*, 9 Pet. 663, 677: "We admit that the rule, that a copy of a copy is not evidence, is correct in itself, when properly understood and limited to its true sense. The rule properly applies to cases where the copy is taken from a copy, the original being still in existence and capable of being compared with it, for then it is a second remove from the original; or where it is a copy of a copy of a record, the record being still in existence by law deemed as high evidence as the original, for then also it is a second remove from the record. But it is quite a different question whether it applies to cases of secondary evidence where the original is lost, or the record of it is not in law deemed as high evidence as the original; or where the copy of a copy is the highest proof in existence. On these points we give no opinion; because this is not in our judgment the case of a mere copy of a copy verified as such, but it is the case of a second copy verified as a true copy of the original [being R.'s copy of a record copy, the latter being made by himself and compared with the original]. . . . In effect, therefore, he swears that both are true copies of the original power, [and either would be admissible.]"

1871, *Foster, J.*, in *Cameron v. Peck*, 37 Conn. 763: "The rule that a copy of a copy is not evidence properly applies [1] to cases where the original is still in existence and capable of being compared with it, or [2] where it is the copy of a copy of a record, the record being still in existence, and being by law as high evidence as the original."

§ 1275. **Same: (2) Specific Rules of Preference as to Copy of Copy.**
 (a) In ascertaining whether there are any specific rules of preference prop-

but the substantive law as to what constitutes the record; this matter is not within the purview of this treatise, but is dealt with briefly *post*, § 2450.

¹ One of its first appearances seems to be in 1653, *Faulconer's Trial*, 5 How. St. Tr. 323, 349, 356, cited in the next section.

² 1838, *Alderson, B.*, in *Everingham v. Roundell*, 2 Moo. & Rob. 138 ("There would be no limit to the reception of secondary evidence, if that were so. . . . This is but the shadow of a shade").

erly applicable to the detriment of a mediate copy, we must first distinguish those situations in which a mediate copy would be excluded or admitted upon *independent principles*.

(a¹) On the one hand, assuming proof by a copy of a copy to be legitimate, the very notion implies that the intermediate document was a correct copy; and until the *correctness of the intermediate document* is shown, there is nothing to verify the second copy as being correct, for it is based on the anonymous hearsay of the person who made the first document, purporting to be but not shown to be really a copy of the original. Without such testimony by some one to the correctness of the intermediate document as a copy, the copy of it (on the principle of § 1278, *post*) is plainly inadmissible.¹

(a²) On the other hand, a copy which happens to have been first transcribed from an intermediate copy can be made itself an immediate copy, by *comparing* and *verifying* it directly from the original.² Moreover, a mediate copy used as a memorandum, by one knowing the original, to *refresh recollection* of the original (*ante*, § 760) and not offered as a copy, is not offered as a copy of a copy, and is therefore available, wherever (*ante*, § 1268) recollection-testimony is proper.³

(b) It then remains to ascertain what definite *rules of preference* apply against a mediate copy as such, *i. e.* assuming that it is proved to be what it purports to be. These legitimate rules of preference are based upon the general notion that, where the original is still accessible (though not producible, under § 1218, *ante*) for the purpose of obtaining an immediate copy, there an immediate copy may fairly be required to be obtained and offered.

(b¹) In the first place, if the *original is an existing public record*, and the immediate copy *not*, a mediate copy from the latter (it seems well settled) should be excluded; since the original is still accessible for obtaining an immediate copy.⁴

¹ 1814, *Teed v. Martin*, 4 Camp. 90 (to prove an affidavit of ship-ownership, an official clerk who had made an entry from a certificate of registry made by another clerk who alone had seen the affidavit, not admitted); 1884, *Dyer v. Hudson*, 65 Cal. 372, 4 Pac. 235 (stenographer's copy of certified copy read in evidence at former trial, original document being lost, excluded; but here the stenographer was not called to verify it, nor the reader of the certified copy); 1898, *Crane Co. v. Tierney*, 175 Ill. 79, 51 N. E. 715 (copy of a record which was a copy of a copy of a document not proved, excluded); 1875, *Fowler v. Hoffman*, 31 Mich. 215 (copy of a copy, the latter not shown to be correct, inadmissible; unless the former can be verified from recollection as correct); 1882, *People v. McKiuney*, 49 id. 334, 13 N. W. 619 (copy by one stenographer of another's notes without subsequent comparison of copy and original, excluded, the notes being lengthy and covering over 100 pages).

² 1859, *Gregory v. McPherson*, 13 Cal. 562, 574 (copy of a copy, compared anew with the original, received); 1835, *Winn v. Patterson*, 9 Pet. 663, 677 (copy of a record-copy of an orig-

inal, both apparently being made and verified by R., receivable).

³ 1843, *Dunlap v. Berry*, 5 Ill. 326, 331 (copy of a copy may be used to refresh memory as to the original); 1875, *Fowler v. Hoffman*, 31 Mich. 215, *supra*, note 1.

⁴ 1685, *Anon.*, *Skin*. 174 ("If the original [will] be burnt or lost, etc., a copy of their [i. e. Ecclesiastical Court's] registry hath been often given in evidence; but a copy of a copy cannot"); 1862, *Sternberg v. Callanan*, 14 Ia. 251 (copy of copy of declaration; excluded on the facts); 1897, *Drum v. Cessman*, 58 Kan. 331, 49 Pac. 78 (copy of judicial records should be of the originals, not of the transcript); 1869, *Goodrich v. Weston*, 102 Mass. 362 (Wells, J.: "Whenever a copy of a record or document is itself made original or primary evidence, the rule is clear and well settled that it must be a copy made directly from or compared with the original; . . . so long as another may be obtained from the same source, no ground can be laid for resorting to evidence of an inferior or secondary character"); 1864, *Lund v. Rice*, 9 Minn. 230 (record of a copy of recorded deed, inadmissible apart from statute); 1831, *Lincoln v. Battelle*,

(b²) In the next place, if the original and also the immediate copy are both existing public records, the same rule would seem to apply, for it is still as feasible to obtain an immediate copy from the original record, though here there is found some difference of judicial opinion and statutory rule.⁵ Where the original is out of the jurisdiction, the requirement may well be relaxed.⁶

(c) Such are the legitimate and easily defended rules of preference. There remains to be noticed certain situations, in which it would seem that no rule of preference can properly exist, *i. e.* situations in which the original is no longer accessible for purposes of immediate copying. Where this is the case,

6 Wend. 475, 484 (copy of a certified copy of a foreign decree, excluded); 1881, *Goddard v. Parker*, 10 Or. 102, 106 (certified copy of certified copy of official map, excluded); 1890, *La-sater v. Van Hook*, 77 Tex. 650, 655, 14 S. W. 270 (certified copy of deed-record, original being lost, preferred to examined copy of certified copy); 1843, *Carpenter v. Sawyer*, 17 Vt. 121, 124 ("a copy of a certified copy of a record is not evidence").

⁵ In this class of cases the commonest instance of statutory change is the allowance of the use of copies from the re-record, in another county, of a judicial record or the like: *Ariz. Rev. St.* 1887 § 1878 (certified copies of records of new county transcribed from records of original county, admissible); *Ark.*: 1851, *State v. Crow*, 11 Ark. 642, 656 (justice's judgment-transcript filed in Circuit Court; clerk's copy of this sufficient); *Colo. Annot. Stats.* 1891, § 457 (certified copies of records transcribed on formation of new county, admissible); *Ill.*: 1873, *Miller v. Goodwin*, 70 Ill. 659 (transcript of official copy of original legislative minutes, admitted); *Ind.*: 1876, *Nelson v. Blakey*, 54 Ind. 29, 35 (articles of incorporation filed with county recorder, certified copy of this record filed with Secretary of State; certified copy from the Secretary's office, excluded as a copy of a copy of a copy not authorized by the statute); *Ia. Code* 1897, § 4539 (documents in office of U. S. surveyor-general, though themselves copies, provable by copy); 1862, *Niles v. Sprague*, 13 Ia. 198, 202 (a foreign certificate of marriage must be proved by direct copy, and not by a copy of the clerk's record); *Ky.*: 1816, *Hedden v. Overton*, 4 Bibb 406 (copy of a book of record, itself containing copies of Virginia patents, admitted, under a statute admitting copies of "records and other papers" of the register's office); 1816, *Owings v. Ulery*, ib. 450 (Maryland will, probated there, and recorded by copy in this State; copy of record admitted); 1817, *Rogers v. Barnett*, ib. 480 (similar); 1818, *Spurr v. Trimble*, 1 A. K. Marsh. 278, 279 (copy of power of attorney, certified by Virginia notary as recorded by him, then recorded by local clerk of Court; a copy of this, excluded); *La.*: 1831, *Lum v. Kelso*, 2 La. 64, 67 (copy of record of judgment made in another court, excluded); 1851, *Look v. Mays*, 6 La. An. 726 (transcript of lower Court's transcript of Supreme Court's order of reversal, received); 1857, *West Feliciana*

R. Co. v. Thornton, 12 id. 736 (similar); 1859, *Wood v. Harrell*, 14 id. 61, 63 (certified copies of recorded copies received on the facts); *Miss. Annot. Code* 1892, § 1807 (records of county or court or office, transcribed in order of board of supervisors; copy or transcript of records to have same effect as original); *Mo. Rev. St.* 1899, § 10197 (county surveyor's certified copy of filed certified copy of U. S. field-notes, admissible); 1827, *Bettis v. Logan*, 2 Mo. 2 (transcript of transcribed record filed in another court, admissible); *Nev. Gen. St.* 1885, §§ 304, 311 (certified copies of certain transcribed mining records, admissible); *N. C.*: 1824, *State v. Welsh*, 3 Hawks 404, 407, 409 (certified copy of a statute reciting another statute, admissible); *Henderson, J.*, diss.; *N. C. Code* 1883, § 428 (certified copy of judgment recorded with county recorder, admissible); *Pa. St.* 1798, P. & L. Dig. Court Rec. 3 (exemplifications of Philadelphia County Court records of roads, copied from original record, receivable); *St.* 1833, P. & L. Dig. Evid. 32 (official copies of copies of official drafts of donation lands, receivable); *St.* 1889, P. & L. Dig. Evid. 27 (record of probated will in another county than proved, receivable in certain cases); *Tex. Rev. Civ. Stats.* 1895, §§ 2319, 2320 (certified copies of transcribed records for new counties, admissible); §§ 4585-4593 b (transcribed records in general; provisions for using); *U. S. Rev. St.* 1878, §§ 897, 898 (transcripts of certain judicial records into new books, admissible); *Va.*: 1814, *Whitacre v. M'Ilhanev*, 4 Munf. 310, 312 (copy of a record containing copies of decree, etc., excluded).

⁶ 1900, *Knoxville Nursery Co. v. Conn.*, 108 Ky. 6, 55 S. W. 691 (certified copy of a foreign corporation's certificate of incorporation locally filed, admissible; the foreign certificate is not here the original, because the local certificate is itself a new admission of corporate existence); 1900, *Com. v. Corkery*, 175 Mass. 460, 56 N. E. 711 (corporation commissioner's certified copy of a copy filed with him of foreign articles of incorporation, admitted); 1868, *Corbett v. Nutt*, 18 Gratt. 624, 633, 637 (certified copy of a will and probate from a court in D. C., where it had been probated from an authenticated copy from court of original probate, received, the second probate being out of the State; whether a copy of this second copy could be received, not decided).

a mediate copy may well be used as freely as an immediate copy, because otherwise the unfair burden (similar to that spoken of *ante*, § 1268) would be imposed on the proponent of searching for possible immediate copies and of proving them unobtainable. Any rule requiring in such a case the immediate copy to be accounted for must proceed on the radical principle that a mediate copy is so inferior to an immediate copy that the latter must always be used if any one pre-existing specimen can by possibility be found. It is one thing to require (as in par. *b*) that, where new direct copies can be obtained *ad libitum*, such a copy shall be procured at a definite office; but it is taking a much further step to say that, though no new ones can now be created, yet search must be made in unspecified places for any that may have been previously taken and may still exist. To such an extent very few Courts are willing to go. Four varieties of this situation may be distinguished:

(*c*¹) Where the *original* and the *first copy* are both *lost* or *destroyed*, it is clear that the mediate copy should be admitted; and this seems not to have been disputed.⁷

(*c*²) Where the *original* is *lost* or *destroyed*, and the *first copy* is not producible because it is an *official record*, practically the same situation as the preceding is presented, since neither original nor first copy is producible. It is generally conceded that the mediate copy may be used; and the statutes which authorize the official copying of *torn* or *illegible* records provide usually for admitting copies of these copies.⁸

(*c*³) Where the *original* is a *deed lawfully recorded* and therefore need not be produced (*ante*, §§ 1224, 1225), the *first copy* being the *official record* and thus also not producible, practically the same situation is again presented,

⁷ 1873, *Cornett v. Williams*, 20 Wall. 226, 245 (copy of a certified copy of a judgment, both original and certified copy being destroyed, admitted).

⁸ Add also the statutes cited *infra*, note 12: 1653, *Faulconer's Trial*, 5 How. St. Tr. 323, 349, 356 (a deposition being lost, but being recorded in Haberdasher's Hall, "the proper court where it ought to remain," an examined copy of the record, and another copy in the House journals, were used, though objected to as "but a transcript of a transcript, a copy of a copy"); Ariz. Rev. St. 1897, § 2556 (certified copies of transcribed defaced records, admissible); Ill. Rev. St. 1874, c. 124, § 11 (certified copies of copies of lost enrolled laws in office of Secretary of State, admissible); Ind. Rev. St. 1897, §§ 1255-1294 (copy of copy of lost records restored, admissible); § 1343 (re-recorded mutilated, etc., records of Supreme Court, provable by clerk's certified copy under court seal); Ky. Stats. 1899, §§ 1632-1634 (transcription of torn, etc., records, equivalent to original); Md. Pub. G. L. Art. 35, § 51 (land-office commissioner's certified copy under seal of an extract from a deed transmitted by court clerk, admissible if deed and record are lost or destroyed); Mass. Pub. St. c. 37, §§ 8, 11 (certified copies of certified copies of worn, etc., records, lawfully

ordered and filed, admissible); Mo. Rev. St. 1899, § 9109 (re-recording of records torn, etc.; certified copies admissible); N. J. Gen. St. 1896, Conveyances, § 181 (mutilated, torn, etc., records may be proved by re-record or certified copy thereof); N. C. Code 1883, § 3662 (certified copies of old records, etc., transcribed, admissible); Oh. Rev. St. 1898, §§ 906, 907, 907b (copy of copies of old records re-copied, admissible); Pa. St. 1833, P. & L. Dig. Evid. 34 (certified copies of official copies of defaced ancient official papers in surveyor-general's office, receivable); St. 1844, P. & L. Dig. Evid. 15 (copies by register of probate of entries from certain Orphans' Court papers, receivable "in the event of the loss or destruction" of such papers); Vt. St. 1894, § 3007 (certified transcript of town records, to be used as originals if the originals are lost or destroyed); W. Va. Code 1891, §§ 9-15 (provision made for equal effect to be given to records reproduced from prior lost or destroyed records); St. 1872-3, c. 164 (proceedings of commissioners to establish contents of burnt records, usable when "no higher or better evidence can be had"); St. 1895, c. 15 (county clerk's certified copy of re-recorded copy of lost or destroyed record, admissible); Wis. Stats. 1898, §§ 661 a-661 c (certified copies of re-recorded lost records, admissible).

except that here it is still possible to copy directly from the original if it could be discovered by search. But the object of such statutory provision for recording is generally understood to be to facilitate the use of the record for the purpose of obtaining copies,—the ordinary case of a recorded deed being the typical one. Hence, whatever may be the rule as to exempting from the production of the original deed (*ante*, § 1225), nevertheless, whenever a copy is receivable at all,—*i. e.* either after or without accounting for the original,—it may be a copy from the official record; the objection that it is a mediate copy not being recognized as having force for such a case:

1835, *Story, J.*, in *Winn v. Patterson*, 9 Pet. 603, 677: "It is certainly a common practice to produce in the custody of the clerk, under a *subpoena duces tecum*, the original records of deeds duly recorded. But in point of law a copy from such record is admissible in evidence upon the ground stated in *Lynch v. Clerk*,⁹ that where an original document of a public nature would be evidence if produced, an immediate sworn copy thereof is admissible in evidence; for as all persons have a right to the evidence which documents of a public nature afford, they might otherwise be required to be exhibited at different places at the same time."

1848, *Stetson v. Gulliver*, 2 Cush. 494, 499: "When the book of the register would be evidence, a certified copy is entitled to have the same effect; there being very little ground to apprehend any mistake from that cause, and upon consideration of the great public inconvenience which would result from having the books of record removed from their proper custody and place of security."

This is universally conceded where the first copy is contained in an official register (as with deeds of land usually), and is expressly declared in the statutes of registration (*ante*, § 1225). The only arguable case seems to be that of a copy required to be filed but not recorded in a book.¹⁰ It is upon this principle also, or an extension of it, that a copy from an *authorized re-record* in general (*e. g.* in another county) is receivable;¹¹ and this principle, combined with that of (*c*²) above, admits copies of *re-records* of *conveyances*

⁹ 3 Salk. 154.

¹⁰ 1694, *Smart v. Williams*, Comh. 247 (a copy of a will recorded at the Prerogative Office, opposed "because it is but a copy of a copy; but the Court allowed it, for the entry in the ecclesiastical books is the original *quod hoc*; otherwise to make a title to lands by devise"; on the latter point, see the reason *ante*, § 1238); 1882, *Martin v. Hall*, 72 Ala. 587 (certified copy of record of official bond, required to be filed but not to be recorded, excluded); 1875, *Vance v. Rohberg*, 50 Cal. 346, 349 (certified copy of officially filed copy of articles of consolidation, receivable); Cal. C. C. P. 1872, § 1855 (for public or recorded documents, a copy of the record suffices; for documents lost or in opponent's possession, "either a copy or oral evidence"); 1873, *Toledo W. & W. R. Co. v. Chew*, 67 Ill. 378, 381 (corporate articles; copy filed by law; copy of this official record, admitted as copy of duplicate original); 1879, *Board v. May*, 67 Ind. 561, 566 (certified copy of official record of soldier's discharge, etc., admitted); 1848, *Stetson v. Gulliver*, 2 Cush. 494 (see quotation *supra*); 1869, *Goodrich v. Westou*, 102 Mass. 362 (same); 1876, *Willamette*

F. C. & L. Co. v. Gordon, 6 Or. 175, 177, *semble* (copy of recorded document, admissible); 1900, *Hilliard v. Enders*, 196 Pa. 587, 46 Atl. 839 (certified copy of a record-copy, required to be filed, of a deed, admissible). Compare the cases on *foreign corporate articles*, cited *supra*, note 6.

¹¹ Ill. Rev. St. c. 30, § 29 (certified copies of recorded certified copy of deed of lands in different counties, admissible); 1890, *Collins v. Valleau*, 79 Ia. 626, 629, 43 N. W. 284, 44 N. W. 904 (re-record in another county; re-record admitted); Mich. Comp. L. 1897, §§ 8997, 8999, 9000, 9004, 9031 (certain re-recorded deeds, provable by certified copy); Mo. Rev. St. 1899, § 9086 (deed affecting land in another county or in new subdivided county); 1880, *Crispen v. Haunavan*, 72 Mo. 548, 556 (re-recorded deed provable under statute by certified copy).

No attempt is made to collect all such statutes here, because they are too numerous to be set forth accurately, and because they almost always expressly make copies admissible. It may be noted that the statutes cited under (*b*) *supra*, providing for transcribed *public records in general*, will thus usually cover the present case of deed-records.

whose original records are destroyed, i. e. without requiring the copy to be taken from the original conveyance though in existence.¹² The use of an abstract from such a record, however, involves the principle of Completeness, and may be better considered under that head (*post*, §§ 2105, 2107).

(⁴) The fourth variety of situation occurs where the *original* is *lost* or *destroyed* and the *first copy* is not an official record and is *not* shown to be lost or otherwise *accounted for*. This presents the only situation in which a supposed strict rule of preference can practically make any difference to the proponent's disadvantage. In the preceding cases there is virtually a general agreement that the mediate copy can be used because the immediate copy cannot be had; and the question here is really, Must it be shown that an immediate copy cannot be had? Is the mediate copy receivable without such a showing? The objection to such a rule, as already noted (*ante*, § 1275), is the excessive burden of search and proof placed on the proponent, — a burden disproportionate to the small risk of error involved in the use of a mediate copy. As regards the state of the law, it is just here that the place of really debatable and still unsettled doctrine is found. It has already been seen (in paragraph *a*, above) that there is no support for the extreme notion that a copy of a copy is absolutely inadmissible; it has also been seen, on the other hand (in paragraph *b*, above) that a copy of a copy is generally conceded not to be receivable so long as the original is accessible for direct copying, and also (in paragraphs *c*, *c*¹, *c*², *c*³, above) that by general concession a copy of a copy is receivable when neither original nor first copy are to be had. But none of these concessions answers the present inquiry, namely, When the original is not accessible for a direct copy, but the intermediate copy copied from (or some other pre-existing direct copy) is by possibility available, must the latter be produced or accounted for? The orthodox English doctrine seems clearly to have laid down such a rule;¹³ but, for the reasons above suggested, this unnecessarily strict requirement has been rejected by a majority of American Courts,¹⁴ although in view of

¹² The statutes almost always expressly so provide; the following list is not complete, and those cited *supra* (*c*²) will also usually cover this case of deed-records: Colo. Annot. Stats. 1891, § 3752 (recorder's certified copy under official seal of re-recorded documents whose original records are destroyed, admissible); Fla. St. 1901, c. 4950 (certified copies of re-recorded instruments or copies of deeds whose records have been burnt, admissible); Ill. Rev. St. 1874, c. 116, §§ 6-8, 11, 22 (certified copies of conveyances, etc., or certified copies thereof, re-recorded to supply the loss of original records, admissible); Mo. Rev. St. 1899, § 929 (re-recorded conveyances where records have been destroyed by fire, admissible); Okl. St. 1895, c. 42 (provisions for recording, as equivalent to the original, copies of lost records of deeds and other instruments).

¹³ 1767, *Tillard v. Shebbeare*, 2 Wils. 366 (copy of a Bishop's institution-book entry, copying a presentation; the book itself called for;

"the true point is, Might not the plaintiff have produced better evidence?"); 1816, *Liebman v. Pooley*, 1 Stark. 167 (letter; copy of a copy left at home, excluded); 1838, *Everingham v. Roundell*, 2 Moo. & Rob. 138, *Alderson v. B.* (writ; copy of a copy left at home by the witness, excluded); 1849, *Schley v. Lyon*, 6 Ga. 530, 538 (witness copied from newspaper file, then copied the copy; excluded, even though files were unavailable); 1899, *State v. Cohen*, 108 Ia. 208, 78 N. W. 857 (copy of copy of policy, excluded, the first copy not being shown unavailable); 1782, *Morris v. Vanderen*, 1 Dall. 64, 65 (copy of a certificate of a survey, excluded).

¹⁴ 1871, *Cameron v. Peck*, 37 Conn. 563 (admitting a copy of a press-copy of a letter); 1860, *Womack v. White*, 30 Ga. 696, 700 (copy of sale-advertisement, admitted; newspaper itself not required); 1869, *Goodrich v. Weston*, 102 Mass. 362 (lost letter; the copy of a letter-press copy, the latter not accounted for, was

the numerous discriminations above noted, it can hardly be said that any clear and settled doctrine exists except in a few jurisdictions.

2. Rules as to Qualifications of Witness to Copy.

§ 1277. **In general.** A copy, merely as a piece of paper, has no standing as evidence. In order even to be termed "copy," it must have the support of a witness qualified to say that it represents the contents of the original document:

Ante 1726, Chief Baron *Gilbert*, *Evidence*, 96: "A copy of the deed must be proved by a witness that compared it with the original; for there is no proof of the truth of the copy, or that it hath any relation to the deed, unless there be somebody to prove its comparison with the original."

A copy, in short, is merely one mode (*ante*, § 799) of presenting the testimony of a witness. The witness, therefore, must be qualified; and thus the general principles of witnesses' qualifications have here certain special applications.

§ 1278. **Witness to Copy must have Personal Knowledge of Original.** A general principle for witness' qualifications is that he must speak from personal observation of the event or thing to be testified to, and that therefore in general a witness is not qualified who bases his testimony, not on his own personal observation, but on imagination, or inference, or the hearsay of others (*ante*, § 657). Upon this principle, then, a person who proposes to testify to the contents of a document, either by copy or otherwise, *must have read it*. He may not describe its contents merely on the credit of what another has told him it contains, even though his informant purports to have read it aloud in his presence.

This rule is not always enforced by Courts; and no doubt there are cases in which the trial Court's discretion may properly allow exceptions. But the general rule is a proper one, and is constantly invoked.¹ Upon the same

accepted; "there are no degrees of legal distinction in this class of evidence"; 1890, *Smith v. Brown*, 151 *id.* 338, 340, 24 N. E. 31 (two successive assignments of a judgment; the first being lost, the second was held not preferable to a copy of the first; "if there are several sources of information of the same fact, it is not ordinarily necessary to show that all have been exhausted before secondary evidence can be resorted to"); 1821, *Robertson v. Lynch*, 13 *John.* 451, 452, 457, *semble* (copy of a letter-book copy, receivable); 1830, *Jackson v. Cole*, 4 *Cow.* 587, 595 (copy of a copy of appraisers' certificate received, the original being lost); 1896, *Howard v. Quantlebaum*, 46 S. C. 95, 24 S. E. 93 (a copy from a certified copy of a will, the will and the record having been destroyed by fire, admitted); 1813, *Duncan v. Blair*, 2 *Overt.* 213, 214 (the recorded entry of land being lost, a copy of a warrant containing a copy of the entry and a copy of an abstract of the entries was received).

¹ In the following list the cases on both sides

are included: 1672, *Peterborough v. Mordant*, 1 *Mod.* 94 (the witness to a copy, "being asked whether he did see the very deed and compare it with that copy, he answered in the negative," whereupon his testimony was disallowed); 1830, *R. v. Haworth*, 4 C. & P. 254, 256 (must have read the original); 1896, *Edisto Phos. Co. v. Stanford*, 112 Ala. 493, 20 So. 613 (the witness must have seen the document); 1901, *Lester v. Blackwell*, 128 Ala. 143, 30 So. 663 (testimony of persons who had heard a deed read, admitted); 1853, *Hooper v. Chism*, 13 Ark. 496, 501 (one who had heard a bill of sale read, by an unspecified person; insufficient); 1878, *Weis v. Tierman*, 91 Ill. 27, 30 (a person who had heard or read that records were destroyed, excluded); 1848, *Hodges v. Hodges*, 2 *Cush.* 460 (one testifying from statements of the signer, excluded); 1846, *Matthews v. Coalter*, 9 Mo. 696, 699, 701 (one who heard a paper read, allowed to testify to the reading of contents, on the *res gestæ* principle); 1892, *Rice v. Rice*, — N. J. Eq. —, 25 *Atl.* 321 (copy of a letter dictated, the writer

principle, testimony to contents by a foreigner or an illiterate person is ordinarily inadmissible.² It is upon this principle that a copy of a copy, as already noted (*ante*, § 1275, par. a), may be excluded where it does not appear that the intermediate document was really a copy.³

§ 1279. **Same: Exception for Copy of Official Records; Cross-Reading not Necessary.** To the preceding rule there is a classical and settled exception, covering the case of a copy made of an *official record*. Here it has never been doubted that, if the witness "cross-read" with another person (usually the record-keeper or his clerk) — *i. e.* held the copy and followed it as the other read aloud the original, then followed the original while the other read aloud the copy —, his testimony to the copy's correctness would be admissible; although it is obvious that his testimony is none the less based on hearsay. The only objection here raised has been that there should at least be a cross-reading, *i. e.* that a single co-reading, *i. e.* one or the other of the above parts of the process, is insufficient; but even this objection has been by long tradition and practice almost unanimously repudiated.¹

not seeing the original nor the dictator the copy; received, with reservation that for formal documents, essential to a claim, etc., cross-reading, or the like, might be required); 1897, *Schubert Lodge v. Schubert Verein*, 56 *id.* 78, 38 *Atl.* 347 (printed copy of the constitution of a secret order; the State-lodge secretary received it from the Supreme-lodge secretary; the former's testimony held sufficient); 1874, *Nichols v. Kingdom Co.*, 56 *N. Y.* 618 (letter; even though the letter is now destroyed, not provable by one who has not read it); 1875, *Edwards v. Noyes*, 65 *N. Y.* 126, *semble* (same); 1880, *Nelson v. Whitfield*, 82 *N. C.* 46 (a lost will having been shown to be probated, its contents were proved by others who had heard read what purported to be the will or a copy); 1894, *Propst v. Mathis*, 115 *id.* 526, 20 *S. E.* 710 (rejecting a witness who testified to the contents of a lost will read over to him by the clerk; distinguishing *Nelson v. Whitfield*, *supra*, because here the same witness was expected to suffice for both the contents and the fact of probate); 1827, *Pipher v. Lodge*, 17 *S. & R.* 214, 221, 232 (a copy by a clerk of a deposition, not clearly shown to have been based on the original, receivable, per *Tod, J.*, excluded, per *Gibson, C. J.*, and *Rogers, J.*); 1869, *McGinniss v. Sawyer*, 63 *Pa.* 266 (lost document; witness must have seen and read it); 1870, *Coxe v. England*, 65 *id.* 212, 222 (one who saw a few words of a letter which another read aloud, not competent, because "her knowledge was hearsay"); *Tex. Rev. Civ. Stats.* 1895, § 1905 (lost will may be proved by one "who has heard it read"); 1871, *Johnson v. Bolton*, 43 *Vt.* 303, 304 (testimony by an illiterate who heard another person read a letter, excluded).

On the same principle it has been held that a bystander may not testify to the accuracy of a report of the examination of an illiterate accused; 1834, *R. v. Chappell*, 1 *Moo. & R.* 395 (Denmn, L. C. J.; "For if the prisoner signs his name, this implies that he can read, and that he has

read the examination and adopted it. But if he has not signed it, or has only put his mark, there are no grounds to infer that he can read or that he knows the contents, and no person can swear that the examination has been correctly read over to him except the person who read it"). *Accord*: 1834, *R. v. Richards*, *ib.* 396, n., *Patteson, J.* *Contra*: 1835, *R. v. Hope*, *ib.* 396, n., *Patteson* and *Vaughan, JJ.*, for certain cases.

¹ 1884, *Russell v. Brosseau*, 65 *Cal.* 605, 607, 4 *Pac.* 643 (testimony to contents of notice by one unable to read or write, excluded); 1870, *Cheek v. James*, 2 *Heisk.* 170, 172 (a boy from 5 to 8 years old at the time of execution of a bond, held not competent to testify to its contents). *Contra*: 1883, *Breen v. Richardson*, 6 *Colo.* 605 (a foreigner, executing articles of partnership read over to him, allowed to testify to the contents of the destroyed original); 1872, *Morris v. Swaney*, 7 *Heisk.* 591, 597 (contents of a lost will allowed to be shown by illiterate persons who had heard it read aloud by others; the analogy of examined records invoked, in which cross reading is not necessary).

² That a party's admission may suffice, though not based on personal knowledge, see *ante*, §§ 1053, 1255.

What personal knowledge is required as to the genuineness of the original from which the copy was taken is dealt with *post*, § 2158.

For copies of telegrams, see *post*, § 2154.

³ 1808, *Reid v. Margison*, 1 *Camp.* 469 (Wood, B.: "Had the witness who was called done all that the defendant requires, still the other person engaged in the examination might by possibility have misread the copy as well as the original; and it would come to this, that to prove a copy of a record there must always be two witnesses, the man who read and the man who examined. But this would be a great public inconvenience, and there is no rule of law to require it"). *Accord*: 1795, *M'Neil v. Perchard*, 1 *Esp.* 264 (writ); 1808, *Gyles v. Hill*, 1 *Camp.* 471, note

§ 1280. **Same: Sundry Distinctions (Press-copies; Witness not the Copyist; Double Testimony; Impression or Relief; Spoliation).** (1) Where a process of copying — by *blotter-press* or the like — is in its general operation fairly accurate, it should be enough that the witness has gone through the process, even though he has not afterwards verified the copy with the original.¹ The same principle should apply to *photographic copies* (*ante*, §§ 793, 795).

(2) The witness to a copy need not be *himself* the transcriber or *copyist*. If he has at some time compared the original and the alleged copy made by another, he is qualified to verify the copy. If a period has elapsed between his sight of the original and his sight of the copy, so that he is virtually nothing more than a recollection-witness (*ante*, § 1266) — as where he is first shown the alleged copy in court and is asked to say whether it is a copy of the original as he remembers it —, then it is possible that he should be regarded as an inferior witness to a copy-witness in the strict sense (as noted *ante*, § 1268); but that he is at least a qualified witness has not been doubted.²

(3) On the same principle, a paper may be shown a copy by the *united testimony* of *two persons* neither of whom alone could testify to all the elements. The typical instance is that of paper A shown by one witness to be a copy of a certain paper B, another witness then showing paper B to be identical with the absent original in issue.³

(official record); 1809, *Rolf v. Dart*, 2 Taunt. 52 (judgment); 1833, *Fuson v. Kemp*, 6 C. & P. 72 (bill of costs); 1839, *R. v. Hughes*, 1 Cr. & D. 13 (record of conviction); 1807, *Lynde v. Judd*, 3 Day 499; 1852, *Pickard v. Bailey*, 26 N. H. 152, 169; 1830, *Beardsley, Sen., in Hill v. Packard*, 5 Wend. 375, 387 ("Copies of records are to be proved, as other transcripts, by a witness who has compared the copy line for line with the original, or has examined the copy while another person read the original"); 1870, *Krise v. Neason*, 66 Pa. 253, 260 (whether cross-reading is necessary; held not here, because the reader was the agent of both parties); 1872, *Morris v. Swaney*, 7 Heisk. 591, 597, *ante*, § 1278, note 2. *Contra*: 1837, *Slane Peerage Case*, 5 Cl. & F. 23, 42 (for public documents); 1892, *Rice v. Rice*, — N. J. Eq. —, 25 Atl. 321, *semble*, *supra*, note 1. *Not clear*: 1848, *Crawford and Lindsay Peerages*, 2 H. L. C. 534, 545 (cross-reading of an ancient document in Latin; both readers and the copyist called, on the facts).

That the personal knowledge of an officer giving a certified copy is not required, see *post*, §§ 1635, 1677.

¹ 1842, *Simpson v. Thornton*, 2 Moo. & Roh. 433; 1890, *Ford v. Cunnigham*, 87 Cal. 209, 210, 23 Pac. 403; *Haw. Civil Laws 1897*, § 1407 ("where any writing whatsoever shall have been copied by means of any machine or press which produces a facsimile impression or copy of such writing," the copy suffices, on proof of being so taken, "without any proof that such impression or copy was compared with the said original").

² 1833, *R. v. Fursey*, 6 C. & P. 81, 84 (for proving notices, usual way is "to give a [alleged]

copy to the witness and ask if it is a copy of what he saw"); 1837, *R. v. Murphy*, 8 Id. 297, 306, 307, 308, *semble* (testimony that a paper was similar to one in evidence, admitted); 1875, *Lombard v. Johnson*, 76 Ill. 599, 601 (the copyist himself need not come, if another qualified person can verify the copy); 1820, *Barbour v. Watts*, 2 A. K. Marsh. 290 (one who had first seen the copy some time after seeing the original; not decided); 1837, *Dana v. Kemble*, 19 Pick. 112, 116 (a paper in the handwriting of the deceased writer of an original; this paper testified to be of the same tenor as the original; held sufficient); 1851, *Harvey v. Chontean*, 14 Mo. 587, 597 (the witness need not have the original before him, if the correctness of the copy is otherwise known to him); 1894, *Nostrum v. Halliday*, 39 Nehr. 828, 833, 58 N. W. 429, *semble* (copy of a plat not made by witness nor compared with original, excluded); 1832, *Smith v. Axtell*, 1 N. J. L. 494, 498 ("It has not been compared; the witnesses who state it to be a copy, speak only from their recollection of the original"; admitted, though a copy in the strict sense was held preferable); 1881, *Kollock v. Parcher*, 52 Wis. 393, 400, 9 N. W. 67 (a defective official-copy may be verified by another person so as to be admissible); 1895, *Althouse v. Jamestown*, 91 id. 46, 64 N. W. 423 (the fact of serving a particular notice being in existence, and the testimony of the person who made the copy offered not being available, the testimony of one who had read the original and also the copy was received).

³ 1699, *Medicot v. Joyner*, 2 Kehle 546 (a deed-copy "made by the witness to carry about

(4) On the principle of knowledge (*ante*, § 658), it is not necessary that the quality of a witness' knowledge or belief should be that of absolute certainty; his belief or impression, if fairly certain and definite, will suffice. But it is of course difficult to draw the line precisely between the sufficient and the insufficient degrees of positiveness.

(5) A document's contents may be inferred from circumstantial evidence, — in particular, from *spoliation* or *suppression* by the opponent (*ante*, § 291).

3. Rules depending on the Hearsay Rule and its Exceptions.

§ 1281. Witness must be called, unless by Exception to the Hearsay Rule for Certified Copies, etc. A paper offered as a copy but not supported by any person's testimony in Court is a hearsay — *i. e.* extrajudicial — statement, obnoxious to the Hearsay rule (*post*, § 1362). Hence, some person must be called to the stand to verify the paper as the copy that it purports to be. A paper offered anonymously as a copy, or offered without calling some witness to verify it, is inadmissible. This principle, never disputed, is, with occasional lapses, constantly enforced in excluding supposed copies;¹ though in earlier times there was undoubtedly more laxity in this respect.²

But there are exceptions to the Hearsay rule, under which copies made by specific classes of persons may be admitted. (1) Under the exception for Official Statements (*post*, § 1677), copies made by officers lawfully authorized to give copies — *i. e.* exemplified, certified, attested, or office copies — are receivable. (2) Upon a similar principle, statutory provision is often made for the establishment, by *judicial proceedings*, of a copy of a lost or destroyed document (*post*, § 1682). (3) There is an early and limited exception, nowadays not much invoked, allowing the use of *recitals in one deed* of the contents of another as evidence of the latter's contents (*post*, § 1573). (4) There was also once an exception recognized for *ancient copies of ancient lost records* (*post*, § 1573). (5) There is an exception in favor of *private reports* of judi-

to counsel, but never examined with the original," admitted, because "this is good evidence as well as [*i. e.* together with] testimony of a witness of the contents of the deed burnt"; 1817, *R. v. Watson*, 2 Stark. 116, per Lord Ellenborough, C. J. ("When you wish to prove that a party has notice of the contents of a newspaper, you show by one witness that he had a copy of the paper and by another what the contents were"); 1885, *Huff v. Hall*, 56 Mich. 456, 457, 23 N. W. 88 (lost letter; B testifies to a letter shown him by A; A testifies that the letter was one received from the defendant; allowed); 1827, *Bullitt v. Overfield*, 2 Mo. 4 (copy verified by one witness for an original identified by another, admitted). That the witness to an *examined copy of a public record* must show that the document examined was really the desired record, is dealt with under Authentication (*post*, § 2158).

¹ 1844, *State Bank v. Ensminger*, 7 Blackf. 104, 108 (copy made by clerk in such a hurry

that he could not swear to accuracy; held sufficient, opponent possessing the original); 1886, *Re Gazette*, 35 Minn. 532, 533, 29 N. W. 347 (that a paper "seemed to be" a copy of a pleading, insufficient); see also *ante*, § 658.

² 1807, *Fisher v. Samuda*, 1 Camp. 190, 192 (a copy made by the plaintiff himself, incompetent from interest, excluded, because such testimony "must be of a nature which the law would receive in other instances"); 1819, *Wills v. M'Dole*, 5 N. J. L. 501 (copy insufficiently proved); 1885, *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 453, 3 N. E. 485 (the writing delivered to the telegraph office being the original, and destroyed, the transcript delivered to the sendee was taken as a copy, in the absence of any objection to its accuracy; compare § 2154, *post*); 1844, *Kelly v. Craig*, 5 Irel. 129, 131 (paper delivered by a clerk to a sheriff, purporting to be a copy of the tax-list, excluded).

³ 1707, *Winne v. Lloyd*, 2 Vern. 603 (copies by a deceased person admitted).

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cial decisions in other jurisdictions (*post*, § 1703), and, by statute, for copies certified by the clerks or other custodians of certain private documents such as *corporate records* (*post*, § 1663).

4. Sundry Principles.

§ 1282. **Completeness of Copy: Abstracts.** The general principle of Completeness (*post*, §§ 2105-2111) requires that, where the terms of a document are to be proved, the whole of the contents, whether in the original or by copy, be presented to the tribunal. It is impracticable to separate from the general treatment of that principle the specific rules applicable to the proof of a document's contents, and the various questions are there dealt with; in particular, the questions whether the whole of a document must be contained in the copy, and not a mere extract or an abstract, whether a copy must be stated to have been "truly" or "correctly" copied, and the like.

SUB-TITLE II: RULES OF TESTIMONIAL PREFERENCE.

CHAPTER XL

§ 1285. Nature and Kinds of Testimonial Preference.

TOPIC I: PROVISIONAL (OR CONDITIONAL) TESTIMONIAL PREFERENCES.

§ 1286. General Nature and Policy of these Rules.

SUB-TOPIC A: PREFERENCE FOR AN ATTESTING WITNESS.

§ 1287. History.

§ 1288. Reason and Policy of the Rule.

(a) "Where the execution of any document,"

§ 1290. Kind of Document covered by the Rule; at Common Law, all Documents were included; Statutory Modifications.

§ 1291. Documents incidentally or "Collaterally" in Issue.

(b) "Purports to have been attested,"

§ 1292. Who is an Attesting Witness.

(c) "A party desiring to prove its execution,"

§ 1293. Rule applies only in proving Execution, not in using the Document for Other Purposes.

(d) "Against an opponent entitled in the state of the issues to dispute execution,"

§ 1294. Execution not disputable (1) because of Estoppel or other rule of Substantive Law.

§ 1295. Execution not disputable (2) because of rule of Pleading.

§ 1296. Execution not disputable (3) because of Judicial Admission.

§ 1297. Execution not disputable (4) because of Opponent's Claim under the Same Instrument.

§ 1298. Execution disputable, and rule applicable, where the Opponent merely Produces the Instrument, without Claiming under it.

(e) "Must, before using other evidence,"

§ 1299. Attester preferred to any Third Person, including the Maker of the Document.

§ 1300. Attester preferred to Opponent's Extrajudicial Admissions.

§ 1301. Attester preferred to Opponent's Testimony on the Stand.

(f) "Either produce the attester as a witness,"

§ 1302. Attester need not Testify Favorably; Witness Denying or not Recollecting.

§ 1303. Same: Discriminations (Refreshing Recollection; Implied Attestation Clause; impeaching one's Own Witness, or one's Own Attestation; Illinois Rule admitting only Attesting Witnesses in Probate).

§ 1304. Number of Attesters required to be Called.

§ 1305. Same: Rule satisfied when One Competent Witness testifies by Deposition or Affidavit.

§ 1306. Same: When All Witnesses are unavailable In Person, One Attestation only need be Authenticated.

(g) "Or show his testimony to be unavailable,"

§ 1308. General Principle of Unavailability. § 1309. All the Attesters must be shown Unavailable.

§ 1310. Statutory Enumerations of Causes of Unavailability.

§ 1311. Causes of Unavailability: (1) Death; (2) Ancient Document.

§ 1312. Same: (3) Absence from Jurisdiction.

§ 1313. Same: (4) Absence in Unknown Parts.

§ 1314. Same: (5) Witness' Name Unknown, through Loss or Illegibility of Document.

§ 1315. Same: (6) Illness or Infirmary; (7) Failure of Memory; (8) Imprisonment.

§ 1316. Same: (9) Incompetency, through Interest, Infancy, Insanity, Blindness, etc.

§ 1317. Same: (10) Refusal to Testify, Privileged or Unprivileged.

§ 1318. Same: (11) Document proved by Registry-Copy.

§ 1319. Same: Summary.

(h) "And also authenticate his attestation unless it is not feasible."

§ 1320. If the Witness is Unavailable, must his Signature be proved, or does it suffice to prove the Maker's?

§ 1321. Proof of Signature dispensed with, where not Obtainable.

§ 1285. **Nature and Kinds of Testimonial Preference.** In the preceding Chapter has been examined that sort of preference which is accorded to the original of a writing; its production before the tribunal is preferred, if feasible, instead of testimonial or circumstantial evidence about the contents. The preference now to be examined is a preference for one kind of testimonial evidence (*i. e.* one kind of witness) over another. The rules of preference here are of two sorts, one less stringent than the other. By one sort of preference, it is required that a particular witness or class of witnesses be called before any other can be resorted to, so that the latter cannot be used until the former is produced or is shown to be unavallable. This sort of preference may be termed *provisimal* (or *conditional*).¹ By the other sort, the preferred witness or class of witnesses is not only first required, but if it is available, it is made the exclusive source of proof; that is, if the preferred witness is available, his testimony is taken as so trustworthy that no other testimony to the same point is received, nor is his testimony allowed to be shown incorrect. This sort of preference may be termed *conclusive* (or *absolute*).¹ The various rules of conditional preference are dealt with in §§ 1286-1339; the rules of absolute preference in §§ 1345-1353. They are few in number, and rest upon considerations peculiar to the case of each one.

Topic I: PROVISIONAL (OR CONDITIONAL) TESTIMONIAL PREFERENCES.

§ 1286. **General Nature and Policy of these Rules.** The general notion of preference which insists that a particular witness shall be called before another can be called rests on the supposed excellent position of that particular witness to obtain knowledge of the matter more accurately than any other person. His opportunities of knowledge, it must be supposed, have been not only better than those of others, but so much better that it would be a palpable risking of injustice to proceed in the trial without endeavoring to obtain him. Moreover, such a rule should be applied only where the class of witnesses thus preferred can be designated with some precision and certainty; because the party required to call him must in fairness be able to know beforehand, in order to summon them, the person or persons to whom the rule will be applied by the Court on the trial. Finally, such a rule obviously assumes nothing as to the precise nature of the witness' testimony. He may, on appearing, affirm or deny the existence of the fact in question; he is required to be used, but without any assumption that he will say the one thing or the other thing, and merely with the assumption that whatever he can contribute will be worth hearing. In other words, such a rule is a rule imposed by the law by way of insuring a supply of trustworthy testimony which otherwise the partisan interests of either side might fail to furnish.

Now the situations in which these combined considerations apply must necessarily be few. There are doubtless many classes of witnesses who

¹ For the use of the phrase "best evidence" as applicable to this class of rules, see *ante*, § 1174.

might be supposed to have better opportunities of knowledge than others; but there are not many in which it can be securely assumed, for the purposes of a fixed rule, that they have had opportunities so far in excess of others that they must invariably and positively be utilized. Moreover, the precise definition of such persons by specific rules is still less often feasible. Finally, and most important of all, the cases in which the law needs, of its own motion, and independently of the litigants' efforts, to insist upon their attendance are decidedly few in number. The whole spirit of the Anglo-American system of trials is to leave the search for evidence in the hands of the parties themselves. Their interested zeal is regarded as sufficient to insure a full and exhaustive marshalling of all the evidential data on either side; and this attitude of the law, whether abstractly wise or not, has so thrown the parties upon their own efforts that in practice parties do exert themselves as effectively as could be desired.¹ In fact, our system of partisan responsibility for the purveying of evidence, while it is marked by the natural defects of partisanship, is at least more successful in the thorough canvassing of all sources of evidence than any system of judicial responsibility could be in this country, or (perhaps) than in any other country such a system actually appears to be to-day. Under such conditions, then, the cases might well be extremely few in which it would be necessary for the law to step in and to insist, independently of the parties' probable efforts, on the presence of a specific witness. Such indeed is the fact in our law; for these rules are extremely few.

In general, then, there may be assumed to be no place in our system of evidence for rules of testimonial preference; a few do exist; but they exist as exceptions to a general principle which leaves it to the efforts of the parties to search for and to procure any witnesses who might be supposed to be superior in testimonial equipment to others.² Apart from these few definite exceptions, there is no general principle that the "best evidence" must be procured,³ in the sense that a specific witness, presumably better qualified than other competent witnesses, must be produced or accounted for before the others can be used:

1841, *Story, J.*, in *U. S. v. Gibert*, 2 Sumner 19. 81 (refusing to require the calling of one who saw a fire, in preference to one who saw it set): "It appears to me that the whole basis of the argument is founded upon a mistake of the meaning of the rule of law as to the production of the best evidence. The rule is not applied to evidence of the same nature and degree; but it is applied to reject secondary and inferior evidence in proof of a fact which leaves evidence of a higher and superior nature behind in the possession or power of the party. Thus, if the party offers a copy of a paper in evidence, when he has the original in his possession, the copy will be rejected, for the original is evidence of a higher nature. . . . But the rule does not apply to several eye-witnesses testifying to the

¹ Compare the influence of this spirit on other rules (*post*, §§ 1847, 2251).

² It might be thought that, of possible considerations leading to such exceptions, one might be the consideration that this preferred witness should be a person not likely to be known to one of the parties; and that another might be the con-

sideration that the burden of showing such a witness unavailable should in fairness fall upon one party rather than the other; and these may be noticed as evidently having force in the maintenance of certain of the rules.

³ See *ante*, § 1174, for a further examination of the fallacies of this "best evidence" phrase.

same facts or parts of the same facts, for the testimony is all in the same degree, and where there are several witnesses to the same facts, they may be proved by one only. All need not be produced. If they are not produced, the evidence may be less satisfactory or less conclusive, but still it is not incompetent."

1875, *Campbell, J.*, in *Elliott v. Van Buren*, 33 Mich. 49, 52 (repudiating any preference for a physician's testimony to an injured person's condition): "The term 'best evidence' is confined to cases where the law has divided testimony into primary and secondary; and there are no degrees of evidence, except where some document or other instrument exists the contents of which should be proved, by an original rather than by other testimony which is open to the danger of inaccuracy. But where living witnesses are placed on the stand, one is in law on the same footing as another. If he can testify at all, he can testify in the presence as well as in the absence of those who may be supposed wiser or more reliable. There are some questions on which some witnesses cannot testify at all, for want of knowledge. No one can be allowed to prove what he has never learned, whether it be ordinary or scientific facts. But one who can testify under any circumstances upon the facts on which he is examined may do so as well where his superiors are to be found as where he knows as much as any other."

It remains to examine the few specific rules which appear in our law as deviations from this general principle.

Sub-topic A: PREFERENCE FOR AN ATTESTING WITNESS.

§ 1287. **History.** The rule requiring the calling of a person who has attested a deed by his subscription comes down to us as the survival of a very early procedure. The connection by tradition is direct, though the original rule belongs to an epoch wholly alien in its ideas of proof and trial. Its history has been thus set forth:¹

1898, Professor *James Bradley Thayer*, *Preliminary Treatise on Evidence*, 502: "[The rule] has a clear and very old origin. Such persons belonged to that very ancient class of transaction or business witnesses, running far back into the old Germanic law, who were once the only sort of witnesses that could be compelled to come before a court. Their allowing themselves to be called in and set down as attesting witnesses was understood to be an assent in advance to such a compulsory summons. Proof by witnesses could not be made by those who merely happened casually to know the fact. However exact and full the knowledge of any person might be, he could not, in the old Germanic procedure, be called in court as a witness, unless he had been called at the time of the event as a preappointed witness. It was a part of such a system and in accordance with such a set of ideas that witnesses formally allowed their names to be written into deeds in large numbers. When jury trial, or rather proof by jury, as it originally was, came in, the old proof by witnesses was joined with it when the execution of the deed was denied; and the same process that summoned the twelve, summoned also these witnesses. The phrase of the precept to the sheriff was *summe duodecim* (etc. etc.) *cum aliis*. The presence of these witnesses was at first as necessary as that of the jury. Great delays and embarrassments attended such a requirement where the number of witnesses might be so great; the jury was cumbersome enough anyway. Accordingly, in 1318, the presence of the witnesses was made no longer absolutely necessary; they must still be summoned, but the case might go on without them. After another century and a half the process against the witness became no longer a necessity. It was not issued unless it were called for. After still another century, in 1562-3, process against all kinds of wit-

¹ Substantially the same account had been given, in 1803, by Chief Justice Kent, in *Fox v. Reil*, 3 John. 477.

nesses was allowed, requiring them to come in, not with the jury or as a part of the jury, but to testify before them in open court, and then the old procedure of summoning such witnesses with the jury seems to have died out; [but they must still be summoned as witnesses.] . . . As late as the early part of the eighteenth century it was doubtful whether a deed could be proved at all, if the attesting witnesses came in and denied it. Half a century later, Lord Mansfield, while reluctantly yielding to what he stigmatized as a captious objection that you must produce the witness, declared that 'It is a technical rule that the subscribing witness must be produced; and it cannot be dispensed with unless it appeared that his attendance could not be produced.'²

§ 1288. **Reason and Policy of the Rule.** This ancient rule thus continued to be enforced long after the disappearance of the primitive system of trial and the notions of proof in which it had its origin. By the end of the 1700s (*ante*, § 8) rules of evidence began to be argued out and to be maintained or repudiated according as they seemed to possess or to lack a reason in existence. What was the reason that sufficed to maintain this rule as a part of the new and ratiocinative system of evidence that began to be formed by the end of the 1700s? Here is found considerable difference of opinion, — a difference natural enough in view of the fact that no sound reason could in truth be furnished for the strict and entire perpetuation of the rule. Under such circumstances, insufficient and inconsistent reasons were likely to be advanced by those who could not see the way to a radical departure from long tradition.

(1) A favorite reason was that *the parties* to the document *had agreed* to make the attester their witness to prove execution :

1815, *Ellenborough*, L. C. J., in *R. v. Harringworth*, 4 M. & S. 350: "Inasmuch as they are the plighted witnesses, the knowledge they have upon the subject is essential, and if it can be procured must be forthcoming."

1851, *Cresswell*, J., in *Gerapulo v. Wieler*, 10 C. B. 690, 696: "It is not on the ground that his is the best evidence; . . . but because he is the witness agreed upon between the parties."

1853, *Pollock*, C. B., in *Whyman v. Garth*, 8 Exch. 803: "The attesting witness must be called to prove the execution of a deed for this reason, that by an imperative rule of law the parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his being called to depose to the circumstances attending its execution."¹

The difficulty about this reason is that no such agreement can be implied, particularly where attestation is required by law. Moreover, were such the reason, the rule would not apply between others than the parties to the document, — which is not the fact. Furthermore, this assumes that the opponent charged as obligor or maker is a party to the document, — which, if the execution is denied, is an assumption of the very point in issue :

¹ The function of the attesting documentary witness in the early Germanic system of proof is set forth in the following works: 1892, Brunner, *Deutsche Rechtsgeschichte*, I, 420-426; 1877, Ficker, *Beiträge zur Urkundenlehre*, I, §§ 61 ff.; 1887, Posse, *Die Lehre von Privaturkunden*, 70; 1889, Bresslau, *Haudbuch der Urkundenlehre*, I, 489, 790-814.

This feature of Germanic procedure was also of great importance, in the history of our parol evidence rule, in relation to the use of the seal; and it is therefore considered more particularly *post*, § 2426.

² *Accord*: 1796, *Grose*, J., in *Barnes v. Trompowsky*, 7 T. R. 265; 1826, *McMurtry v. Frank*, 4 T. B. Monr. 39.

1807, *Spencer, J.*, in *Hall v. Phelps*, 2 John. 451: "The notion that the persons who attest an instrument are agreed upon to be the only witnesses to prove it, is not conformable to the truth of transactions of this kind, and, to speak with all possible delicacy, is an absurdity."

1805, *Burket, J.*, in *Garratt v. Hanshue*, 53 Oh. 482, 42 N. E. 256: "Another reason given for the rule is because the parties themselves, by selecting the witnesses, have mutually agreed to rest upon their testimony in proof of the execution of the instrument and of the circumstances which then took place, and because they know those facts which are probably unknown to others. This supposed mutual agreement is a pure fiction, and rarely, if ever, exists in fact. If in any case it has a real existence, and can be shown, it may perhaps be enforced; but the mere fiction is entitled to no weight and to no respect."²

(2) Another reason, suggested almost as often, is that the opponent is entitled to the benefit of cross-examining the attesting-witness as to the circumstances of execution; or, put in another way, that the attester may not only know more than some other person observing the execution, but may be able to speak as to fraud, duress, or other matters of defence:

1779, *Ashhurst, J.*, in *Abbot v. Plumbe*, 1 Doug. 210: "[The opponent] would be deprived of the benefit of cross-examining him concerning the time of the execution of the bond, which might be material."

1801, *Alvanley, L. C. J.*, in *Manners v. Postan*, 4 Esp. 241: "The rule was founded on the principle that there should be an investigation from the subscribing witness of what took place at the time of the execution of the instrument."

1803, *LeBlanc, J.*, in *Call v. Dunning*, 4 East 54: "A fact may be known to the subscribing witness not within the knowledge or recollection of the obligor, and he is entitled to avail himself of all the knowledge of the subscribing witness relative to the transaction."

The objections to this reason are numerous. First, it is inconsistent with the rule itself; for the rule applies even where fraud, duress, and time are not in issue, and even where the maker himself is competent as a witness. Again, the attester is in practice not usually a person who knows anything about the circumstances preceding the document's execution, or knows more than any other person who by being present would be a qualified witness. Finally, if the witness does possess special knowledge about some affirmative issue, the opponent is the proper person to call the witness, if he desires him. This reason for the rule, then, is no more capable of defence than the first.³

(3) Has the rule, then, no justification in policy? It certainly has none, in its original broad form. But in most jurisdictions it has by statute been limited to documents required by law to be attested (*post*, § 1290); and in this shape it seems to be entirely justifiable. In the first place, the attestation is in such cases required by law as a special precaution against forgery;⁴

² *Accord*: 1834, *Parker, J.*, in *Farnsworth v. Briggs*, 6 N. H. 561, 565.

³ See some of these objections set forth in the following opinions: 1834, *Parker, J.*, in *Farnsworth v. Briggs*, 6 N. H. 561, 565; 1895, *Burket, J.*, in *Garratt v. Hanshue*, 53 Oh. 482, 42 N. E. 256. See, further, the reasons of the Common Law Procedure Commissioners, quoted

post, § 1290, objecting to the scope of the rule as applicable to documents not required by law to be attested. The great critic of our evidence system has also had his say against the rule: 1827, *Bentham*, *Rationale of Judicial Evidence*, b. VII, c. VI (*Bowring's ed.*, vol. VII, p. 190).

⁴ See the quotation *post*, § 1304.

thus the attestation itself must in any case be proved as an element in the validity of the document, and there seems to be no special hardship in obtaining the witness rather than in obtaining evidence of his signature. In the next place, such documents are, in most jurisdictions, wills of deceased persons and deeds of illiterate persons; for such documents, the maker himself being either deceased or not acquainted with writings, the attester's testimony is almost inevitably the most desirable and most trustworthy source of information as to the fact of execution; moreover, it is in such cases that the defences of fraud or undue influence are most likely to be made, and here also the attester's testimony is likely to be of use and ought to be obtained if possible. Still further, in these and all other cases where attestation is legally required, the situation is one in which by hypothesis the risk of a false document is serious, and the determination ought not to be left to the unsupported denial of the alleged maker (even assuming him competent and testifying). Finally, between the two parties, the burden of producing the witness or proving him unavailable ought fairly to be placed upon the party of whose case it is a part to prove the due execution and attestation. For these reasons, it seems unwise to dispense with the rule to any further extent.

The rule at common law may be thus stated:

Rule: (a) *Where the execution of any document (b) purports to have been attested, (c) a party desiring to prove its execution, (d) against an opponent entitled in the state of the issues to dispute execution, (e) must, before using other evidence, (f) either produce the attester as a witness, (g) or show his testimony to be unavailable (h) and also authenticate his attestation unless it is not feasible.*

Such is the scope of the rule as it obtained in its orthodox and broadest form. This broadest form, however, was not adopted or maintained in all jurisdictions; and certain modifications, now more or less common, are to be noticed under the various parts.

(a) "Where the Execution of any Document"

§ 1290. **Kind of Document covered by the Rule; at Common Law, all Documents were included; Statutory Modifications.** At common law the rule was applied to *all kinds of documents* whatever, when purporting to bear an attestation, whether or not the document was sealed, whether or not it was in the nature of a specialty, and whether or not the attestation was required by law as an element of the document's validity.¹

But by the beginning of the 1800s the unnecessary hardship and the mere

¹ The American rulings are placed in the next note; there was in England no question as to this proposition: 1810, *Wardell v. Fermour*, 2 Camp. 282, 284 (refusing to distinguish between a lease-assignment and a post-obit bond; *Ellenborough*, L. C. J., said it did not depend on "the nature of the deed to be proved; it must depend upon the possibility of procuring

the attendance of the attesting witness, not upon the testimony he is likely to give"); 1817, *Higgs v. Dixon*, 2 Stark. 180 (applied to a warrant to distrain); 1848, *Streeter v. Bartlett*, 5 C. B. 562 (applied to the proof in the Common Pleas of a debtor's schedule required by the Insolvent Debtors' Court to be attested, but not by the insolvency-statute).

technicality of the rule in this broadness of scope began to be recognized. It may be supposed, too, that the then increasing resort to handwriting-testimony (*post*, § 1993) made it easier to rely less upon attesting witnesses. In 1853, the objections to it found effective expression in the following passage in the Report of a Parliamentary Commission notable for the authoritative character of its members:

1853, *Common Law Procedure Commission* (Jervis, Martin, Walton, Bramwell, Willes, Cockburn), Second Report, 23: "We do not purpose to meddle with the preappointed evidence of execution required either by the Legislature or by persons creating powers; but we think it deserving of serious consideration whether this formal proof of the execution of written documents may not in other cases be dispensed with, where the execution is either admitted or capable of other proof. The principle on which the necessity for producing the attesting witness rests is that the witness is supposed to be conversant with all the circumstances under which the deed was executed. But it is notorious that in practice the attesting witness in the majority of instances knows nothing of the transaction; the instrument having been prepared, a clerk, a servant, or a neighbor is called in to attest it. Added to which, as parol testimony is not admitted to contradict or vary the terms of a written instrument, the occasions are few indeed where the evidence of the attesting witness goes further than to prove the execution of the writing. On the other hand, the necessity of calling the attesting witness, where the execution of the document is not the real matter in dispute and where there are no concomitant circumstances to be inquired into, is often attended with difficulty and expense, and sometimes leads to the defeat of justice. Cases have occurred where, in tracing a title, numerous witnesses from distant parts have been rendered necessary to prove the formal execution of deeds, though their execution was not really in dispute and the handwriting to all might have been proved by a single witness, and doubtless would have been admitted but for the difficulty which it was thought would by the existing rule be thrown in the way of the party alleging title. It also sometimes happens in the course of a cause that the adversary's case renders it necessary to give in evidence a document which it was not supposed would be required, or a document is produced by a witness on his subpoena which turns out, contrary to the expectation of the party requiring it, to be attested; the attesting witness is not at hand; yet the signature of the party might be easily proved, or the witness producing the instrument may have heard him admit the execution; nevertheless the document cannot be received, and the party requiring it loses his cause. When the genuineness of the document is not really in dispute, it is clear that the parties ought not to be limited to any particular witness to prove the execution. When the genuineness is in dispute, the party producing it will be sure to call the attesting witness, as the absence of the latter would throw the greatest discredit on the instrument. We therefore recommend that, except in cases where the evidence of attestation is requisite to the validity of the instrument, an attesting witness need not be called."²

Accordingly, in 1854, *England* restricted the rule thereafter to documents required by law to be attested, and this statute has been adopted in *Canada* also.³

² Compare the arguments set forth *ante*, § 1288.

³ *England*: 1854, St. 17 & 18 Vict. c. 125, § 26 ("It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto"); 1854, St. 17 & 18 Vict. c. 104,

§ 526 (the attesting witness need not be called for shipping documents required by this Act to be attested); 1886, *Re Rice*, L. R. 32 Ch. D. 35 (appointment by attested deed, attestation not being requisite to validity; Cotton, L. J.: "In petitions in lunacy and in chancery, it has been usual since the Act to require proof by the attesting witness"); *Canada*: the following statutes follow the wording of Eng. St. 1854,

In the *United States*, the common-law doctrine was recognized to have the same scope as in England; except that by a few Courts it was confined to documents under seal. In many jurisdictions, however, a statutory restriction has been enacted similar to that of England.⁴ Under such restrictions,

c. 125; Dom. Crim. Code, 1892, § 696; B. C. Rev. St. 1897, c. 71, § 44; N. Br. Consol. St. 1877, c. 46, § 23; Newf. Consol. St. 1892, c. 57, § 21; N. Sc. Rev. St. 1900, c. 183, § 32; Ont. Rev. St. 1897, c. 73, § 54; P. E. I. St. 1889, c. 9, § 19.

⁴ Where no rulings or statutes are found, the Court would presumably apply the orthodox rule. In the following list, the statute in each jurisdiction is placed last, though in time the statute may have preceded some of the judicial rulings. In some jurisdictions (*e. g.* South Carolina) the statute does not go as far in restriction as the English statute; in others (*e. g.* Florida and California) the statute has in appearance gone farther: *Ala.*: 1881, *Ellerson v. State*, 69 Ala. 1, 3 (applies to "every private writing"; here, a contract for cropping); 1896, *Martin v. Mayer*, 112 id. 620, 20 So. 963 (bill of sale); 1897, *Jones v. State*, 113 id. 95, 21 So. 229 (mortgage of personalty); 1899, *Stamphill v. Bullen*, 121 id. 250, 25 So. 928 (proof by joint maker, not sufficient under statute for co-maker's execution); *Ark.*: 1843, *Brock v. Sixton*, 5 Ark. 708 (applicable to all attested documents); *Cal.*: C. C. P. 1872, § 1940 ("any writing" is provable either by one seeing the execution, or by evidence of the maker's hand, or by a subscribing witness; but this clearly was not intended to override C. C. P. § 1315, quoted *post*, § 1310); *Fla.*: Rev. St. 1892, § 1808 (probate may be granted on the oath of the executor, or if he is interested, "of any other credible person having no interest under the will, that he verily believes the writing exhibited" to be the testator's last will); *Ga.*: 1878, *Davis v. Alston*, 61 Ga. 227 (a written contract for the sale of land; assimilated to a deed, and tested by "the rule of law applicable to deeds," *i. e.* about preferred witnesses); 1895, *Giannone v. Fleetwood*, 93 id. 491, 21 S. E. 76 (applicable to all attested documents); *Haw.*: Civil Laws, 1897, § 1425 (like Eng. St. 1854, c. 125); *Ila.*: Rev. St. 1887, § 5993 (like Cal. C. C. P. § 1910); *Ill.*: Rev. St. 1874, c. 51, § 51 (whenever any instrument "not required by law to be attested by a subscribing witness" is offered in a civil cause, "and the same shall appear to have been so attested, and it shall become necessary to prove the execution of any such deed or other writing otherwise than as now provided by law, it shall not be necessary to prove the execution of the same by a subscribing witness to the exclusion of other evidence, but the execution of such instrument may be proved by secondary evidence without producing or accounting for the absence of the subscribing witness or witnesses"); *Md.*: Pnb. Gen. L. 1888, Art. 35, § 6 (attested document's execution may be proved as if not attested, except for proof of will); *Mass.*: 1839, *Valentine v. Piper*, 22 Pick. 85 (rule applicable to "an instrument under seal

and commonly requiring attesting witnesses"); St. 1897, c. 386, Rev. L. 1902, c. 175, § 70 ("The signature to an attested instrument or writing, except a will, may be proved in the same manner as if it were not attested"); *Mich.*: Comp. L. 1897, § 10199 (an attested instrument may be proved without calling the subscribing witness, "except in cases of written instruments to the validity of which one or more subscribing witnesses are required by law"); *N. Y.*: 1829, *Henry v. Bishop*, 2 Wend. 575 (does not apply "to instruments not under seal, or at least in regard to negotiable paper"); 1829, *Jackson v. Rice*, 3 id. 180, 183 (applicable to instruments under seal); Laws 1833, c. 195, § 1 (the subscribing witness need not be called, except for instruments to the validity of which a subscribing witness is necessary); *N. D.*: 1897, *Brynjolfson v. Elev. Co.*, 6 N. D. 450, 71 N. W. 555 (holding the rule applicable to a chattel mortgage required to be attested under Rev. Code 1895, § 4793; but not clearly declaring how far R. C. §§ 3579, 3581, 3582, providing for proof before a recorder of deeds, abrogate the common-law doctrine); St. 1897, c. 59, Rev. Code 1899, § 3888 a ("In proving any written instrument or contract to which there is a subscribing witness, or to which there are two or more subscribing witnesses, it shall not be necessary to call said witness or any one of two or more of said subscribing witnesses; but the instrument or contract may be proved, except for purposes of recording the same, by the same evidence by which an instrument or contract to which there is no subscribing witness may be proved"); 1901, *McManus v. Commow*, 10 N. D. 340, 87 N. W. 9 (applying § 3888 a, Rev. Code 1899); *Ok.*: 1877, *Warner v. R. Co.*, 31 Oh. St. 265, 270 (applied to a contract); *Or.*: 1899, *Hannan v. Greenfield*, 36 Or. 97, 53 Pac. 888 (rule applied to agency-contract); C. C. P. 1892, § 761 (common-law rule maintained); *R. I.*: Gen. L. 1896, c. 244, § 43 (calling not required for "any instrument to the validity of which attestation is not requisite"; proof may be made "as if there had been no attesting witness thereto"); *S. C.*: 1804, *Madden v. Burris*, 1 Brev. 387 (St. 1802, applied to an indorsement on a note); 1806, *Gervais v. Baird*, 2 Brev. 37 (same applied to signature by mark); 1807, *Faisley v. Snipes*, 2 Brev. 200 (St. 1802); the maker's signature suffices, even though a mark, if distinguishable); 1810, *Shiver v. Johnson*, ib. 397 (maker's peculiarity of mark, sufficient for St. 1802); 1825, *Townsend v. Covington*, 3 McC. 219 (St. 1802 does not apply to a written agreement for sale of land not under seal); 1827, *Edgar v. Brown*, 4 McC. 91 (bond executed in another State; St. 1802 applied); 1840, *Blackman v. Stogner*, Cheva Eq. 175 (St. 1802 applied in Chancery suit); 1841, *Trammell v. Roberts*, 1 McM. 305 (here the defendant made oath,

the rule comes into application chiefly for wills and for illiterates' deeds, and, in England, for powers of appointment. Moreover, even where the common-law rule obtains in strictness, the principle (*post*, § 1318), which dispenses with it for proof by copies of registered instruments, relieves nowadays in most instances from its harshness.

In order to apprehend the precise scope of the statutory rule, it is therefore in most jurisdictions necessary to note what documents are required by law to be attested as an element of their validity; but this is a matter of substantive law, not within the present purview. From such statutes, however, three special kinds of statutes should be distinguished. (1) A statute (as in Pennsylvania) which prescribes merely that a document shall be "proved" by (any) two or more witnesses involves a rule of Quantity (dealt with *post*, §§ 2048, 2049), and not a rule of preference; *i. e.* any two or more competent witnesses suffice, and there is therefore no preference for attesting witnesses above others.⁵ (2) A statute providing that documents presented for registration must be "proved" to the registrar by the maker's acknowledgment or the statement of an attesting witness does not in itself concern the mode of proof before a judicial tribunal, but only the conditions precedent to lawful registration, and does not make attestation a necessary element of validity so as to affect the application of the present rule.⁶ (3) The rule for proof of *nuncupative wills* by persons present involves both a rule of Preference and a rule of Quantity; but is better examined under the latter head (*post*, § 2050).

§ 1291. Documents Incidentally or "Collaterally" in Issue. Where the

and the exemption of St. 1802 did not apply); 1802, *Swancey v. Parrish*, 62 S. C. 240, 40 S. E. 554, *semble* (the Court inclined to hold the rule not applicable to documents not requiring attestation; here, a chattel mortgage); St. 1731, Gen. St. 1882, c. 86, §§ 2226, 2227, Rev. St. 1893, §§ 2362, 2363, Code 1902, §§ 2898, 2899 (deeds, bonds, etc., attested as proved before a mayor, governor, or notary of a domestic or foreign State, receivable "as if the witnesses to such deeds were produced and proved the same *in voce*"; with limitation as to claims against residents of this State, conditioned on "such foreign country" according similar treatment); St. 1802, Gen. St. 1882, c. 86, §§ 2213, 2214, Rev. St. 1893, §§ 2348, 2349, Code 1902, §§ 2884, 2885 ("The absence of a witness to a bond or note" shall not be cause for postponement, "but the signature to such bond or note may be proved by other testimony," unless the opponent expressly disputes its genuineness); *Trun.*: 1834, *Suggett v. Kitchell*, 6 Yerg. 425, 428 (will of personalty; subscribing witnesses, or at least more than one, need not be called); 1850, *Moore v. Steele*, 10 Humph. 562, 564, *semble* (subscribing witnesses to a will of personalty not preferred); 1850, *Jones v. Arterburn*, 11 id. 97, 101 (where there are in fact subscribing witnesses to a will of personalty, the rules of preferred witnesses are to be applied); St. 1789, c. 23, § 1, Code 1896, § 3904

("written wills with witnesses thereto," if not contested, are required to be proved by "at least one of the subscribing witnesses, if living"; if contested, every will, "written or nuncupative," by "all the living witnesses, if to be found, and by such other persons as may be produced to support it"); *Va.*: 1794, *Turner v. Strip*, 1 Wash. 319, 322 (proof of deed need not be by subscribing witness, under St. 1748); *Wis.*: 1846, *Carrington v. Eastman*, 1 Pinney 650, 656 (rule applied to a receipt).

⁵ 1784, *Hight v. Wilson*, 1 Dall. 94 (it is not necessary "that the proof of the will should be made by those who subscribed as witnesses," under the Act of 1705 requiring wills to be "proved by two or more credible witnesses, upon their solemn affirmation, or by other legal proof"); 1788, *Lewis v. Maris*, ib. 278, 288, *semble* (same); 1868, *Carson's Appeal*, 59 Pa. 493, 496 (same; under St. 1833); see also *post*, § 1304.

A statute, however, providing for both "proving" and attesting does involve also a rule of preference for the attestors: 1815, *Clarke v. Bertlett*, 4 Bibb 201 (statute requiring manumissions to be "attested and proved by two witnesses"; held, that the two proving it must be the two attesting it).

⁶ For the exemption from the rule in the case of proof by copies of a registered deed, see *post*, § 1318.

document whose execution is to be proved is not a document necessarily involved in the pleadings, but is a minor document coming incidentally into issue in the course of the details of proof, there is much reason in dispensing with the rule. In the first place, the document is not of such importance as to call for the rigorous precaution of the rule; and secondly, it is not possible for the proponent to anticipate every minor turn in the course of the proof, and he may thus without fault be taken by surprise and be unprepared with the attester and yet otherwise able to make sufficient proof.

This limitation to the rule was never recognized in England;¹ but in the United States it has found frequent judicial support:

1813, *Brackenridge, J.*, in *Heckert v. Haine*, 6 Binn. 16, 20 (here the plaintiff wished to prove the receipt of money from A, by the defendant's intestate for the use of the plaintiff, the payor A having taken an attested receipt); "The receipt is a matter collateral to his case and not directly in issue. . . . [The witness] could not legally be supposed to be in his keeping, as a witness called by a party to subscribe a writing is supposed to be. . . . In the case of a third person, even where it is the foundation of a suit and comes in collaterally, I do not see the reason. . . . I would then restrain the rule to a case where the execution of a writing is directly in issue, unless notice shall have been given that it was material to have this proof. . . . Coming in collaterally, it would be taking a party by surprise to render it necessary to produce the subscribing witness."

1845, *Gilchrist, J.*, in *Rand v. Dodge*, 17 N. H. 343, 357: "When one not a party or privy to the contract, nor claiming any benefit, or exemption from the fulfilment of its exigencies or the violation of its terms, has occasion for a collateral purpose to show that such a contract existed, . . . when the existence of the writing is of no consequence or significance but as a part of the *res gestae* which a stranger seeks to prove and to characterize with reference to his own rights, then the reason of the rule entirely fails and the rule itself has no application."

Accordingly, in many jurisdictions the rule is not applied in such cases.²

¹ 1791, *Breton v. Cope*, Peake 30 (rule applied to a deed cancelled and offered only as containing an admission); 1801, *Manners v. Postan*, 4 Esp. 239 (action for penalties for usury; in proving the usury, an attested warrant of attorney, held subject to the rule).

² *Accord: Ala.*: 1831, *Ellerson v. State*, 69 Ala. 1, 3 (indictment for removing personal property subject to lien; witness to contract creating lien required to be called); 1892, *Steiner v. Trainum*, 98 Ala. 315, 318, 13 So. 365 (trover for a horse; note given at the sale; exempted); 1892, *Lavrette v. Holcombe*, ib. 503, 510 (same; affidavit); *Ga.*: 1890, *Hudson v. Puett*, 86 Ga. 341, 12 S. E. 640 (claim for rent; to show reasonable value, a contract of lease of same property to another, held not collateral); 1893, *Giannone v. Fleetwood*, 98 id. 491, 493, 21 S. E. 76 (execution on property claimed under mortgage; bill of sale used to rebut evidence of fraud, held not collateral); 1895, *McVicker v. Conkie*, 96 id. 584, 595, 24 S. E. 23 (rule not applicable to document offered only as standard for comparison of hands); 1897, *Summerour v. Felker*, 102 id. 254, 29 S. E. 448 (action for rent; note given for the rent, not collateral); *Code* 1895, § 5244 (production not necessary if paper is "only incidentally or col-

laterally material to the case"); *Ky.*: 1816, *Brashear v. Burton*, 4 Bibb 442 (title to personalty; bill of sale incidentally in chain of title; rule not enforced); *Me.*: 1830, *Drew v. Wadleigh*, 7 Greenl. 94 (rule not applied to document used to discredit a witness as containing an inconsistent statement); 1841, *Ayers v. Hewitt*, 1 Appl. 281, 285 (if it is a document "wholly *inter alia*, under whom neither party can claim to deduce any right, title, or interest to himself," the rule does not apply; as here, to a bill of sale corroborating a witness' testimony to a third person's insolvency); 1845, *Pullen v. Hutchinson*, 12 Shepl. 249, 253 (the preceding case approved; here the rule was held applicable to a bill of sale to the defendant affecting his claim); *Mich.*: 1880, *Hess v. Griggs*, 43 Mich. 397, 399, 5 N. W. 427 (plaintiff in replevin, resting on possession under a contract with a third person by the defendant; rule applied); *N. H.*: 1845, *Rand v. Dodge*, 17 N. H. 343, 357 (rule not applied to a contract making G. the agent of an ancestor or to do acts of prescriptive possession; see quotation *supra*); *Pa.*: 1813, *Heckert v. Haine*, 6 Binn. 16, 20 (see quotation *supra*); *Tenn.*: 1874, *D-mombrenn v. Walker*, 4 Baxt. 199 (to rebut a contention that the will under which the plaintiff claimed was procured by un-

The precise terms of this limitation are not uniformly defined, and are difficult to define; the trial judge's determination should be allowed to control. The term "collateral," often used, is elusive and unsatisfactory; and it is sometimes mistakenly employed to designate the principle of certain other cases (*post*, § 1293), where the rule is also not applied.

(b) "Purports to have been Attested."

§ 1292. **Who is an Attesting Witness.** The notion of an attesting or subscribing witness is that of a person who, at the request or with the consent of the maker, places his name on the document for the purpose of making thereby an implied¹ or expressed statement that the document was then known by him to have been executed by the purporting maker.²

(1) In the first place, then, a person who, though he saw the execution, and though his name is on the document, did *not write it himself*, is not an attesting witness, because he did not in fact make the attestation.³

(2) For the same reason, a *fictitious person* whose name is signed is not an attesting witness.⁴

(3) Again, an *officer*, whose signature is required by law or by rule of Court to give validity to a document or to enable it to be filed for a specific purpose, is not an attesting witness,⁵ because he signs for a different purpose;

due influence, the plaintiffs offered a former will of a similar tenor; held, that the rule did not apply, where a paper "comes incidentally in question," as here; 1874, *Henly v. Hemming*, 7 *id.* 524 (rule not applicable to a bill of sale of goods sued for in replevin); *W.*: 1849, *Curtis v. Belknap*, 21 *Vt.* 433 (the plaintiff was hired by T. to perform work, but T. abandoned the contract; the defendant then hired the plaintiff to complete the work at the same price; held, the rule did not apply to the writing between T. and the plaintiff, which "was only incidentally in question," and of which "the parties to his contract had never constituted the subscribing witness . . . the exclusive witness of their contract").

Contra: 1826, *Roberts v. Tennell*, 3 *T. B. Monr.* 247, 250; 1831, *Goodall v. Goodall*, 5 *J. M.* 596, 598; 1871, *Kalmes v. Gerrish*, 7 *Nev.* 31, 34. *Undecided*: 1857, *Conn. v. Castles*, 9 *Gray* 121 ("collaterally or incidentally"; left undecided).

Distinguish the cases cited *post*, § 1293.

¹ A clause expressly using words of attestation is unnecessary, if the real purpose of signing was to attest; 1848, *Chaplain v. Briscoe*, 11 *Sm. & M.* 372, 379, 382 (persons signing in the usual place, but not named as witnesses, required to be called); and cases cited *post*, § 1511.

² Distinguish the question of substantive law whether the attestation, as an element in the validity of a document required to be attested, suffices under that substantive law. See for examples: 1835, *Doe v. Burdett*, 4 *A. & E.* 1 (under what circumstances a general attestation is sufficient); 1855, *Clay v. Holbert*, 14 *Tex.* 139, 200.

Whether a person signing may under the "parol evidence" rule show that his intention was merely to attest and not to be an obligor is a different question (*post*, § 2419).

³ 1843, *Cussous v. Skinner*, 11 *M. & W.* 161, 168 (the attesting witness' name was written by another person in pencil; held, not necessary to call him; *Abinger, L. C. B.*: "It is not the mere presence of a person at the time of the execution of an instrument that makes him an attesting witness; for if five hundred persons were, if they do not sign as attesting witnesses, you are not bound to call one of them"); 1816, *Jackson v. Lewis*, 13 *John.* 504 (signature of a second witness by the first, treated as if attested by one only); 1814, *Allen v. Martin*, 1 *Law Repos. N. C.* 373 (the maker had himself written the witness' name; rule not applicable).

The primitive notion of an attestation was quite otherwise, under the Germanic system of proof, by which a person might write the names of any number of his absent friends to his deed and get their consent afterwards; "a witness to a deed, according to the popular conception, was not necessarily one who had seen it executed, but one who was willing to give it credit by his name"; Thayer, *Preliminary Treatise on Evidence*, 98, citing instances; 1543, *Rolle v. Hampden*, *Dyer* 53 *b*; and see another instance, since published, in the *Selden Society's Select Civil Pleas*, I, No. 76; see also the accounts in the German writers cited *ante*, § 1287, particularly *Breslau*, pp. 536-538, 548, 790-814.

⁴ 1791, *Fasset v. Brown*, *Peake* 23; 1805, *Burrows v. Lock*, 10 *Ves. Jr.* 470, 474.

⁵ 1844, *Bailey v. Bidwell*, 13 *M. & W.* 73 (an attorney attesting a petition in the Bank-

and for the same reason an officer authorized to take an acknowledgment and to give a certificate thereof admissible as evidence under the Hearsay exception (*post*, §§ 1676, 1682) would not be an attesting witness.⁶

(4) A person who, though he sees the execution, does not *then sign*, is not an attesting witness;⁷ for the object of attestation is to secure the written record of his knowledge before any doubt can arise as to its correctness.

(5) A person who attests, but is at the time *incompetent* to act as attesting witness, under the substantive law prescribing the qualities of a valid attestation, is without the scope of the rule and need not be called.⁸ Whether his attestation *may* be used, by proving the signature, as evidence of execution, is another question (*post*, § 1510); as also the question whether a subsequently-arising incompetency to testify exempts from production (*post*, § 1316).

In all the preceding instances the rule of calling the witness does not apply, and other evidence may be used; although, the attestation being a nullity, the document may, under substantive law requiring it to be attested, be after all excluded as invalid.

(c) "A Party desiring to Prove its Execution."

§ 1293. Rule applies only in proving Execution, not in using the Document for other Purposes. The object of attestation is to provide a witness who shall be able to testify to the execution of the document by the person making it, *i. e.* to authenticate its genuineness. Hence, so far as the party is engaged in proving something about the document other than its mere execution — *e. g.* its contents, its delivery, or the like —, the attesting witness is not a preferred witness.¹ For this reason, the rule does not apply where a

ruptey Court, where such attestation was required for filing; not necessary to be called).

⁶ 1892, *Lavretta v. Holcombe*, 98 Ala. 503, 510, 12 So. 789 (affidavit acknowledged before a notary; held not an attesting witness requiring preference, though he might be to give validity to a document). *Contra*: 1902, *Hayes v. Banks*, 132 Ala. 354, 31 So. 464, *semble* (notary's defective certificate of acknowledgment).

⁷ Cal. C. C. P. 1872, § 1935 ("A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party *thereupon* signs his name"); amended in 1901 (by substituting for "it acknowledged," the words "a party thereto declare that it was executed by him"; for the validity of the amendment, see *ante*, § 488); 1829, *Henry v. Bishop*, 2 Wend. 575, 577 (one who saw the execution but signed afterwards, not an attesting witness).

⁸ 1848, *Doe v. Twigg*, 5 U. C. Q. B. 167, 170 ("the attestation . . . is a mere nullity," and the maker's execution is to be proved otherwise); 1853, *Packard v. Draymore*, 11 Cush. 283, 285 (may be proved "as if there had been no attesting witness"). The following case is peculiar, but seems sound; 1849, *Potts v. House*, 6 Ga. 324, 316 (a negro, incompetent as a witness, was

the interpreter making a will, and was required to be called).

¹ Besides the following cases, the authorities to the same effect, for proof of execution in general, cited *post*, § 2132, would be applicable; 1837, *Hancock v. Byrne*, 5 Dana Ky. 513 (identifying a note; on the theory that the writing itself is better than a witness, calling the witness held not necessary); 1879, *Skinner v. Brigham*, 126 Mass. 132 (trover for chattels obtained from the plaintiff in exchange for an invalid deed by third persons purporting to convey certain land; witnesses not required, because the delivery of a paper, not the signing of a deed, was to be proved); 1873, *Eslow v. Mitchell*, 26 Mich. 500, 502 (not required in proving contents); 1875, *Raynor v. Norton*, 31 id. 210, 213 (same); 1830, *Foster v. Wallace*, 2 Mo. 231 (that a co-signer of a bond had executed merely as surety for the other; production not required); 1813, *Heckert v. Haine*, 6 Binn. 16, 17 (to prove a written receipt the witness must be called, but not to prove the fact of payment); 1824, *Babb v. Clemson*, 10 S. & R. 419, 426 (same, for a bill of sale); 1826, *Wishart v. Downey*, 15 id. 77, 79 (same, for a receipt); 1826, *Harding v. Craigie*, 8 Vt. 501, 508 (a note signed by three persons, with S. as witness; to prove

deed is used to show color of title or extent of claim by one claiming title through adverse possession (*post*, § 1778); for the claimant does not rest upon the authenticity of the deeds, but upon its contents as embodying the extent of his claim. Whether the rule should apply to one who desires to *disprove the genuineness* of a document is a difficult question,² but it would seem that, since by hypothesis the party alleging its execution must already have been excused or exempted from producing the witness, the party denying should not be put in a less favorable position, and the rule should not apply.

(d) "Against an Opponent entitled in the State of the Issues to Dispute Execution."

§ 1294. **Execution not Disputable (1) because of Estoppel or other Rule of Substantive Law.** Where the opponent by his prior conduct is estopped from denying execution, the execution cannot be put in issue by him, and the party offering the document need not in any manner evidence its execution (*post*, § 2132). Since the production of the attesting witness is required solely for the purpose of evidencing execution, the rule of production therefore does not apply.¹ For the same reason, whenever a rule of substantive law forbids the execution to be denied, the rule does not apply; and this seems to include the case of a document whose execution the opponent was *officially bound* to secure and can therefore not now deny.³

§ 1295. **Execution not Disputable (2) because of a Rule of Pleading.** So far as any rule of pleading requires that the execution of a document named in the declaration must be expressly traversed, the failure to plead in denial must, under such a rule, be equivalent to a confession of the allegation of execution in the declaration, and thus the execution is not in issue on the trial, and the present rule does not apply. Accordingly, at common law, so far as a plea of *non est factum*, or other form of specific traverse distinct from the general issue, was required for putting the execution into issue, and of course so far as the opponent failed to plead the general issue or any specific traverse, the rule for calling the attesting wit-

nesses; plaintiff may then, to deny execution, call a witness other than the subscribing ones; on the principle that he should be no worse off than if defendant had not been exempted from calling them).

that S. in fact witnessed only one signature, and that the others were added after attestation, S. need not be called).

¹ 1854, *Jordan v. Faircloth*, 13 Ga. 544 (not applicable to one calling the maker to deny the genuineness of a deed in his name); 1856, *Stamper v. Griffin*, 20 id. 312, 320 (claim of adverse possession under a bond in the name of Z., but admitted to have been forged; claimant must call witness, "whether the object be to prove that a writing is genuine or that it is spurious," since he "is the person who knows better than all others that the writing is genuine, if it is genuine, and spurious, if it is spurious"); 1859, *Wells v. Walker*, 29 id. 450, 452 (deed read by defendant to jury without producing

witnesses; plaintiff may then, to deny execution, call a witness other than the subscribing ones; on the principle that he should be no worse off than if defendant had not been exempted from calling them).

² 1849, *Perry v. Lawless*, 5 U. C. Q. B. 514 (representations as to genuineness of a note, made before the plaintiff's purchase).

³ 1822, *Scott v. Weithman*, 3 Stark. 168 (action against a sheriff for taking insufficient sureties on a replevin bond; the sheriff's duty being to take the bond, the due execution was taken as admitted by him); Ga. Code 1895, § 5244 (rule not applicable to office bonds require by law to be approved or tested by a particular functionary).

ness did not apply,¹ though no liberality was shown in interpreting this principle.²

In more recent times, and since the improvement of common-law pleading, the place of this principle has generally been taken by statutory enactments expressly providing that the opponent's failure to put in issue a document whose execution is alleged in the opponent's pleading shall be taken as an admission of its execution, and the execution cannot be denied. These statutes provide for the taking of issue sometimes merely in the pleading, sometimes additionally by affidavit; but the principle and the effect is practically the same in all. These statutes, and the decisions interpreting them, involve a rule of pleading, and are therefore without the present purview.³

§ 1296. **Execution not Disputable (3) because of Judicial Admission.** For the purposes of proof, a judicial admission of the opponent — i. e. an express agreement for the purposes of the trial — has the same effect as a failure to plead in denial; it is a waiver of proof on the subject (*post*, § 2588). Hence when a document's execution is judicially admitted, the present rule does not apply.¹ Such judicial admissions, however, must be distinguished from ordinary or circumstantial admissions, with which they have nothing in common except the name. The use of the latter sort in the present connection raises a different question (*post*, § 1300).

§ 1297. **Execution not Disputable (4) because of Opponent's Claim under the Same Instrument.** Where the opponent's claim, as expressly set forth in the pleadings or as developed in the course of proof, predicates the genuineness of the very document which the proponent now desires to prove, it is

¹ 1818, *Cooke v. Tanswell*, 8 Taunt. 450 (Gibbs, C. J.: "In cases where *non est factum* is not pleaded, . . . I never yet heard it contended that it was necessary to call the subscribing witness").

² 1811, *Williams v. Sills*, 2 Camp. 519 (Ellenborough, L. C. J.: "The defendant by refraining from the plea of *non est factum* has only admitted so much of the deed as is expanded upon the record; and if the plaintiff would avail himself of any other part of the deed, he must prove it by the attesting witness in the common way"); 1838, *Gillett v. Abbott*, 7 A. & E. 783 (a plea admitting the execution of a deed of indemnity sued on, the deed's recital setting out in part a deed of trust, does not dispense with the witness to the deed of trust); 1841, *Jackson v. Bowley*, Car. & M. 97 (on an issue of *plene administravit*, in an action against an executor, the witness to a deed to the testator must be called).

³ They are further noticed under *Judicial Admissions* (*post*, § 2594).

The curious result may occur, where such a statute exists, and where the limitation about documents incidentally in issue (*ante*, § 1290) does not exist, that the essential documents in the case need not be authenticated at all, while minor documents must be proved according to

the rigor of the present rule; e. g. 1826, *Roberts v. Tennell*, 3 T. B. Monr. 247, 256.

Distinguish the following: 1878, *Holden v. Jenkins*, 125 Mass. 446 (failure to deny a signature, under a statute requiring a specific denial, does not relieve from proof of the attesting witness' signature for the purpose of availing of a longer statutory bar for attested documents; but "might relieve" from calling the witness to prove the maker's signature).

⁴ 1800, *Laing v. Kaine*, 2 B. & P. 85 (warrant of attorney; since "it appeared that the defendant did not merely acknowledge the instrument, but agreed [for the purpose of legal proceedings] that the plaintiff should act upon it as if the witness himself had been produced," the calling was not required); 1839, *Bringle v. Goodson*, 8 Scott 71, 83, per Tindal, C. J.; 1885, *Coleman v. State*, 79 Ala. 49; 1890, *Richmond, etc. R. Co. v. Jones*, 92 Id. 228, 9 So. 276; 1893, *Hawkins v. Ross*, 100 Id. 459, 464, 14 So. 278; 1881, *Jones v. Henry*, 84 N. C. 320, 323; 1834, *Grady v. Sharron*, 6 Yerg. 320, 321, 324 (admission by counsel exempts from calling witnesses). *Contra*, but clearly wrong: 1844, *Hylton v. Hylton*, 1 Gratt. 161, 165 (admission, during trial, of the due execution of a will, not sufficient to dispense with the testimony required by law).

clear that the former is in precisely the same situation as if he had by pleading or by judicial admission conceded the document's execution. It is obviously inconsistent for him to assert its execution as an element of his present claim or defence, in one part of the proceedings, but in another part in effect to deny the execution by putting the proponent upon proof of it. So long as the opponent maintains the former attitude, he must relinquish the latter one; so long as the document is genuine for his purposes, it is also (so far as he is concerned) genuine for the proponent's purposes. The execution thus not being disputable, the rule requiring the attesting witness to prove it does not apply.

This has long been judicially conceded; although the precise terms defining the situation are not uniformly expressed, and the application of the principle to particular states of facts is open to more or less difference of opinion.¹

§ 1298. Same: Execution Disputable, and Rule Applicable, where the Opponent merely Produces the Instrument, without Claiming under it. Towards the end of the 1700s a doctrine was started that, where the docu-

¹ England: 1726, Gilbert, Evidence, 26 (a claim by the opponent under a deed A reciting a deed B exempts from proof of deed B); 1818, Knight v. Martin, Gow 26 (assignor against assignee of a lease) the defendant's possession of the instrument, claiming under it, dispenses with the witness); 1819, Gorton v. Dyson, 1 B. & B. 219, 221 (action against executors; their claim under the will, held to dispense with calling the witnesses); 1821, Orr v. Morice, 3 id. 139; 6 Moore 347 (action for use and occupation against assignees in bankruptcy; the production by the defendants of the assignment, together with their occupation of the premises, held a "claim of beneficial interest," and the witness dispensed with); 1826, Doe v. Deakin, 3 C. & P. 402; 1826, Burnett v. Lynch, 8 D. & R. 368, 375, 5 B. & C. 589, 600, 604 (action on the covenants of a lease, by the lessee against the assignee, who had himself assigned to a third person; per Bayley, J., "if a party has taken under a deed all the interest which the deed is calculated to give," he cannot dispute execution); 1826, Doe v. Hemming, 9 D. & R. 15 (lease to a defendant by an ancestor of the plaintiff in ejectment; the plaintiff had obtained possession of the document and refused to produce or show it until the trial; no proof of execution required, because the plaintiffs "intended to derive a benefit from the possession of the lease, and their conduct . . . was such as clearly admitted its validity"); 1831, Bradshaw v. Bennett, 1 Moo. & Rob. 143, 5 C. & P. 48 (action to get back a deposit on a sale rescinded; the rule dispensed with as to the agreement of sale, the defendant being one "taking an interest" under it); 1835, Doe v. Wilkins, 4 A. & E. 86 (ejectment, the defendant claimed under a deed which the plaintiff offered; extrinsic evidence to show this claim held proper, and proof of execution dispensed with); 1835, Carr v. Burdiss, 1 C. M. & R. 782, 784 (trover for goods taken under a fraudulent assignment; the defendants pleaded

the assignment; the plaintiff not required to call the witness to prove it, even though he was impeaching it as fraudulent; "the object which the parties have in calling for its production" is immaterial); 1836, Doe v. Wainwright, 1 Nev. & P. 8, 12 (ejectment, defendant possessing and claiming under a deed offered by the plaintiff; witness dispensable); 1839, Bringle v. Goodson, 8 Scott 71, 83 (will; calling dispensed "where the will is recited in a deed under the seal of the party and some advantage is taken by him under it"); 1843, Bell v. Chaytor, 1 C. & K. 102 (action on a contract to employ; the defendant's claim that the contract was not broken held to dispense with the witness). Canada: 1851, Chisholm v. Sheldon, 2 Grant U. C. 178 (conveyances produced by an opponent claiming an interest thereunder; no proof of execution necessary); United States: Cal. C. C. P. 1872, § 1941 (quoted post, § 1300); 1860, Herring v. Rogers, 30 Ga. 615, 617 (production by opponent, and claim under it, sufficient); Ga. Code 1895, § 5243 ("The production of the paper by the opposite party, if he claims any benefit under it, dispenses with the necessity of proof"); 1898, Brown v. Mendonca, 12 Haw. 249, 251 (production by the opponent, claiming "any interest of a substantial and abiding nature," even though not concerning the subject of the suit, suffices); 1821, Lewis v. Ringo, 3 A. K. Marsh. 247; 1857, McGregor v. Wait, 10 Gray 72, 73, 75 (plea of a right of way in an action of trespass; rule not applied to plaintiff's proof of deed under which defendant claimed); 1819, Jackson v. Kingsley, 17 Johns. 158; 1829, Duncan v. Gibbs, 1 Yerg. 256, 259 (plaintiff used a deed to defendant to prove D. incompetent for defendant as warrantor; held that defendant could use the deed though not legally recorded so as to prove execution); 1827, Rhoades v. Selin, 4 Wash. C. C. 715, 719 (admissible without authentication, if the opponent producing is "a party to it or claims a beneficial interest under it").

ment to be proved was in *possession* of the opponent, and was *produced* by *him* on notice, the proponent need not prove its execution, and therefore, of course, need not call the attester.¹ This singular doctrine was placed, in the first ruling, on the ground that the proponent would have been ignorant of the attester's name, and therefore the attester was in effect unavailable (on the principle of § 1314, *post*). But in later rulings it seems to have been supported rather on a confused notion of its identity with the principle just considered (in § 1297), *i. e.* the opponent's claim under the document. This latter ground is certainly unsound; for there is an essential difference between the opponent's mere custody of the document and his making claim under it; the former can never in itself be equivalent to a judicial admission of genuineness. The earlier reason is scarcely more tenable. The proponent's ignorance of the names might have been remedied by a bill for discovery, or by a motion for a continuance after learning the names on production; under modern statutes, the names could always be learned by demanding inspection before trial. Moreover, it is difficult to see why, even if the ignorance was irremediable, the proponent should be excused from all proof of execution; he might be excused from calling the attesters, but not from making some other proof of execution; there is a hiatus here, which indicates that this earlier reason was not so much the real one as the later one, above noted. Finally, as a matter of policy, it does not seem fair that an opponent who happens to possess a document should be obliged to have it taken against him as genuine merely because of that chance possession. The doctrine, in short, can only be termed, in the language of Mr. Justice Washington, "a kind of legal legerdemain."

After some fluctuation of rulings the doctrine of *R. v. Middlezoy* was in England finally repudiated.² It had already obtained some footing in this

¹ 1787, *R. v. Middlezoy*, 2 T. R. 41 (pauper settlement; the other parish proving a hiring in M. parish, the latter in rebuttal claimed a prior apprenticeship of the pauper in the former, and gave notice to produce the indenture; but, on its production by the opponent, offered no evidence of execution; held, unnecessary; Buller, J.: "In civil actions . . . the deed when produced [from the opponent's custody] must *prima facie* be taken to be duly executed, because the plaintiff, knowing who are the subscribing witnesses, cannot come prepared at the trial to prove the execution of the deed; therefore, an instrument coming out of the hands of the opposite party must be taken to be proved"; and two such unreported rulings of Lord Mansfield were cited).

² 1793, *Bowles v. Langworthy*, 5 T. R. 366 (*R. v. Middlezoy* approved; trover by assignees in bankruptcy; here the defendant had produced at the commissioners' hearing a bill of sale, claiming under it); 1807, *Johnson v. Lewellin*, 6 Esp. 101 (Ellenborough, L. C. J., thought that *R. v. Middlezoy* "appeared to have been decided without due consideration," and declined to follow it); 1807, *Gordon v. Secretan*, 8 East

548 (Ellenborough, L. C. J., "said that the case of *R. v. Middlezoy*, which was much questioned at the time, had been since overruled"; the production by the opponent "did not supersede the necessity of proving it by one of the subscribing witnesses, if any, as in ordinary cases"; counsel argued the difficulty of learning the names of the witnesses; but the Court pointed out that this was outweighed by the disadvantage that, "however questionable its execution might be, and even though he [the opponent] had impounded it because it was forged or had been obtained by fraud," yet the mere possession would in that case suffice to authenticate it; but a stay was granted to give an opportunity to call the witnesses); 1809, *Wetherston v. Edgington*, 2 Camp. 91 (Heath, J.: "The old rule was the sensible one, that an instrument coming from the opposite side was *prima facie* taken to be duly executed"; but he conceded that the rule had been changed); 1810, *Pearce v. Hooper*, 3 Taunt. 60 (trespass for entering a close in C.; the defendant called for the deed of C., which would show that the close was not the plaintiff's; attesting witnesses unnecessary); 1821, *Orr v. Morrice*, 3 B. & B.

country;³ but it has also been discountenanced in as many jurisdictions; though the question has seldom come up for adjudication.

Where the opponent *refuses to produce*, or otherwise suppresses the document, it would seem that his refusal would certainly (on the principle of § 291, *ante*) be some evidence of the document's genuineness, and might fairly dispense with the rule requiring production of the attester.⁴

(e) "Before using Other Testimony."

§ 1299. **Attester preferred to any Third Person, including the Maker of the Document.** By the very notion of a rule of preference, the rule for an attester's testimony prefers it in priority over the testimony of any other person present and observing the execution of the document.¹

But is the rule so rigid that even the testimony to execution of the person actually purporting to be the *maker of the document* (not being a party to the suit) is not to dispense with the calling of the attester? Such was the orthodox acceptance:

1815, *Ellenborough, L. C. J., in R. v. Harringworth*, 4 M. & S. 350 (pauper's settlement; the pauper's own testimony, not a party to the suit, to his indenture, excluded): "The rule is universal that you must first call the subscribing witness; and it is not to be varied in each particular case by trying whether in its application it may not be productive of some inconvenience."

This extreme result has been maintained in England and in most American jurisdictions.² But there seems no good reason for it. It partakes of the

139, C. P. (the fluctuations in the preceding rulings reviewed; *Pearce v. Hooper* regarded as taking a middle ground, *i. e.* possession, plus the claim of a beneficial estate; per *Dallas, C. J., and Richardson, J., Gordon v. Secretan* held to represent the law, qualified by *Pearce v. Hooper*; per *Burrough, J., R. v. Middlezooy* was still law; per *Park, J., undecided on that point*; 1828, *Burnott v. Lynch*, 8 D. & R. 368, 375 (lessee against assignee of the lease, who had assigned to D.; admitted, "coming as it did out of the hands of the defendant, or of a person who claimed under him," per *Holroyd, J.*; "the deed came out of the possession of the party," per *Bayley, J.*); 1841, *Collina v. Baynton*, 1 Q. B. 117 (assumpsit for money had and received; plea, partnership; an alleged agreement of partnership, proved by the defendant, but produced by the plaintiff; the witness held indispensable); *Canada: 1844, Joplin v. Johnson*, 2 Kerr N. Br. 541 (mere production not sufficient).

¹ Cal. C. C. P. 1872, § 1941 (quoted *post*, § 1309); 1884, *Hobby v. Alford*, 73 Ga. 791; 1828, *Stevenson v. Dunlap*, 7 T. B. Monr. 134, 137, *semble*; 1815, *Betts v. Radger*, 12 John. 223 (the practice here "has been in conformity with what Mr. J. Heath calls the old rule," *i. e.* of *Middlezooy*; "if the party producing the instrument is one of the parties to it," this dispenses with proof of execution); 1898, *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884

(deed and bond produced on order by defendants, presumed genuine).

² 1819, *Jackson v. Kingsley*, 17 John. 158 (production of an instrument by one who is a party to it and claims a beneficial estate under it, necessary to dispense); 1859, *Hill v. Townsend*, 24 Tex. 575, 580, *semble*; 1827, *Rhoades v. Selin*, 4 Wash. C. C. 715, 719.

³ 1818, *Cooke v. Tanswell*, 8 Taunt. 450 (the opponent refused to produce on notice; "if he wished to throw on the plaintiff the burthen of calling the subscribing witness, he might have produced the deed"); 1838, *Poole v. Warren*, 3 Nev. & P. 693 (copy of a notice to quit; proof of execution not necessary, following *Cooke v. Tanswell*). This effect would certainly follow under those statutes in some jurisdictions (*ante*, § 1295, *post*, § 1859) by which an opponent may be defaulted for refusal to produce on notice.

⁴ 1856, *Tudor v. Tudor*, 17 B. Monr. 383, 390 (will not provable by draughtsman); 1823, *Labarthe v. Gerbean*, 1 Mart. N. S. 486 (attester preferred even to the testimony of the parish judge certifying it); 1855, *Barry v. Ryan*, 4 Gray 523 (excluding proof by another person present); *Contra*: 1895, *Garratt v. Hanahue*, 53 Oh. 482, 42 N. E. 256 (not preferred to the officer taking the acknowledgment of the maker).

⁵ *Eng.*: 1794, *Johnson v. Mason*, 1 Esp. 89 (maker of the deed under which the plaintiff held); 1815, *R. v. Harringworth*, *supra*; 1853, *Whyman v. Garth*, 8 Exch. 803 (maker of a

pedantic and the obstinately technical to insist on the calling of the attester when the very person whose execution is to be proved is willing to take the responsibility of charging himself on oath with the act of execution. That he may possibly be a partisan of the proponent's is no more reason for excluding him than for excluding any other partisan witness, and is no more likely to be the case with his testimony than with that of the attester:

1858, *Roberts, J.*, in *White v. Holliday*, 20 Tex. 679, 682: "When are they [the witnesses] needed? Are they needed at all when the parties are both agreed upon the same thing, about the execution and objects of the contract, and have no issue or dispute in relation to it? If it be an essential element in their creation and capacity that they must be produced when the parties are agreed, a party litigant cannot admit his deed by plea or other writing filed in court; [yet] that has never been doubted. . . . By what stronger evidence can it be made to appear that the parties to the deed do agree about its execution (and thereby dispense with the subscribing witnesses) than for the grantee to assert the execution in his petition and to procure the grantor to appear in open court on the trial and as a witness aware to the execution as alleged by the grantee? . . . [After pointing out that fraud, lack of consideration, etc., were not in issue and therefore the testimony of a witness could not be better than that of the disinterested grantor.] . . . This is not an exception under the rule that the subscribing witnesses must be called or accounted for, but a case above the rule and superseding it, and in accordance with that which enjoins that the best evidence must be adduced."

This desirable view has been accepted in a number of jurisdictions.³ It is occasionally put on the ground of the statutory abolition of parties' disqualifications; but this is erroneous, for at common law the maker, though not incompetent by interest, was nevertheless excluded. — If the attesting witness is called, but fails to testify (*post*, § 1302), the maker's testimony is then receivable.⁴

§ 1300. **Attester preferred to Opponent's Extrajudicial Admissions.** If the opponent has extrajudicially admitted the execution of the document, need the rule requiring the attestor's testimony still apply? The distinction

deed); *U. S.*: *Ala.*: 1891, *Coker v. Ferguson*, 70 Ala. 284, 286, 288; 1882, *Russell v. Walker*, 73 id. 315, 317 (mortgagor for mortgagee); *Ga.*: 1849, *Tyler v. Stephens*, 7 Ga. 279 (grantor); 1889, *Baker v. Massengale*, 83 id. 137, 142, 10 S. E. 347 (maker's testimony, as assignor to plaintiff); 1895, *Fletcher v. Perry*, 97 id. 368, 23 S. E. 824; *Ind.*: 1844, *Sampson v. Grimes*, 7 Blackf. 176; *Ky.*: 1808, *Reading v. Metenlf*, *Hardin* 535 (release to interested witness; releasee's proof of execution not sufficient); 1816, *Brashear v. Burton*, 4 Bibb 442; 1820, *M'Clain v. Gregg*, 2 A. K. Marsh, 454, 456, *semble*; 1821, *McIntire v. Funk*, Litt. Sel. C. 425, 427; 1823, *Rees v. Lawless*, 4 Litt. 218; 1826, *McMurtry v. Frank*, 4 T. B. Monr. 34; *Mass.*: 1862, *Brigham v. Palmer*, 3 All. 450 (mortgagee calling a mortgagor in an action against a third person; excluded); *Mo.*: 1847, *Glasgow v. Ridgeley*, 11 Mo. 34, 39.

³ *Ala. Code* 1897, § 1797 ("The execution of any instrument of writing attested by witnesses may be proved by the testimony of the maker thereof, without producing or accounting

for the absence of the attesting witnesses"); 1902, *Hayes v. Banks*, 132 Ala. 354, 31 So. 464 (statute applied); *Ga. Code* 1895, § 5244 (attester not required if the maker "testifies to its execution"); 1874, *Bowling v. Hax*, 55 Mo. 447, 448, *semble*; 1813, *Jackson v. Neely*, 10 John. 374, 376 (deed; testimony of the maker sufficient); 1895, *Garrett v. Hanahne*, 53 Oh. 482, 42 N. E. 256; 1858, *White v. Holliday*, 20 Tex. 679 (grantor of a deed, not a party, called to stand; witnesses dispensed with); 1878, *Wiggins v. Fleishel*, 50 Tex. 57, 63 (preceding case approved; but the grantee's testimony held not to dispense with subscribing witnesses); 1879, *Texas Land Co. v. Williams*, 51 id. 51, 59 (approving the preceding case; but making an exception where the deed is lost; the distinction rests on a misunderstanding of the phrase "secondary evidence").

⁴ 1896, *Kelly v. Sharp S. Co.*, 99 Ga. 393, 397, 27 S. E. 741 (maker's testimony received, where witnesses were called but could not prove execution).

between a judicial or solemn admission and an ordinary or circumstantial admission (*ante*, §§ 1048, 1057) is here important; the former is an absolute waiver of proof on the whole matter, and relieves the proponent from offering any evidence of execution (*ante*, § 1296); the latter is simply an inconsistent utterance, offerable as one piece of evidence, going with the other evidence to discredit the opponent's present claim. The proponent is therefore here not relieved from proving execution; but the question is whether, of the various sorts of evidence available to him, he must employ the attester's testimony in preference to the extrajudicial utterances of his opponent. These utterances, it may be observed, if receivable, are equally receivable whether the opponent was (as usually) himself the maker of the document or not; in the former case they are more probative; but they come in, if at all, not because he was the maker, but because he is the opponent in the suit.

Now, so far as concerns their practical trustworthiness, for the purpose of dispensing with the attesting witness, it is to be observed, as already noticed in dealing with the same evidence for proving a document's contents (*ante*, § 1255), that the real objection to them rests only on the possibility of fabricated testimony to oral admissions. The possibility of error in an opponent's actual admission of the document's execution is very small. If in a writing produced to the Court, such an admission clearly appears to have been made, there is no reason why such evidence should not serve at least to dispense with the evidence of the attesting witness. But where the alleged admission is an oral utterance, and the opponent denies it, and the testimony of some witness has to be believed before we can assume that the admission was really uttered, here it seems less desirable to abandon the ordinary preference for the attesting witness and to replace it by evidence open to such uncertainties. In short, where the supposed admission is contained in a writing produced to the Court, it should suffice to dispense with the attesting witness; but not where it is alleged as a mere oral utterance and is denied by the opponent.

The rulings have been by no means harmonious. No express and final settlement of the point seems to have been reached in England; but apparently a written admission was sufficient to dispense, and there is some authority to the same effect for an oral admission.¹ In the United States the

¹ 1701, *Dillon v. Crawly*, 12 Mod. 500 (the witness to a deed was subpoenaed but did not appear; an indorsement of the party himself on the deed, acknowledging it, was offered, but objected to; Holt, C. J.: "Can there be better evidence of a deed than to own it and recite it under his hand and seal?"; and all the Court agreed); 1779, *Abbot v. Plumbe*, 1 Doug. 216 (a bankrupt's extrajudicial oral acknowledgment of a bond, excluded, in an action of trover by the assignees, who wished to prove the petitioning creditor's debt); 1793, *Bowles v. Langworthy*, 5 T. R. 366 (trover by assignees in bankruptcy against one holding under a sale; to prove the bill of sale, as an act of bankruptcy, the defendant's admissions as to its execution were received; *Abbot v.*

Plumbe distinguished because the defendant was there no party to the document); 1811, *Jones v. Brewer*, 4 Taunt. 46 *semble* (admissions excluded); 1841, *Wollaston v. Hakewill*, 3 Scott N. R. 593, 617 (a memorial — or recorded copy — of a deed, made by one of the parties, apparently held to dispense); 1845, *Lord Gosford v. Rohb*, 3 Ir. L. R. 217 ("no admission of a party" can dispense; here, certain conduct of a landlord held not to dispense with the proof of a power of attorney to execute the lease); 1845, *Fishmongers' Mistery v. Robertson*, 1 C. B. 60, 74 (undecided); same case, 6 id. 896, 903 (a subsequent memorandum on a contract, admitting execution, held to dispense); 1856, *Houghton v. Koenig*, 18 id. 235, 233, *semble* (the

distinction between a written and an oral admission has seldom been taken, and the majority of Courts do not allow extrajudicial admissions to dispense with the rule.²

Distinguish here, however, (1) the exclusion of oral admissions of title, forbidden because in effect violating the Statute of Frauds (*ante*, § 1257); (2) the case of an attesting witness testifying to the maker's oral acknowledgment of execution on the faith of which the attester signs in attestation;³ here the rule is satisfied by calling the witness, and the maker's acknowledgment is an adoption of his previously-placed signature and is itself equivalent to execution in the attester's presence (*ante*, § 1292).

acknowledgment by the lessee, in the counterpart, of the holding on the terms of the lease is sufficient authentication of the lease).

² *Ala.*: 1833, *Bennet v. Robinson*, 3 Stew. & P. 227, 240 (note; admissions by the maker, defendant's intestate, not sufficient; *Hall v. Phelps*, N. Y., repudiated; a well-reasoned opinion); 1882, *Russell v. Walker*, 73 Ala. 317 (admissions excluded); 1885, *Coleman v. State*, 79 id. 49 (mortgage; oral admissions of mortgagor-defendant, not *in jure*, excluded); 1890, *Richmond, etc. R. Co. v. Jones*, 92 id. 226, 9 So. 276 (admissions excluded); 1893, *Hawkins v. Ross*, 100 id. 459, 464, 14 So. 278 (same); *Cal.*: 1863, *Hilborn v. Alford*, 22 Cal. 482, 484 (note; *Hall v. Phelps*, N. Y., apparently approved); C. C. P. 1872 § 1942 (where "evidence is given that the party against whom the writing is offered has at any time admitted its execution," it is enough if the writing is more than 30 years old or is "produced from the custody of the adverse party and has been acted upon by him as genuine"; this clause unites in hopeless confusion several distinct principles, and it is not worth while to attempt to disentangle them; the ensuing amendment correctly draws the section); Commissioners' amendment of 1901 (by substituting for the entire sentence the following: "A writing may also be proved by evidence that the party against whom it is offered has at any time admitted its execution, or by evidence that it is produced from his custody and has been acted upon by him as genuine"; for the validity of this amendment, see *ante*, § 488); *Conn.*: 1794, *Low v. Atwater*, 2 Root 72 (admissions excluded); *Ga.*: 1851, *Ellis v. Smith*, 10 Ga. 253 (same); 1871, *Mills v. May*, 42 id. 623 (same); *Ida.* Rev. St. 1887, § 5995 (like Cal. C. C. P. § 1942, omitting the clause for ancient documents); *Ky.*: 1816, *Fearn v. Taylor*, 4 Bibb 363, 365 (admissions of predecessor in title; "perhaps" witnesses must be called; here there were none); 1817, *Cartmell v. Walton*, ib. 488 (oral admission by defendant, excluded); 1828, *Stevenson v. Dunlap*, 7 T. B. Monr. 134, 137 (admissions of predecessor used on the facts); *Mo.*: 1826, *Smith v. Mounts*, 1 Mo. 671 (acknowledgment by maker of deed, excluded); *Mont.*: C. C. P. 1895, § 3233 (like Cal. C. C. P. § 1942); *N. H.*: 1848, *Cram v. Ingalls*, 18 N. H. 613, 617 (recognition, in a deed, of an attested mortgage, evidence of its execution); *N. Y.*: 1807, *Hall v. Phelps*, 2

John. 451 ("An instrument, though attested by a subscribing witness, may be proved by the confession of the party who gave it"; here a note, by the defendant's extrajudicial admission); 1808, *Fox v. Reil*, 3 id. 477 (a bond by the defendant; admissions excluded; *Kent*, C. J., distinguished the ruling in *Hall v. Phelps* as applying only to a note; "the rules of evidence may be more safely relaxed in the one case than in the other"); 1819, *Shaver v. Ehle*, 16 id. 201 (note orally admitted genuine by the defendant-maker; excluded, because the admission did not relate specifically to the note offered); 1824, *Rowley v. Ball*, 3 Cow. 303, 311 (similar admissions held sufficient, because applying to the specific note); 1835, *Corbin v. Jackson*, 14 Wend. 619, 623, 630 (oral admissions of the execution of an attested power of attorney, held sufficient; *Tracy*, Sen., diss.); 1844, *Hollenback v. Fleming*, 6 Hill 303, 305 ("confession or acknowledgment of the party" will not dispense); *N. C.*: 1881, *Jones v. Henry*, 84 N. C. 320, 323 ("as a general rule," the admission of an obligor is not sufficient); *Oh.*: 1827, *Zerby v. Wilson*, 3 Oh. 42 (contract affecting realty; defendant's admissions not dispensatory); 1877, *Warner v. R. Co.*, 31 Oh. St. 265, 270 (grantor's admissions, held not dispensatory); 1895, *Garrett v. Hanshne*, 53 id. 482, 42 N. E. 256 (same); *Or.*: C. C. P. 1892, § 761 (like Cal. C. C. P. § 1942); *Pa.*: 1804, *Taylor v. Meekly*, 4 Yeates 79 (oral and written admissions received, where one witness could not remember and the others seemed fictitious); 1849, *Williams v. Floyd*, 11 Pa. St. 499 (promissory note; admissions before a justice, sufficient, following *Hall v. Phelps*, N. Y.); *R. I.*: 1852, *Kinney v. Flynn*, 2 R. I. 319, 323 (admissions excluded); *U. S.*: 1802, *Smith v. Carolin*, 1 Cr. C. C. 99 (admissions excluded); 1820, *Turner v. Johnson*, 2 id. 202 (same); 1848, *Savage v. D'Wolf*, 1 Blatchf. 343 (party's admission of contract not under seal, sufficient, by N. Y. law); *Vt.* Rev. St. 1898, § 3405 (like Cal. C. C. P. § 1942, omitting the clause as to ancient writings); *Vt.*: 1802, *Adams v. Brownson*, 1 Tyl. 452 (note by deceased partner of defendant; deceased partner's admission allowed to dispense with witness); 1839, *Hodges v. Eastman*, 12 Vt. 358 (admission of note's execution, receivable in action on promise to pay in consideration of the note).

³ 1794, *Powell v. Blackett*, 1 Esp. 97.

§ 1301. **Attester preferred to Opponent's Testimony on the Stand.** When the opponent also becomes witness as well as opponent — *i. e.* when he is placed upon the stand or makes discovery on interrogatories —, and thus his utterances are not only ordinary admissions but also testimony, the objections against dispensing from the rule disappear entirely. The principal objection (noted *ante*, § 1300), that his extrajudicial oral admissions may be evidenced by fabricated testimony, is here of no force, for his testimony to the execution is delivered in the very presence of the tribunal. It is an excess of pedantry to insist on the production of the attester when the opponent himself (usually also the maker of the document) can be found testifying, on the stand or in a sworn answer, to the desired fact of execution. Nevertheless, this insistence is found in a number of jurisdictions;¹ though others properly here dispense with the rule and do not require the calling of the attester.² The latter result has sometimes been reached as a supposed consequence of the statutory abolition of parties' incompetency (though erroneously, for the question could and did come up at common law in regard to an answer obtained by a bill of discovery); the effect thus being, on this supposition, to admit also (for example) the testimony on his own behalf of a grantee-plaintiff to his grantor-defendant's execution.³ But this result, though fair enough, is not maintainable on the same ground as the use of an opponent's testimony, and in truth goes beyond any of the foregoing principles of exemption.

(f) "Must either Produce the Attester as a Witness."

§ 1302. **Attester need not Testify Favorably; Witness Denying or not Recollecting.** The notion of the rule of preference for the attesting witness is that of the general desirability, in the furtherance of truth, of obtaining his knowledge on the subject (*ante*, § 1288). What its tenor may be,

¹ 1803, *Call v. Dunning*, 4 East 53, 5 Esp. 16 (admission in an answer to a bill of discovery); 1836, *Ashmore v. Hardy*, 7 C. & P. 501, 503 (answer in chancery, admitting execution of a deed from W. to defendant); 1853, *Whyman v. Garth*, 8 Exch. 503 (the opponent, the maker of the deed, was not allowed to be called; Pollock, C. B.: "If in the course of the proceedings in the cause the party to the deed admits the execution, or if by his pleadings he does not require the execution to be proved, he may be very reasonably said to have waived the [implied] agreement [to call the subscribing witness]"; but not otherwise); 1884, *Askew v. Steiner*, 76 Ala. 218, 221 (testimony of plaintiff-grantee under mortgage, not sufficient to exempt from production); 1890, *Richmond & D. R. Co. v. Jones*, 92 id. 218, 226, 9 So. 276 (even questioning the party and maker on the stand, insufficient); 1895, *Winter v. Judkins*, 106 id. 259, 17 So. 627; 1851, *Ellis v. Smith*, 10 Ga. 253 (sworn answer, insufficient); 1878, *Davis v. Alston*, 61 id. 225, 227 (admissions on the stand, insufficient); 1826, *Roberts v. Tennell*, 5 T. B. Monr.

247, 250 (answer in chancery, insufficient); 1862, *Brigham v. Palmer*, 3 All. 450, *semble* (insufficient notwithstanding the abolition of parties' disqualifications); 1874, *Henly v. Hemming*, 7 Baxt. 524, 526 (rule applies even since abolition of parties' disqualification).

² 1876, *Doe v. Nevers*, 16 N. Br. 614 (*Whyman v. Garth*, held not law for a deed executed since Consol. St. c. 46, § 23, quoted *ante*, § 1290); Ala. Code 1897, § 1797 (quoted *ante*, § 1299); Cal. C. C. P. 1872, § 1942, as amended in 1901 (quoted *ante*, § 1300); Ga. Code 1895, § 5244 (quoted *ante*, § 1299); 1885, *Rayburn v. Lumber Co.*, 57 Mich. 273, 274, 23 N. W. 811 (proof by calling the opponent, allowed without requiring the attester); 1858, *White v. Holladay*, 20 Tex. 679, *semble* (quoted *ante*, § 1299).

³ 1874, *Bowling v. Hax*, 55 Mo. 447, 448 (since parties are made competent, the witness need not be called; here, a plaintiff suing on a contract, executed by plaintiff and defendant, was allowed to prove it). *Contra*: 1879, *Wiggins v. Fleishel*, 60 Tex. 57, 63, *semble* (cited *ante*, § 1299).

remains to be seen; the object of the law is to obtain his knowledge, irrespective of the side in whose favor it may bear. Accordingly, it is not necessary, as a part of the rule, that he should testify in favor of execution. The rule is satisfied by calling him, *i. e.* by making *his testimony available* for the trial. If his testimony fails to evidence the execution, the present rule says nothing about the consequences, — whatever any other rule may say. The present rule's force is absolutely spent when the witness is produced for examination. Here also policy agrees with principle; for the practical working of the rule, if it required that the witness should not only testify but testify favorably (*i. e.* if the party desiring to prove execution must fail if the attesters failed to prove it) would be unfair and disastrous, especially in testamentary causes:

1839, *Tucker, P.*, in *Clarke v. Dunnamant*, 10 Leigh 13, 33: "It never could have been the design of the statute to vacate a will which was duly executed, whenever the witnesses to it have forgotten any material circumstances attending the attestation. They are indeed always called upon to prove the will, not because the statute requires that they shall prove a compliance with all the requisites of the law, but because they would be most likely to prove or disprove them, and because upon principles of common law the attesting witness to every instrument must be produced if living and within the power of the Court."

1862, *Denio, J.*, in *Tarrant v. Ware*, 25 N. Y. 425, 426: "Prior to any adjudication upon the subject, it might have been argued with some plausibility that the nature and objects of the provisions declaring a certain number of subscribing witnesses necessary to a valid will required that the number specified should unite in testifying to an execution and attestation of the instrument in the manner required by the act; or at least that the will could not be established if a part or all of them should deny the existence of the facts requisite to show a proper execution. The witnesses were supposed to be persons selected by the testator to bear witness that he had actually executed the paper with a knowledge of its contents and in the form prescribed by law and that he was of suitable age and capacity and not under restraint; if the persons thus selected could not or would not affirm the existence of these facts, the intention of the law (it might be said) would not be answered; . . . [and] if the testimony of the chosen witnesses, when unfavorable to the will, could be disregarded, a will may be set up and established by testimony not authorized by the statute and which the Legislature had not considered perfectly safe in ordinary cases. But, on the other hand, it was soon seen that the attesting witnesses might forget the facts to which they had once attested, and that it was not impossible that they might be tampered with by interested parties and thus be induced to deny on oath the facts which they had been selected to witness and to depose to. This view prevailed with the Courts. . . . Whether their [the witnesses'] denial of what they had attested proceeds from perversity or want of recollection, the testament may in either case be supported."

1895, *Lumpkin, J.*, in *Gillis v. Gillis*, 96 Ga. 1, 15, 23 S. E. 107: "[The attesting witnesses are,] unless accounted for, indispensably necessary witnesses; but the testimony, even as to the *factum* of the execution, is not confined to them. The fact to be established is the proper execution of the will. If that is proved by competent testimony, it is sufficient, no matter from what quarter the testimony comes, provided the attesting witnesses are among those who bear testimony, or their absence is explained. The inquiry, as in other cases, is whether, taking all the testimony together, the fact is duly established. It is not required that any one or more of the essential facts should be proved by all, or any number, of the attesting witnesses. The right is simply to have the attesting witnesses examined, no matter what their testimony may be."

Accordingly, the failure of the attester, *from lack of memory*, to prove execution, is not in itself any breach of the present rule; and though the proponent has still to prove the execution in some sufficient way, he is no longer hampered by any rule about attesting witnesses.¹

For the same reason, the attester's positive *denial* of the facts of execution, contradicting the statements implied or expressed in his attestation, leaves the proponent still free to prove by other testimony, if he can, the facts of due execution; a permission demanded not only by principle but also by policy, inasmuch as the proponent would otherwise be defeated of his rights by a corrupt attester.²

¹ Besides the following cases, the statutes and cases in the next note are also authorities to the same effect: *England*: 1728, *Dorner v. Thurlaud*, 2 P. Wms. 506, 510 (obscure); 1844, *Burgoyne v. Showler*, 1 Roberts. Ecl. 5, 10 (even if they forget, the execution is assumed); 1848, *Leach's Goods*, 12 Jur. 381; *United States*: 1843, *Lazarus v. Lewis*, 5 Ala. 457, 459; 1861, *Hall v. Hall*, 38 id. 131, 133; 1895, *Barnewall v. Murrell*, 108 id. 366, 18 So. 331; 1857, *Reinhart v. Miller*, 22 Ga. 402, 416; 1895, *Gillis v. Gillis*, 96 id. 1, 14, 23 S. E. 107; 1896, *Kelly v. Sharp S. Co.*, 99 id. 393, 398, 27 S. E. 741; 1898, *Buchanan v. Grocery Co.*, 105 id. 393, 31 S. E. 105; 1902, *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907; 1832, *Griffith v. Huston*, 7 J. J. Marsh. 385, 387; 1840, *Quimby v. Buzzell*, 4 Shepl. 470, 473; 1829, *Russell v. Coffin*, 8 Pick. 143, 150; 1840, *Dewey v. Dewey*, 1 Metc. 349, 353 (if recollection were required, "the validity of a will would depend not upon the fact whether it was duly executed, but whether the testator had been fortunate in securing witnesses of retentive memories"); 1879, *Abbott v. Abbott*, 41 Mich. 540, 542, 2 N. E. 810; 1890, *Mays v. Mays*, 114 Mo. 536, 540, 21 S. W. 921 (failure to testify to sanity); 1896, *Morton v. Heidorn*, 135 Id. 609, 37 S. W. 504; 1823, *Marshall v. Gongler*, 10 S. & R. 164, 167; 1832, *Miller's Estate*, 3 Rawle 312, 318 ("The law is not so unreasonable as to declare that the grantee must lose his right wherever they have lost their memory"; here, of a will); 1855, *Welch v. Welch*, 9 Rich. 133, 136 (that one subscribing witness cannot recollect the facts, immaterial, if otherwise proved; here, by the other subscribers); 1897, *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555 (where two of three witnesses admitted their signatures, but could not recollect the circumstances); 1839, *Clarke v. Dunnavant*, 10 Leigh 13, 22 (quoted *supra*).

² *England*: 1683, *Hudson's Case*, Skinn. 79 (two of the three swore that he was incapable and his hand was guided; but others proved the will); 1694, *Dayrell v. Glascock*, ib. 413; *Austin v. Willes*, Buller N. P. 264 ("notwithstanding the three witnesses all swore to its not being duly executed, the devisee obtained a verdict"); *Pike v. Bradbury*, ib. 264 ("the first and second witnesses denying their hands, it was objected he should go no farther; for it was argued that, though, if you call one witness who proves against you, you may call another, yet if he prove against you too, you can go no farther;

but the Chief Justice admitted him to call other witnesses to prove the will, and he obtained a verdict"); 1729, *Rice v. Oatfield*, 2 Stra. 1096 (the preceding case, cited in argument, was apparently approved); 1762, *Lowe v. Jolliffe*, 1 W. Bl. 365 (besides the attesting witnesses themselves, "a dozen servants of the testator all unanimously swore him to be utterly incapable of making a will," etc.); 1779, *Mansfield, L. C. J.*, in *Abbot v. Plumbe*, 1 Doug. 216 ("It was formerly doubted whether if the subscribing witness denies the deed, you can call other witnesses to prove it," but no longer); 1790, *Ley v. Ballard*, 3 Esp. 173, note (neither of the attesters had seen the execution; *Kenyon, L. C. J.*: "If they disavow having seen it executed, other persons who saw it executed, or can prove the party's handwriting, may be called"; so, too, even if they "prove contrary to what their attestation purport, namely, that the party did not execute it"); 1798, *Kenyon, L. C. J.*, in *Jordaine v. Lushbrook*, 7 T. R. 599, 604 (approves *Lowe v. Jolliffe*); 1815, *R. v. Harringworth*, 4 M. & S. 350 (*Ellenborough, L. C. J.*, "His testimony is indeed not conclusive, for . . . the party may go on to prove him such [untrustworthy] and may call other witnesses to prove the execution"); 1815, *Bootle v. Blundell*, 19 Ves. Jr. 494, 501, 507 (*Eldou, L. C.*: "If they had all denied their attestation, but it could be proved by circumstances that they unjustly denied it, the will might be proved to be a good will by other circumstances"). *United States*: 1895, *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831; 1853, *Rogers v. Diamond*, 13 Ark. 474, 483; Cal. C. C. P. 1872, § 1941 ("If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence"); 1858, *Rash v. Purnel*, 2 Harringt. 448, 454; 1848, *Talley v. Moore*, 5 id. 57; 1857, *Reinhart v. Miller*, 22 Ga. 402, 416; 1895, *Gillis v. Gillis*, 96 id. 1, 14, 23 S. E. 107 (execution may be otherwise proved, no matter how the attesting witness testifies; see quotation, *supra*); *Ida. Rev. St. 1861*, § 5994; *Ida. Code 1897*, § 4619; 1827, *Booker v. Bowles*, 1 Blackf. 90; 1854, *Barry v. Hoffman*, 6 Md. 78, 87; 1834, *Whitker v. Salisbury*, 15 Pick. 534, 544; 1878, *Martin v. Perkins*, 56 Miss. 204, 209 (their testimony as to incapacity does not conclude the propounder of a will); *Mont. C. C. P. 1895*, § 3232; *Nebr. Comp. St. 1899*, § 5917; 1830, *Jackson v.*

§ 1303. **Same: Discriminations (Refreshing Recollection; Implied Attestation Clause; Impeaching One's Own Witness, or One's Own Attestation; Illinois Rule admitting only Attesting Witnesses in Probate).** (1) May not the attester, though not actually recollecting the circumstances, adopt his signature as a record of past recollection, and base his testimony on the faith of his signature, which he would not have put there had he not witnessed the execution? That he may, is clear by the principle of Recollection (*ante*, § 737), under which this mode of testifying has already been considered.

(2) If the witness' testimony on the stand wholly fails through lack of recollection, may not his signature and attestation, on being proved by himself or some one else, suffice as an *implied testimony to the facts of due execution*? To use the attestation in this way is to use a hearsay (*i. e.* extrajudicial) statement, but for this case a well-recognized exception to the Hearsay rule exists. Moreover, the question arises how far this implied statement can be regarded as covering all the facts essential to due execution; both these questions, involving the existence and scope of a Hearsay exception, are better considered under that head (*post*, §§ 1510-1512). Whether the failure of recollection *excuses from calling the witness* is a different question (*post*, § 1315).

(3) If the attester, when called by the proponent, denies the facts of execution, in contradiction to his attestation, is it not a violation of the rule against *impeaching one's own witness* to allow the proponent to go on to prove due execution in spite of the attester's testimony? It is not, in truth; but even if it were a case coming under the rule, it would be excused by the exception for a necessary or compulsory witness (*ante*, § 917).

(4) If the supposed attester *denies the genuineness of his signature*, then, if this denial be *taken as true*, he is no attesting witness, and, the document thus not being attested, it is not necessary to call him as such (on the principle of § 1292, *ante*); the proponent may therefore take this as true and go on to prove execution by other testimony.¹ However, if the document is one

Christman, 4 Wend. 278, 282; 1861, Orser v. Orser, 24 N. Y. 51, 52; 1862, Tarrant v. Ware, 25 id. 425, note (quoted, *supra*); 1862, Auburn Seminary v. Calhoun, *ib.* 422, 425; 1832, Crowell v. Kirk, 3 Dev. 356, 358, per Ruffin, J.; Or. C. C. P. 1892, § 761; 1817, Pearson v. Wightman, 1 Mill Const. 336, 340 ("It would be a terrible consequence if such testimony were not admissible; for how often and how easily might witnesses be tampered with to deny their own attestation?"); 1850, Jones v. Arterburn, 11 Humph. 97, 99 (attesting witness denying signature; signature may be proved); 1860, Rose v. Allen, 1 Coldw. 23, 27 (even if all deny due execution, the fact may be otherwise proved); 1869, Alexander v. White, 7 id. 126, 128 (same); 1891, Simmons v. Leonard, 91 Tenn. 183, 190, 18 S. W. 280 (fact of attestation denied); Tex. C. Cr. P. 1895, § 793; Utah Rev. St. 1898, § 3404; 1846, Pollock v. Glassell, 2

Gratt. 439, 461; 1877, Lamberts v. Cooper, 29 Gratt. 61, 67 (sanity; witness who contradicts his attestation is to be viewed with suspicion); 1878, Cheatham v. Hatcher, 30 id. 56, 64; 1881, Webb v. Dye, 18 W. Va. 376, 380; 1878, Jenkins' Will, 43 Wis. 610.

In particular, the attester therefore need not testify to a testator's sanity; 1902, *Re Wells*, 96 Me. 161, 51 Atl. 868.

² 1792, Grellier v. Neale, Peake 146 (Kenyon, L. C. J.: "The subscribing witness not having seen the deed executed, it is the same as if there was no witness at all; and in that case the handwriting may be proved by another witness"); 1805, Burrows v. Lock, 10 Ves. Jr. 470, 474 ("If he denies that [*i. e.* execution in his presence], other evidence is admissible from circumstances, as where there were no attesting witnesses"); 1811, Fitzgerald v. Elsee, 2 Camp. 635 (indenture of apprenticeship; the witness

required by law to be attested as a condition of validity, then it is of no use to the proponer to take the attester's denial as true, for, if he does, the document is invalid for lack of attestation; and he must therefore (and may, under the principle of § 1302) go on if possible to prove the signature's genuineness by other testimony.³

(5) That the attester, if he admits his signature, may not testify to the *falsity of his own attesting statements* (for example, by denying the identity of the maker) was a notion at one time much urged, in virtue of the supposed rule *nemo allegans turpitudinem suam audiendus est*; but this doctrine never received final sanction (*ante*, § 528).

(6) In *Illinois*, by an odd statutory rule of early local origin, on an appeal to a Superior Court from a *refusal* to grant probate of a will, *any other testimony* to execution may be produced, but on an appeal from a grant of probate, *only the attesters' testimony* will be received.³

§ 1304. **Number of Attesters required to be Called.** The object of placing more than one attestation upon a document, whether at the parties' voluntary instance or by requirement of law, is ordinarily not to demand the combined testimony of all at the trial, but merely to provide by way of caution a number of witnesses, so that the contingencies of death, removal of residence, and the like, may be guarded against and one witness at least may be expected to be available. If a statute expressly required the document to be "proved" by a specified number (*post*, § 2048), the case would clearly be different. But a main object in statutes requiring attestation as an element of validity is to surround the act of execution with certain safeguards; the object of securing evidence for litigation is a secondary one. So far, therefore, as such an object exists, it can hardly be implied to have in view anything beyond what is above noted, *i. e.* a precautionary supply of persons from whom a testifier is likely to remain available in spite of the accidents that might have totally destroyed the supply if there had been but one person provided in advance. No doubt such statutes often negative the above view by expressly providing not only that a certain number shall attest, but also that all of the required number shall be called to testify. But, in the absence

had not seen the execution; handwriting allowed; Lawrence, J.: "It is to be treated as if there were no attesting witness"; 1810, *Lemon v. Dean*, ib. 636 note, LeBlanc, J. (note; same ruling); 1812, *McCraw v. Gentry*, 3 id. 232 (the witnesses had seen the defendant acknowledge, but not sign the note; held, that it was as if there were no attesting witness; and thus the defendant's acknowledgment sufficed).

³ 1808, *Phipps v. Parker*, 1 Camp. 412 (the witness had not seen the execution; Ellenborough, L. C. J.: "If it was not executed in his presence, the conclusion of law is that it [a policy] was never executed as a deed, although it may have been signed by these two directors. . . . Now appearing certainly not to have been executed in the presence of the witness, I think it must be considered as invalid"; distinguishing *Lowe v. Jolliffe*, where the truth of the

attesters was denied, and the requirements of attestation might have been in reality fulfilled).

³ 1840, *Walker v. Walker*, 3 Ill. 291; 1860, *Duncan v. Duncan*, 23 id. 365; 1867, *Andrews v. Black*, 43 id. 256 (explaining the principle fully); 1875, *Crowley v. Crowley*, 80 id. 469; 1895, *Hobart v. Hobart*, 154 id. 610, 615, 39 N. E. 581 (the rule excluding other testimony on appeal from grant of probate does not apply to other testimony to testator's signature where an attesting witness is dead); 1898, *Thompson v. Owen*, 174 id. 229, 51 N. E. 1046; 1901, *Illinois Masonic Orphans' Home v. Gracy*, 190 id. 95, 60 N. E. 194; 1902, *Webster v. Yorty*, 194 id. 408, 62 N. E. 907; 1902, *Re Tobin*, 196 id. 484, 63 N. E. 1021; 1902, *Kohley's Estate*, 200 id. 189, 65 N. E. 699. The relevant statutory clauses are printed in part *post*, § 1304.

of express statements, such a requirement is not properly to be implied; and it was not implied in common-law practice:

1795, *Lord Camden in Doe v. Hindson*, 1 Day 41, 51:¹ "The Legislature set up these witnesses as a guard, to protect the testator from fraud in that critical minute when he was about to execute his will. . . . There is a great difference between the method of proving a fact in a Court of justice and the attestation of that fact at the time it happens. . . . The new thing introduced by this statute [of Frauds] is the attestation; the method of proving this attestation stands as it did upon the old common-law principles. Thus, for instance, one witness is sufficient to prove what all three have attested; and, though that witness must be a subscriber, yet that is owing to the general common-law rule that, where a witness has subscribed an instrument, he must be always produced, because it is the best evidence. This we see in common experience; for after the first witness has been examined, the will is always read. . . . This [above distinction], I am afraid, has not always been attended to; but some persons have been apt to reason upon this point as if the statute had directed the will to be proved by three credible witnesses; forgetting the difference between the subscription and the proof of that subscription."

1834, *Tindal, C. J., in Wright v. Tatham*, 1 A. & E. 3, 23: "It may be observed, however, that the Statute of Frauds did not look primarily to the mode of proving the will when contested, but to the security of the testator at the time of the execution of the will;"² the statute intending that three witnesses should be in the nature of guards or securities, to protect him in the execution of his will against force or fraud or undue influence. The proof of the will by the three witnesses, supposing it should afterwards come in contest, is only an incidental and secondary benefit, derived from that mode of attestation. . . . It is well settled that in an action at law it is sufficient to call one only of the subscribing witnesses, if he can speak to the observance of all that is required by the statute."

This was the view of the common law. For attested documents in general, the rule has always been that but one attester need be called.³

For wills, the rule was clearly the same in England in the common-law Courts.⁴ But in Chancery (while the precedents were not harmonious) the practice seems to have been to call all the required number of attestors, — at least unless the Chancellor's discretion was exercised to the contrary.⁵

¹ Reprinted *n. v. Hinds v. Kersey*, Burn's Ecclesiastical Law, IV, 118.

² So also, *Temp. G. II, Allen v. Hill*, Gilbert 257, 261.

³ 1733, *Holdfast v. Dowling*, 2 Str. 1254; 1843, *Thomas v. Wallace*, 5 Ala. 268, 275; 1898, *Sowell v. Bank*, 119 Id. 92, 24 So. 585; 1888, *O'Sullivan v. Overton*, 56 Conn. 102, 105, 14 Atl. 300; 1896, *Cooper v. O'Brien*, 98 Ga. 773, 26 S. E. 470; 1815, *Allen v. Trimble*, 4 Bibb 21; 1800, *Collins v. Elliott*, 1 H. & J. 1; 1829, *Russell v. Coffin*, 8 Pick. 143, 150 ("unless there is some reason to believe or suspect that the instrument has been forged"); 1851, *Gelott v. Goodspeed*, 8 Cush. 411 ("in ordinary cases, where the mere formal execution" is involved); 1851, *White v. Wood*, lb. 413 (although the other witness was in court); 1860, *Melcher v. Flanders*, 40 N. H. 139, 157; 1809, *Shepherd v. Goss*, 1 Overt. 487; 1855, *Harrrell v. Ward*, 2 Sneed 610, 612; 1849, *Jesse v. Parker*, 6 Gratt. 57, 61, 64.

⁴ *Ante*, 1726, Gilbert, Evidence, 103 (one

suffices, "unless they show such characters of fraud as would make it necessary to produce the rest"); 1763, *Buller Nisi Prius*, 264 ("The devisee need produce only one [witness], if that one prove all the requisites," the opponent being at liberty to call the others); 1816, *Eldon, L. C., in Bullen v. Michel*, 4 Dow 297, 331 (at common law "they usually call only one witness [to a will], . . . leaving it to the other side, if they think proper, to call the other witnesses"); 1834, *Wright v. Tatham*, 1 A. & E. 3, 22 (see quotation *supra*). *Contra*: 1748, *Townsend v. Ives*, 1 Wils. 216 ("It is a rule that all the witnesses, if living, must be examined to prove the will").

⁵ 1748, *Ogle v. Cook*, 1 Ves. Sr. 177 (all required, by *Hardwicke, L. C.*); 1752, *Grayson v. Atkinson*, 2 Id. 454, 460 (all to be accounted for; here two testified, and the third was beyond seas; but here the fact of the execution in his presence was not otherwise proved; the plaintiff conceded that all must be called if available, but claimed that "it was formerly

In the *United States*,⁶ several forms of the rule find representation. The rule in perhaps most jurisdictions is to call but one attester, for probate in

not required to have all the three witnesses examined; it was first established by Lord Talbot in this Court"); 1740, *Binkeld v. Lambert*, 1 Dick. 337 (Clarke, M. R., said "that the will could not be said to be strictly proved agreeably to the statute; but his conscience being satisfied," he would not require all, but would execute the trusts of the will; here the third witness could not be found); 1780, *Bird v. Butler*, ib. 337, n. (same facts, though the search not so thorough; trusts carried out, but the will not declared proved); 1789, *Powel v. Cleaver*, 2 Bro. C. C. 499, 504 (in practice, but not by absolute rule, all are to be called); 1793, *Fitzherbert v. Fitzherbert*, 4 id. 231; 1800, *Carrington v. Payne*, 5 Ves. Jr. 404, 411, *semble* (all required); 1815, *Bootle v. Blundell*, 19 id. 491, 500, 505, 509 (Eldon, L. C.: "The rule of this Court requiring that to establish a will of real estate all the three witnesses shall be examined is not by any means, as it has been represented, a technical rule"; for after ordering an issue at law the testimony there may be reviewed, and before granting the devise an issue at law, the witnesses may be examined; the general rule admitting necessary exceptions, and perhaps not applying where the will is not wholly, but only partially in question); 1820, *Winchelsea v. Wauchope*, 3 Russ. 441, 453, *semble* (all are not invariably required); 1831, *Tatham v. Wright*, 2 Russ. & Myl. 1, 8, 16 (the Court of Chancery may inform its conscience as it thinks best and may send an issue back to be tried by calling all the attesting witnesses; yet Brougham, L. C., at p. 30, speaks of "the rule which makes it imperative to call all the witnesses to a will," but regards it as applying only to a devisee who moves to establish a will, and not where an heir moves to set one aside).

Canada: P. E. I. St. 1873, c. 21, § 24 (quoted *post*, § 1310).

Ala.: Code 1897, § 4276 ("not be proved by one or more"); 1845, *Bowling v. Bowling*, 8 Ala. 538 (where probate is contested, all must be produced; where not contested, one "might be sufficient"; no statute at this time); *Ariz.*: Rev. St. 1887, §§ 978, 983 (in uncontested probate, the Court "may admit" on the testimony of one witness; if contested, "all the subscribing witnesses" available must be produced); *Ark.*: Stats. 1894, § 7416 (wills; all required by implication; quoted *post*, § 1320); 1843, *Campbell v. Garven*, 5 Ark. 485, 491, *semble* (both necessary); 1876, *Jones v. Williams*, 31 id. 175, 180 (statute applied; proof by calling one witness only, insufficient); *Cal.*: C. C. P. 1872, §§ 1308, 1315 (in uncontested wills, by one subscribing witness only, if he testifies to the execution "in all particulars as required by law, and that the testator was of sound mind at the time of its execution"; in contested wills, by all); Commissioners' amendment of 1901 (quoted *post*, § 1310); *Colo.*: Annot. Stats. 1891, § 4669 ("It shall be the duty of each and every witness to any will" to ap-

pear and testify); § 4670 (the will is to be allowed if "it shall satisfactorily appear by the testimony of two or more of the subscribing witnesses" that it was duly executed); *Conn.*: 1869, *Field's Appeal*, 36 Conn. 277 (one suffices for a will); *Del.*: 1838, *Hush v. Furnet*, 2 Harringt. 448 (all must be called, on an issue out of Chancery to establish a will, because the judgment is final; otherwise, in trying a will at common law in ejectment, where the heir, if defeated, may again bring ejectment); *D. C.*: Comp. St. 1894, c. 70, § 26 (wills of personality; if uncontested, "it shall not be necessary to examine all the witnesses, unless they voluntarily attend"; but proponent must make oath to mode of obtaining will and to non-knowledge of any other will); Code 1901, §§ 131, 132 (quoted *post*, § 1310); *Fla.*: Rev. St. 1892, § 1805 (at a probate contest, "such witnesses as the parties may produce shall be examined"); *Ga.*: Code 1895, § 3281 (one suffices, for probate in common form; all are necessary, in solemn form); 1855, *Walker v. Hunter*, 17 Ga. 364, 390, 407 (not clear); 1874, *Evsns v. Arnold*, 52 Ga. 169, 179 (all required); *Ida.*: Rev. St. 1887, § 5311 (wills; like Cal. C. C. P. § 1315, but "all" is misprinted as "and"); § 5306 (like Cal. C. C. P. § 1308); *Ill.*: Rev. St. 1874, c. 143, § 2 (a will is to be signed by two or more credible witnesses, "two of whom, declaring on oath or affirmation, before the county court . . . shall be sufficient proof of the execution"); § 3 ("It shall be the duty of each and every witness to any will . . . executed in this State, as aforesaid, to be and appear before the county court on the regular day for the probate . . . to testify of and concerning the execution and validity of the same"); § 5 (if the county judge is an attester, he shall make oath in circuit court, and then "if there are other witnesses to said will, the county Court shall take their evidence . . . as in other cases"); § 13 (in case of refusal of probate by a county court, the proponent may support it in the circuit court "by any evidence competent to establish a will in chancery"); 1851, *Rigg v. Wilton*, 13 Ill. 15, 19 (at the trial of a will-issue out of chancery, the attesting-witness need not be called, because his probate deposition is usable; (see *post*, § 1305); but, *semble*, at the probating both must be called); 1886, *Re Page*, 118, id. 576, 578, 3 N. E. 852 (one suffices to "establish" a will); 1897, *Harp v. Parr*, 168 id. 459, 49 N. E. 113, *semble* (same); 1898, *Silnghoff v. Bruner*, 174 id. 561, 51 N. E. 772 (same); 1902, *Kobley's Estate*, 290 id. 189, 65 N. E. 699 (the two must be produced); *Ind.*: Rev. St. 1897, § 2805 (a will "shall be proven by one or more of the attesting witnesses"); 1871, *Hayes v. West*, 37 Ind. 21, 26 (one suffices); *Kan.*: Gen. St. 1897, c. 110, § 12 ("The Court shall cause the witnesses to the will" to come and testify); *Ky.*: 1819, *Lindsay v. McCormack*, 2 A. K. Marsh. 229 (one suffices; the later rulings are the same); 1820, *Harper v. Wilson*, ib. 465; 1821, *Overall v. Overall*, Litt. Sel. C. 501, 503;

common form, and to call all the required number, for probate in solemn form. But statutes loosely drawn have introduced some confusion. How-

1823, *Turner v. Turner*, 1 Litt. 101, 103; 1823, *Kimondorff v. Carmichael*, 3 id. 473, 479; 1829, *Huff v. Sims*, 2 J. J. M. 509, 511; 1833, *Carrico v. Neal*, 1 Dana 162 (if "direct, positive, and explicit"); 1840, *Switt v. Wiley*, 1 B. Monr. 114, 116; 1850, *Cornelison v. Browning*, 10 id. 423, 427; *Lo.*: C. Pr. 1891, § 933 (a will is to be proved "by the number of witnesses required for that purpose by law"); *Me.*: Pub. St. 1883, c. 64, §§ 5, 7 (when there is no objection, a will may be probated on the testimony of "any one or more" of the witnesses; where the original cannot be obtained, execution may be proved by the subscribing witnesses or by "any other evidence competent"); *Mo.*: Pub. Gen. L. 1893, Art. 93, §§ 331, 334 (all are to be examined, for wills of realty; but not for uncontested wills of personalty); St. 1890, c. 416, St. 1892, c. 81 (quoted *post*, § 1310); *Mass.*: 1815, *Sears v. Dillingham*, 12 Mass. 353, 362 (all are required); 1820, *Brown v. Wool*, 17 id. 68, 73 (same); *Mass. St.* 1901, c. 242, Rev. L. 1902, c. 136, § 2 (for uncontested wills, probate may be granted upon the testimony of one witness only, by affidavit); *Mich.*: Comp. L. 1897, § 9279 (in uncontested probate "the Court may in its discretion" act upon "the testimony of one of the subscribing witnesses only"); 1879, *Abbott v. Abbott*, 41 Mich. 510, 543, 2 N. W. 810 ("Our statute does not in terms require all the subscribing witnesses to be sworn on a contest, except inferentially in the Probate Court. This requirement, if it exists, is only implied"); 1879, *Fraser v. Jennison*, 42 id. 206, 223, 3 N. W. 882 (question not decided); *Minn.*: Gen. St. 1894, § 4436 (for uncontested wills the "testimony of one of the subscribing witnesses only" suffices in the Court's discretion); *Miss.*: Annot. Code 1892, § 1816 (a will must be proved by at least one of the subscribing witnesses); 1863, *Evans v. Evans*, 10 Sm. & M. 402, 403 (all required); 1850, *Kirk v. State*, 13 id. 406 (for personalty, only one is required to attest; hence, only one need be called); 1850, *Ragland v. Green*, 14 id. 194, 199 (land; all must be called); 1858, *Crusoe v. Butler*, 36 id. 150, 169 (land; only one need be called; preceding cases not cited); *Mo.*: Rev. St. 1899, §§ 4619, 4620 (all are required by implication to be called); 1834, *Graham v. O'Fallon*, 3 Mo. 507, 510 (one suffices); *Mont.*: C. C. P. 1895, §§ 2330, 2343 (like Cal. C. C. P., §§ 1308, 1315); *Nebr.*: Comp. St. 1899, § 2655 (if not contested, the Court "may in its discretion grant probate thereof on the testimony of one of the subscribing witnesses only"); *Nev.*: Gen. St. 1885, § 2685 (in uncontested wills, the Court may admit on the "testimony of one of the subscribing witnesses only"); § 2687 (if contested, "all of the subscribing witnesses," if available, must be examined); St. 1897, c. 106, §§ 17, 19 (reproduces the foregoing sections); *N. H.*: Pub. St. 1891, c. 187, § 6 (a non-contested will may be probated on the testimony of one witness, "though the others are living and within pro-

cess of the Court"); *N. J.*: 1806, *Dun v. Allen*, 2 N. J. L. [24] 32 (not clear); 1802, *Ward v. Wilcox*, 64 N. J. Eq. 303, 51 Atl. 1094 (even for contested wills, one witness may suffice); *N. M.*: Comp. L. 1897, § 1982 (the judge shall "examine the attesting witnesses to the will"); *N. Y.*: C. C. P. 1877, § 2618 (two witnesses required, i. e. all required by law to attest; but the contestant may require the examination of all); 1822, *Jackson v. Legrange*, 16 John. 386 (one of the witnesses is enough, "if he can prove the execution"; "but if the witnesses cannot prove these requisites, the other witnesses ought to be called"); 1825, *Dun v. Brown*, 4 Cow. 493, 489 (one witness held sufficient; though here one of the other two names was not known); 1825, *Jackson v. Laquere*, 5 id. 221, 225 (one witness sufficient); 1823, *Jackson v. Vickory*, 1 Wend. 408, 412 (one is sufficient, "if he can prove its perfect execution," otherwise the others must be called); 1839, *Hunt v. Johnson*, 19 N. Y. 279, 293 (one suffices, if he can prove the necessary facts); 1862, *Tarrant v. Ware*, 25 id. 425, note (all required); 1862, *Auburn Seminary v. Callahan*, ib. 423, 425 (same); 1867, *Cornell v. Woolley*, 42 id. (Keyes) 378, 379 (one suffices); *N. C.*: Code 1883, § 2148 (two, i. e. all required to attest, must be called); *Oh.*: Rev. St. 1898, § 5925 (Court is to cause "the witnesses to such will" to be examined); *N. D.*: Rev. C. 1895, § 6295 (uncontested will; the Court "may in its discretion grant probate . . . on the testimony of one only of the subscribing witnesses"); § 6296 (contested will; "all the subscribing witnesses" are required); *Okl.*: Stats. 1893, § 1189 (probate of uncontested will may be granted on testimony "of one of the subscribing witnesses only"); § 1193 (if a will is contested, "all the subscribing witnesses," if available, must be produced and examined); *Or.*: C. C. P. 1892, § 761 (one is sufficient); *S. C.*: St. 1839, Gen. St. 1882, c. 61, §§ 1870, 1871, Rev. St. 1893, §§ 2003, 2004, Code 1892, §§ 2491, 2492 (for probate in common form, one witness is sufficient; in solemn form, all are required); 1798, *Hopkins v. DeGraffenreid*, 2 Bay 187, 192 (one suffices "though if they are all alive it is best to produce them"); 1803, *Hopkins v. Albertson*, 1 Brev. 240, 2 Bay 484 (one suffices); 1818, *Howell v. House*, 2 Mill Const. 80, 82 (one suffices); *S. D.*: Stats. 1899, § 6899 (uncontested will; Court may admit to probate on testimony of one only); § 6903 (contested will; all must be "produced and examined"); *Tenn.*: St. 1789, c. 23, § 1, Code 1896, § 3904 ("Written wills with witnesses thereto, when not contested, shall be proved by at least one of the subscribing witnesses, if living; and every last will and testament, written or nuncupative, when contested, shall be proved by all the living witnesses, if to be found, and by such other persons as may be produced to support it"); 1812, *Allen v. Alien*, 2 Overt. 172 (under St. 1784 and 1789, the production of one witness suffices, where the

ever, even where the entire number of those required to attest must be called, no more need be called, even though still others have in fact attested.⁷

From the above requirements of the present rule, the following doctrines must be distinguished: (1) By the substantive law prescribing the *elements of a valid execution*, it may be necessary to prove signing, delivery, presence of the maker, and the like. Now, if the present rule in a given jurisdiction requires but one attester to be called, and if he is unable to testify to all these elements, the present rule is satisfied, but the elements of the execution are not yet made out; so that the proponent may have to call others to prove the remaining facts of his case.⁸ This, however, is not because of the present rule, but because otherwise the requirements of his particular case under the substantive law are not fulfilled. It is to this that the common expression refers, in the rulings above cited, that "one witness suffices, provided he can prove the requisites of a valid execution."

(2) Where a *statute* requires that execution be "*proved*" by a certain number of witnesses, that number must be called, and each must presumably testify to all the elements of a valid execution. But that is merely a rule of Quantity (*post*, § 2048), and has nothing to do with the Preferential rule. The requirement may be, for example, that two witnesses prove execution; but these two may be any competent persons, whether or not they are the ones who have attested the document, and whether or not the document is attested at all. Statutes of this sort obtain in a few jurisdictions for proof of written wills, and in many jurisdictions for nuncupative wills.⁹

§ 1305. **Sax.:** Rule Satisfied when One Competent Witness testifies by Deposition or Affidavit. Supposing the rule in a given jurisdiction to require only one witness to be called to furnish testimony, what amounts to such furnishing of testimony? Is it necessary that he should actually take the stand at the trial? It is of course essential that he should be competent to testify.¹ But, assuming him competent, may he not testify by deposition,

other claims a privilege as interested, the will being contested); 1838, *Crockett v. Crockett*, Meigs 95 (by St. 1789, all the witnesses are required; *semble*, not so before); 1850, *Jones v. Arterburn*, 11 Humpl. 97, 103 (will of personality; all must be produced); *Tex.*: Rev. Civ. Stats. 1895, § 1900 ("one of the subscribing witnesses" suffices); *Utah*: Rev. St. 1898, § 3792 (like Cal. C. C. P. §§ 1308, 1315); *Vt.*: Rev. St. 1839, Stats. 1894, § 2362 (for wills uncontested, one suffices); 1855, *Dean v. Dean*, 27 Vt. 746, 749 (if contested, all should be called); 1866, *Thornton v. Thornton*, 39 id. 122, 151 (all must be called; the Chancery rule followed); *Fa.*: 1846, *Pollock v. Glassell*, 2 Grant. 439, 461 (one at law, two in chancery or probate); 1877, *Lamberts v. Cooper*, 29 id. 61, 67, *semble* (all required); *Wis.*: Stats. 1898, § 3788 (for uncontested probate, "one of the subscribing witnesses only" suffices); 1897, *Jones' Will*, 96 Wis. 427, 70 N. W. 685 (holding (1) that the statute applies only to uncontested wills, (2) that by the common law one witness

only is required if the other is unavailable, *i. e.* in effect, both must be called or accounted for); *Wyo.*: St. 1891, c. 70, chap. 111, § 3 (quoted *post*, § 1310).

⁷ 1898, *Lamb v. Lippincott*, 115 Mich. 611, 73 N. W. 887, *semble* (not more than the law requires need be called); 1857, *Shirley v. Fearn*, 33 Miss. 653, 664 (deed; one only being required to attest, one only need prove); 1903, *Lotts v. Wash*, 175 Mo. 487, 76 S. W. 95. *Not decided*: 1903, *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788 (whether all must be called, not decided; here the trial Court's ruling that the fifth must be called, being in court, was held not improper). Compare § 1309, *post*.

⁸ See, for an illustration, *Burrowes v. Lock*, 10 Ves. Jr. 470, 474.

⁹ That they do not require the production of attesting witnesses, see the citations *ante*, § 1290. The general subject of these statutes is examined *post*, §§ 2048-2051.

¹ 1897, *Honaton v. State*, 114 Ala. 15, 21 So. 813 (where the one called had subscribed by

if the circumstances are such that a deposition would otherwise be admissible; *i. e.* supposing the requirements of the Hearsay rule satisfied, which allow the use of a deposition or of testimony at a former trial on certain conditions (*post*, §§ 1373-1384, §§ 1401-1414), is such a mode of testifying sufficient to satisfy the present rule that the testimony of one attesting witness must be offered? There should be no doubt that it is sufficient; the only objection can come through the Hearsay rule, and this is by hypothesis satisfied:

1834, *Tindal, C. J.*, in *Wright v. Tatham*, 1 A. & E. 3, 22 (not requiring a surviving witness to be called, where the testimony at a former trial of another deceased subscribing witness was offered); "[If the offer had been merely to prove the handwriting of B., the deceased subscribing witness, the survivor P. would have been preferable.] Such testimony might fairly be considered as evidence of a higher and better nature than mere presumption arising from the proof of the witness' handwriting. . . . The effect, however, of B.'s examination is not merely to raise a presumption; it is evidence as direct to the point in issue, and as precise in its nature and quality, as that of P. when called in person."

Wherever, then, by the general principles of the Hearsay rule, a deposition or former testimony would be receivable, its use will satisfy the present rule requiring an attesting witness to furnish testimony.² In some jurisdictions, a statute expressly provides for the use of attesting witnesses' prior testimony or depositions in testamentary cases (*post*, §§ 1411, 1413, 1416).³ The practical bearing of this principle is that otherwise the providing of testimony by deposition or former testimony would be insufficient, and some other attesting witness would have to be called or accounted for.

An *affidavit* is ordinarily not receivable, under the Hearsay rule; but statutes occasionally provide for their employment by attesting witnesses in testamentary cases (*post*, § 1710); in such instances, they would presumably satisfy the present rule.

§ 1306. **Same: When all Witnesses unavailable in Person, One Attestation only need be Authenticated.** Under the principles of § 1320 and § 1505, *post*, when none of the attesters are available in person, the execution *may* be evidenced by authenticating the signature — *i. e.* the extrajudicial statement — of the attester; and in many jurisdictions (as noted in § 1320, *post*) the execution *must* be so evidenced. In that mode of proof, then, the same doctrine of numbers ought to apply, as regards the number of attestations to be authenticated, *i. e.* if in the particular jurisdiction the orthodox common-law rule obtains (under § 1304) that one attester's testimony sulices,

mark only, and could neither read nor write). The same result is implied in those rulings (*post*, § 1316) which allow proof of the witness' signature where he has become incompetent since attestation. A *blind witness'* testimony would apparently suffice (*post*, § 1316).

Distinguish the question of substantive law whether, under a statute requiring attestation of a will by "credible" witnesses, an attestation is *valid* if the attester subsequently becomes in-

competent; in those cases it is conceded that he would be incompetent to satisfy the rule by testifying at the trial.

² But a deposition testifying to the execution of a specific document must ordinarily be made with the *document before the deponent: ante*, § 1185.

³ Distinguish the question *post*, § 1312, whether the deposition of a witness out of the jurisdiction *must* be taken.

then proof of one attestation also suffices; or, if the rule (under § 1304) requires the testimony of all the attesters to be furnished, then the attestations of all must be authenticated. The reason is that the attestation is in effect the extrajudicial statement of the attester to the fact of due execution, admitted under the Hearsay exception (*post*, § 1505), and being admissible so far as concerns the Hearsay rule, it is governed, so far as concerns the present rule, by the general principle in regard to the number of attesters required to be called. In short, if one attester suffices on the stand, one attester suffices when allowed to speak extrajudicially in the attestation-clause.

Accordingly, for *attested documents in general*, the rule (though perhaps once otherwise¹) has long been generally settled to be that proof of a single attester's signature suffices,² just as the calling of a single attester to the stand suffices. For *wills*, however, the differences of practice obtaining in regard to the number to be called to the stand (*ante*, § 1304) are also noticeable here in regard to the number of attesting signatures to be proved, *i. e.* in some jurisdictions one suffices, in others all are required, with varying distinctions.³ It will be noted that there is no objection on principle to the former rule merely from the fact that the attestation of the others is also an element in the validity of execution (as of a will); for the express or implied statement of the attester is (*post*, § 1511) that all the requisites of execution took place, which includes an assertion that the other attestations were made as they purport to be.

The question does not frequently occur for decision, because now by statute, in the instance of most common occurrence — the proof of a will —, an express rule as to the number of signatures to be proved is usually laid down.⁴

¹ 1694, *Smart v. Williams*, Comb. 247 (the two witnesses being dead, "if there be full evidence to prove one of their hands, and any evidence that endeavors have been used to find one to prove the other's hand, it is sufficient").

² In the following list, this is the doctrine maintained, except where otherwise noted: 1744, *Onychund v. Barker*, 1 Atk. 21, 49, *Hardwicke L. C.*; 1798, *Adam v. Kerr*, 1 B. & P. 360; 1848, *Doe v. Twigg*, 5 U. C. Q. B. 167, 170; 1843, *Thomas v. Wallace*, 5 Ala. 268, 275; 1897, *Smith v. Keyser*, 115 id. 455, 22 So. 149; 1863, *Webb v. Wilcher*, 33 Ga. 565, 568, *semble*; 1829, *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429, 434; 1852, *Burnett v. Thompson*, 13 Irel. 379, 381; 1798, *Hopkins v. De Graffeurid*, 2 Bay 187, 191; 1803, *Turner v. Moore*, 1 Brev. 236; 1804, *Munigault v. Hampton*, 1 Brev. 394, *semble* (though lapse of time here excused the proof of one of the hands); 1823, *Young v. Stockdale*, 2 McC. 531 (handwriting of both witnesses required, but that of one was here dispensed with as not attainable); 1827, *Sims v. De Graffenreid*, 4 id. 253 (signature of both witnesses required); 1882, *Stehlin v. Duncan*, 108 U. S. 32, 2 Sup. 313.

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³ 1814, *Jackson v. Burton*, 11 John. 64 ("There is no fixed rule requiring proof of the hand of all the witnesses"; here one was sufficient); 1822, *Jackson v. LeGrange*, 19 ill. 386, 389 (if there is no witness who can prove all the requisites of execution, *semble*, the hands of all or of the rest must be proved); 1825, *Jackson v. Luquere*, 5 Cow. 221, 225 (same, because "the testator may have acknowledged his signing to the witnesses separately"); 1828, *Jackson v. Vickory*, 1 Wend. 406, 412 (approving the preceding); 1837, *Bethel v. Moore*, 2 Dev. & B. 311, 315, *semble* (all required); 1803, *Hopkins v. Albertson*, 2 Bay 484, 1 Brev. 240 (all required, since one may be forged, "in which case it would only be witnessed by two witnesses, which is not an execution" according to law; *Rev. J., diss.*); 1817, *Pearson v. Wightman*, 1 Mil Coust. 336, 344 *semble* (all required); 1821, *Sampson v. White*, 1 McC. 74 *semble* (one suffices); 1850, *Jonea v. Arterburn*, 11 Humph. 97, 103 (will of personalty; handwriting of all, if feasible, must be proved).

⁴ These statutes, however, deal also with several matters involving proof by signature, and accordingly have been for convenience collected

(g) "Or show his Testimony to be Unavailable."

§ 1308. **General Principle of Unavailability.** The notion of a rule of preference among witnesses (*ante*, § 1286) is that the preferred witness must be used *if he can be had*. Accordingly the rule's force is spent if it appears that his testimony is not available. Conversely, the attester, if he is not produced, must be shown unavailable.

This general notion of unavailability has seldom been broadly defined in judicial opinion. The law upon the subject has usually been enunciated by rulings specifying particular situations as exempting from production: but the following passage is comprehensive:

1842, *Woods, J.*, in *Dunbar v. Madden*, 13 N. H. 311, 314: "It is believed to be the well-established general rule of law on this subject, that proof of the handwriting of the witness may be given in all cases when from physical or legal causes it is not in the power of the party to produce the witness at the trial."¹

§ 1309. **All the Attesters must be shown Unavailable.** The rule prefers an attester as a witness; the rule's force is therefore not spent until it appears that no attester can be had; in other words, if there is more than one attester, *all must be shown unavailable* before resort can be had to other testimony. This is ancient and settled doctrine;¹ though it must be noted that, where the law requires a certain number to attest, no more than that number need be accounted for (on the analogy of § 1304, *ante*), even though more than the required number have attested.²

In a single place (*post*, § 1320), to which reference may be made.

Whether *also the maker's signature* must be proved, is a different question, dealt with *post*, §§ 1320, 1513.

¹ It would perhaps be more accurate to add that it must be beyond the party's power to produce the witness "for purposes of examination," for this more clearly includes the case of a witness rendered incompetent by interest.

Other broad phrasings are as follows: 1779, *Abbot v. Plumb*, 1 Doug. 216 (Mansfield, L. C. J.: "unless it appears that his attendance could not be procured"; Buller, J.: "unless some reason can be shown for his absence"); 1813, *Logan, J.*, in *Hart v. Coram*, 3 Bibb 26 ("in a situation which renders his examination impracticable"); 1806, *Taylor, J.*, in *Baker v. Blount*, 2 Hayw. 404 ("divers exceptions, founded on necessity"); 1831, *Clarke v. Courtney*, 5 Pet. 319, 344 (Story, J.: "dead, or cannot be found, or is without the jurisdiction, or otherwise incapable of being produced"); 1814, *Hill v. Nall*, 2 Overt. 241 (absence "must be accounted for in some satisfactory manner").

² 1744, *Omyclund v. Barker*, 1 Atk. 21, 49 *Hawlicke, L. C.*; 1764, *Forbes v. Wale*, 1 W. Bl. 532 (one dead, but the other living); 1790, *Wallis v. Delancey*, 7 T. R. 266, note (proof that the other witness was in foreign parts, required before going to handwriting); 1848, *Doe v. Twigg*, 5 U. C. Q. B. 167, 170; 1898,

Howard v. Russell, 104 Ga. 230, 30 S. E. 802; 1827, *Booker v. Bowles*, 1 Blackf. 90; 1829, *Chambers v. Handley*, 3 J. J. Marsh. 98; 1845, *Woodman v. Segar*, 12 Shepl. 90, 92; 1828, *Jackson v. Gager*, 5 Cow. 383, 385; 1830, *Jackson v. Christman*, 4 Wend. 278, 283; 1785, *Davison v. Bloomer*, 1 Dall. 123; 1835, *Congregation v. Miles*, 4 Watts, 146, 149. The statutes quoted *post*, § 1310, usually mention this part of the rule.

³ 1887, *Snider v. Burks*, 84 Ala. 53, 57, 4 So. 225 (will; where two of the three were dead, and proof of their handwriting was allowed). The interesting question here is this: Supposing only one attester to be required to be called as a witness (*ante*, § 1304), and supposing him to have no recollection when called, may his signature then be proved as sufficient? This question really is: Has the rule been satisfied as to one witness? If so, the rule's force is spent. Now it would seem that at least the witness should, if called, also testify; *i. e.* it is immaterial (*ante*, § 1302) how he testifies, so far as the rule's application to himself is concerned; but so far as going on to other evidence is concerned, the other attestors must be first tried if the first attester is unavailable; and the present notion of unavailability of all as a condition precedent must be thought to include not merely an excused non-production, but also a production which through failure of recollection has resulted in no testimony at all. Accordingly, if the first

§ 1310. **Statutory Enumerations of Causes of Unavailability.** Before considering the common-law doctrines as to sufficient causes of unavailability, it may be noted that statutes¹ have frequently dealt expressly with the same

one, though having no present recollection, adopts his attestation as a record of past recollection, he has in effect testified (*ante*, §§ 745, 754); but if he does not, he is a nullity as a witness, and the remaining attesters must be tried before other evidence can be used. Compare here the principles of §§ 1302, 1303, *ante*, and 1315, *post*.

¹ The statutes deal with the causes noted in the ensuing sections, but to avoid repetition are placed together here. The judicial rulings noted in the later sections, §§ 1311-1318, include those made in application of these statutes to specific causes of non-availability; but rulings merely construing the statute generally are placed here with the statute; for statutes providing that the deposition of a witness out of the State, etc., may be used, see *post*, § 1411, under Depositions: CANADA: *N. Br. St.* 1898, c. 35, § 39, replacing *Consol. St.* 1877, c. 52, §§ 33, 34 ("when all the witnesses to any will are dead, or some are dead and the others reside out of the province, or the whole do so reside," proof "by *visu voce* testimony of the handwriting of the witnesses and the testator" suffices; but on proof in solemn form and whenever the judge may deem necessary, a commission may be ordered to take the testimony of "the witnesses to the will" and others; but for witnesses in the county, the judge shall himself attend to take their evidence, if "such witness is by reason of age, illness, or other cause unable to travel"); *N. Sc. Rev. St.* 1900, c. 158, § 18 ("when the witnesses live out of the province, or more than thirty miles distant from the registry, or by reason of age or illness are unable to appear and give evidence in court," their depositions are receivable); *P. E. I. St.* 1873, c. 21, § 24 ("If the only living witness to any will be out of the jurisdiction, proof of the fact of the death of the other witness, and of the handwriting of either of such witnesses, together with that of the testator, unless he be a markeman, in which case proof of his signature may be dispensed with, shall be sufficient evidence," unless proof in solemn form is required, "in which case a commission may issue and evidence may be taken under the same in such manner as the surrogate may direct"); UNITED STATES: *Alabama*: Code 1897, § 4276 ("a will] must be proved by one or more of the subscribing witnesses, or if they be dead, insane, or out of the State, or have become incompetent since the attestation," then by handwriting); § 4277 ("If none of the subscribing witnesses to such will are produced, their insanity, death, subsequent incompetency, or absence from the State, must be satisfactorily shown before proof of the handwriting of the testator or of any of the subscribing witnesses can be received"); 1895, *Barnswell v. Murrell*, 108 Ala. 366, 378, 18 So. 831 ("if any one or more" is unavailable, the secondary grade may

be resorted to; misconstruing the statute and misunderstanding *Snider v. Burks*, cited *supra*, § 1309); *Arizona*: *Rev. St.* 1887, § 983 (in contested wills, all must be produced "who are present in the county and who are of sound mind"; if none reside in the county, other testimony may be admitted); *Arkansas*: *Stats.* 1894, §§ 7415, 7416 (quoted *post*, § 1320); *California*: *C. C. P.* 1872, § 1308 (in uncontested wills, "the testimony of one of the subscribing witnesses" suffices); § 1315 (in contested wills, "all the subscribing witnesses who are present in the county and who are of sound mind must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the Court; if none of the subscribing witnesses reside in the county at the time appointed for proving the will, the Court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of such execution," it may admit evidence of handwriting); *Commissioners' amendment of 1901*, § 1307 (replacing the former § 1308; in uncontested probates, the testimony of one subscribing witness suffices; if at the hearing "none of the subscribing witnesses resides in the county, but the deposition of one of them can be taken elsewhere, the Court must direct it to be taken, and may authorize a photographic copy of the will to be made and presented to such witness on his examination, who may be asked the same questions with respect to it and the handwriting of himself, the testator, and the other witness, as would be pertinent and competent if the original will were present. If neither the attendance in court nor the deposition of any of the subscribing witnesses can be procured, the Court may admit the testimony of any other witness as provided in § 1317"); § 1317 (replacing the former § 1315; in contested probates, the provisions of the former § 1315 are followed, down to "proving the will"; then the following is inserted: "or if any subscribing witness is incompetent, or is unable to recollect the facts as to the sanity of the testator or the execution of the will"; then at the end is inserted: "the Court may also authorize a deposition and a photograph as in *C. C. P.*, § 1307, *supra*"; for the validity of these amendments, see *ante*, § 488); *Colorado*: *Annot. State.* 1891, § 4676, ("in all cases where any one or more of the witnesses to any will shall die or remove to some distant country, unknown to the parties concerned, or cannot be found, so that his or her testimony cannot be procured," other evidence is allowable); *Columbia (District)*: *Code* 1901, § 131 ("all the witnesses" to a will "who are within the District and competent to testify must be produced and examined, or the absence of any of them satisfactorily accounted for"); § 132 (in wills of realty, for the testimony of a resident witness "unable from sickness, age, or

subject, especially for will-witnesses. These statutes are often obscurely phrased, and seldom enumerate more than two or three causes for excuse.

other cause, to attend court, the register of wills may with such will attend upon said witness and take his testimony. If the testimony of resident attesting witnesses or witness to such will shall have been taken, and any other such witness to said will shall reside out of the District, but within the United States, it shall be sufficient to prove the signature of such witness so out of the District. If the sole witnesses to such will shall be out of said District as aforesaid, or if one or more should be within the United States and one or more be in some foreign country, then it shall be sufficient to take the testimony of any one or all within the United States as the Court may determine, and to prove the signatures of those whose testimony is not required to be taken. If all such witnesses shall be out of the United States, then it shall be sufficient to take the testimony of such of them as the Court may require, and to prove the signature or signatures of the others"; the testimony of those out of the District to be taken by commission, with the will annexed); *Georgia*: Code 1895, §§ 5244, 5245 ("if from any cause the witness cannot be produced or sworn," he need not be; when witnesses are "dead, insane, incompetent, or inaccessible, or being produced, do not recollect the transaction," then other evidence is allowable); § 3282 (they must be produced if "in existence and within the jurisdiction of the Court"); *Idaho*: Rev. St. 1897, § 5311 (like Cal. C. C. P., § 1315); *Illinois*: Rev. St. 1874, c. 148, § 6 (where "any one or more of the witnesses of any will . . . shall die, be insane, or remove to parts unknown to the parties concerned, so that his or her testimony cannot be procured," handwriting and other evidence may be resorted to); *Indiana*: Rev. St. 1897, § 2805 (if "dead, out of the State, or have become incompetent from any cause," then proof by handwriting may be used); § 2906 (all the witnesses must be shown unavailable by death, etc., before proving signatures); *Kansas*: Gen. St. 1897, c. 110, § 13 (if "any witness" has "gone to parts unknown," or has become "incompetent" since execution, the will may be allowed "upon such proof as would be satisfactory, and in like manner as if such absent or incompetent witness were dead"); *Maryland*: Pub. Gen. L. 1888, Art. 93, §§ 334, 337 (examination, in wills of realty, is required "if their attendance can be had"; for wills executed out of the State and not required there to be recorded, the death of the witness exempts from using his deposition); St. 1890, c. 416, St. 1892, c. 81, amending § 334 ("all the witnesses thereto shall be examined if their attendance can be had"; the depositions may be taken "of any or all of the witnesses thereto who from any cause cannot conveniently attend to the office of said register of wills, wherever he may find such witness or witnesses, whether within the State of Maryland or beyond its jurisdiction"; and further the Orphans' Court "may in their discretion

accept proof of any will in the manner prescribed in § 337 of this article, when the attendance of the witnesses thereto cannot in the judgment of the said Court be conveniently had"); St. 1892, c. 504, amending § 337 ("If any witness or witnesses to any will shall die before probate thereof, or if at the time of the probate of any will any witness or witnesses shall be non-residents or beyond the jurisdiction of the Orphans' Court, or if for any other reason their presence cannot be secured, then proof by any credible witness of the signature of the testator or of the signature of any such deceased or absent witness shall have the same effect" as if the witness had testified in court to execution); *Michigan*: Comp. L. 1897, § 9280, How. § 5803 ("If none of the subscribing witnesses shall reside in this State," other testimony may be admitted or proof of handwriting); id. § 9266, How. § 5789 ("their subsequent incompetency, from whatever cause it may arise," shall not prevent probate of a will otherwise proved); 1897, *Sullivan v. Sullivan*, 114 Mich. 189, 72 N. W. 135 (How. § 5803 refers to living witnesses; in How. § 5789, "incompetency, from whatever cause it may arise," includes sickness, death, etc.); *Minnesota*: Gen. St. 1894, § 4437 ("If none of the subscribing witnesses reside in this State," the Court may admit other evidence); *Mississippi*: Annot. Code 1892, § 1816 (one at least must prove, "if alive and resident in the State, and competent to testify; but if none of the subscribing witnesses can be produced," then other evidence may be used); *Missouri*: Rev. St. 1899, § 4620 (when the attesting witnesses are "dead, insane, or their residences unknown," then other evidence may be used); *Montana*: C. C. P. 1895, § 2343 (like Cal. C. C. P. § 1315); *Nebraska*: Comp. St. 1899, § 2656 ("If none of the subscribing witnesses shall reside in this State" at the time, the Court may in discretion "admit the testimony of other witnesses"); § 2641 ("subsequent incompetency, from whatever cause it may arise," shall not prevent probate if other proof is made); § 5917 (if a subscribing witness is absent from the county, other evidence is allowable); *Nevada*: Gen. St. 1885, c. 19, § 18, sec. 2685 (in untested wills, "the testimony of one of the subscribing witnesses only" suffices); id. § 20, sec. 2687 (in contested wills, all who "are present in the county, and who are of sound mind," must be examined; "and the death, absence, or insanity of any of them shall be satisfactorily shown to the Court"); id. § 21, sec. 2688 ("If none of the subscribing witnesses reside in the county," other testimony is admissible); St. 1897, c. 106, §§ 17, 19 (reproduces §§ 18, 20, of Gen. St. 1885; but § 21, sec. 2688, therein is now omitted); St. 1903, c. 6 (amends § 17 of St. 1897, c. 106, by adding that whenever the witness "resides at a distance of more than 27 miles" from the place of trial, his affidavit to due execution and sanity shall suffice instead of calling him in person); *New Hampshire*: Pub.

Whatever were the intentions of the legislators, it would be unfortunate to be obliged to construe the statutory enumeration as exhaustive; and this the Courts are apparently not inclined to do.³ The statutes, therefore, leave

St. 1891, c. 187, § 12 (if attesting witnesses "become incompetent from any cause," proof may be made by "other satisfactory evidence"); *New Mexico*: Comp. L. 1897, § 1982 (witnesses shall be examined "if their attendance is obtainable"; "if not," evidence of signatures, etc., is admissible); *New York*: C. C. P. 1877, §§ 2618, 2619, 2620 (will-witness must be called, if "within the State and competent and able to testify"; death, lunacy, or other incompetency, or not being found after due diligence, exempt absolutely; but of one within the State and disabled by age, sickness, or infirmity from attending, the deposition must be taken, if he is able; and for one absent from the State, a commission must issue if by due diligence his evidence may be had; that the witness "has forgotten the occurrence" also is an excuse); §§ 2539, 2540 (if the witness is ill or in another county, the witness must be examined where he is, or before the surrogate of the other county); *North Carolina*: Code 1883, § 2148 (will-witness must be called "if living," but if "any one or more" are dead, or reside out of the State, or are insane, or otherwise incompetent to testify, then proof of handwriting suffices); *North Dakota*: Rev. C. 1895, § 6296, (witnesses "who are within the State and are competent and able to testify" must be produced); § 6297 ("Before the presence of a witness . . . can be dispensed with, it must be shown by affidavit or other competent evidence to the satisfaction of the Court that he is dead or disqualified, or that he cannot after due diligence be found within this State, or if within the State that he is so aged, sick, or infirm that his presence cannot safely be required"); *Ohio*: Rev. St. 1898, § 5927 (if "any witness is gone to parts unknown," or if "the witnesses to a will" have become incompetent, or if "the testimony of any witness cannot for any reason be obtained within a reasonable time," then the Court may give probate "upon such proof as would be satisfactory, and in like manner as if such absent or incompetent witness were dead"); *Oklahoma*: Stats. 1893, § 1193 (all of the witnesses "who are present in the county, and are of sound mind," must be produced: "and the death, absence, or insanity of any of them must be satisfactorily shown to the Court. If none of the subscribing witnesses reside in the county, and are not present at the time appointed for proving the will," other testimony may be admitted); *Oregon*: C. C. P. 1892, § 761 (attesting witness must be called "if he be living and within the State and can testify"); *Rhode Island*: Gen. L. 1896, c. 210 § 15 (non-contested will may be proved on the evidence of executors, if neither attesting witness is a resident of State); *South Carolina*: Gen. St. 1882, c. 61, §§ 1870, 1871, Code 1902, §§ 2491, 2492 (on probate of a will in common form, "death or removal from the

State" suffices; in solemn form, it suffices if he is "dead or insane"); *South Dakota*: Stats. 1899, § 6903 (witnesses "who are present in the county, and are of sound mind must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the Court. If none of the witnesses reside in the county, and are not present at the time appointed," then other testimony is admissible); *Tennessee*: Code 1896, § 3904 (wills; if not contested, proof suffices by one witness "if living"; if contested, by "all the living witnesses if to be found"); *Texas*: Rev. Civ. Stats. 1895, § 1900 ("If all the witnesses are non-residents of the county, or those resident of the county are unable to attend court," the deposition of one suffices; if none are living, then evidence of handwriting is admissible); *Utah*: Rev. St. 1898, § 3792 (like Cal. C. C. P. § 1315); *Vermont*: Stats. 1894, § 2363 (will-witness; if none reside in the State at the time of the testator's death, then other evidence is receivable); *Washington*: C. & Stats. 1897, § 6103 ("When one of the witnesses to such will shall be examined, and the other witnesses are dead, insane, or their residence unknown, then such proof shall be taken of the handwriting of the testator, and of the witnesses dead, insane, or residence unknown, and of such other circumstances as would be sufficient to prove the will"); § 6104 ("If it shall appear, to the satisfaction of the Court, that all the subscribing witnesses are dead, insane, or their residence unknown, the Court shall take and receive such proof of the handwriting of the testator and subscribing witnesses, to the will, and of such other facts and circumstances as would be sufficient to prove the will"); *Wisconsin*: Stats. 1898, § 3788 ("If none of the subscribing witnesses shall reside in this State . . . or if any one or more of them shall have gone to parts unknown and the Court shall be satisfied that such witness, after due diligence used, cannot be found," then other testimony is admissible); *Wyoming*: St. 1891, c. 70, chap. III, § 3 (for contested wills, "all the subscribing witnesses who are present in the county and who are of sound mind must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the Court; if none of the subscribing witnesses reside in the county," at the time of probate, others may be admitted; and "as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses or any of them").

³ 1849, *Holmes v. Holloman*, 12 Mo. 536 (heirs claimed privilege as parties; production excused; the statutory exemptions for death, etc., held not to be taken as "expressio unius exclusio alterius, but are merely a codification of what was already the common law, and a recognition of the principle upon which second-

the broad principle of the common law untouched, and merely confirm or correct its precedents.

§ 1311. **Causes of Unavailability; (1) Death; (2) Ancient Document.** (1) If there is to be any excuse at all for not producing the attester, it is clear that *death* supplies it; and this is universally accepted, although the earlier reports show traces of a rigor not recognizing even this exemption.¹

(2) Where a document purports to be so old that attesters cannot be supposed to be yet alive, the same ground for exemption exists. An "*ancient*" document, in this sense, has long been defined by a fixed rule, *i. e.* a document purporting to be thirty years old. This rule applies not only to *documents in general*,² but also to *wills*.³ Not only is the production of the attester excused, even though he is alive and available,⁴ but the execution is upon certain other evidence assumed to have been valid; in this aspect, the rule for ancient documents, with the history of its peculiar limitation to thirty years, is elsewhere examined (*post*, §§ 2137-2146).

§ 1312. **Same: (3) Absence from Jurisdiction.** A person not within the jurisdiction is not compellable by the Court's process to appear, and therefore is in effect unavailable as a witness:

1842, *Woods, J.*, in *Dunbar v. Madden*, 13 N. H. 311, 318: "The reason is that the process of the Court cannot reach the witness effectively in a foreign government or

any evidence may be admitted"); 1850, *Jones v. Arterburn*, 11 Humph. 97, 98.

¹ 1673, *Phillips v. Crawly*, Freeman 83 (death sufficient); 1740, *Henley v. Phillips*, 2 Atk. 48 (same); 1748, *Grayson v. Atkinson*, 2 Ves. Sr. 454, 460 (*Harlowicke, L. C.*: "If the witness was dead, it might possibly be sufficient; that is the act of God"); 1796, *Barnes v. Troinpowsky*, 7 T. R. 265 (death sufficient); 1874, *Harris v. Tisereau*, 52 Ga. 153, 163 (Code § 2431 does not prohibit probate of will on the death of witnesses, except by Probate Court); 1890, *Maxwell v. Hill*, 89 Tenn. 584, 15 S. W. 253 (death suffices).

² *England*: 1788, *R. v. Farringdon*, 2 T. R. 466 (certificate of pauper settlement required to be attested); 1795, *Chelsea Water Works v. Cowper*, 1 Esp. 275 (bond); 1798, *Marsh v. Collnett*, 2 id. 665 (*Yates, J., ex rel. Kenyon, L. C. J.*, ruled "that he would not break in upon a rule so well established as that deeds of 30 years' standing proved themselves, by requiring the subscribing witness to be called"); 1828, *Doe v. Wolley*, 8 B. & C. 22, 24 ("the principle . . . is that the witnesses may be presumed to have died"; he need not be called, even if in fact he is living); 1845, *Lord Gosford v. Robb*, 8 Ir. L. R. 217, 219, *semble* (per *Pennefather, C. J.*); 1848, *Doe v. Turnbull*, 5 U. C. Q. B. 129, 131 (even if the witness is in fact alive); 1864, *Orser v. Vernon*, 14 U. C. C. P. 573, 587, *semble*; *United States*: 1888, *Allison v. Little*, 85 Ala. 512, 516, 5 So. 221; Ga. Code 1895, § 5244; 1850, *Settle v. Allison*, 8 Ga. 201, 205 (even if the witness are alive); 1876, *Gardner v. Gran-niss*, 57 id. 539, 555 (same); 1858, *Smith v. Bankin*, 20 Ill. 14, 23 (but not if the witness is living); 1900, *Cunningham v. Davis*, 175 Mass.

213, 56 N. E. 2 (even if the witness is alive and in court); 1874, *Shaw v. Pershing*, 57 Mo. 416, 421 (even though the witnesses were alive); 1898, *Jackson v. Blushan*, 3 John. 292, 295, 298, *semble* (even where the witness is alive); 1826, *Jackson v. Thompson*, 6 Cow. 178, 180; 1830, *Jackson v. Christman*, 4 Wend. 278, 282 (even where the witness is alive and available); 1810, *Northrop v. Wright*, 24 id. 221, 228 (same); 1847, *Willson v. Betts*, 4 Den. 201, 212; 1793, *Jones v. Brinkley*, 1 Hayw. 20; 1811, *Garwood v. Dennis*, 4 Binn. 314, 326; 1823, *McGennis v. Allison*, 10 S. & R. 197, 199 ("perhaps . . . even if they were in full life"); 1840, *Edmonston v. Hughes*, Cheves 81, 84, *semble*; 1830, *Hinde v. Vattier*, 1 McLean 110, 116; 1835, *Winn v. Patterson*, 9 Pet. 663, 674 (applicable to all deeds of thirty years' standing, no matter how proved).

³ 1803, *M'Kenire v. Fraser*, 9 Ves. Jr. 5, *semble*; 1817, *Rancliffe v. Parkyns*, 6 Dow 149, 202, *semble*; 1826, *Doe v. Pasalngham*, 2 C. & P. 440; 1826, *Doe v. Drakin*, 3 id. 462 (*Vaughan, B.*: "The rule of 30 years is founded on the presumption that the witnesses are dead"); 1828, *Doe v. Wolley*, 8 B. & C. 22; 1835, *Doe v. Burlett*, 4 A. & E. 1, 19 ("even were they all alive"); 1820, *Duncan v. Baird*, 2 N. & McC. 400, 408 (in the form of a presumption of death).

⁴ See the citations in the preceding notes. Distinguish the following ruling: 1815, *Mauby v. Curtis*, 1 Price 225 (a receipt of 53 years before, offered as a hearsay statement against interest, excluded on hearsay grounds, because the writer was not shown deceased; the authentication question apparently not decided).

country, and consequently it is not within the power of the party, legally speaking, to produce him."

This general doctrine, though not positively established till the end of the 1700s,¹ is now universally accepted;² although there is considerable difference

¹ 1673, Phillips v. Crawly, Freeman 83 (attested deed; "because they did not prove the witnesses dead, nor that they were gone to sea — though they alleged it —, it was not permitted at first to be given in evidence"); 1740, Henley v. Phillips, 2 Atk. 48 (requiring stricter proof of death for witnesses living long abroad, i. e. apparently because if really alive their presence abroad would not satisfy the rule); 1779, Coghlan v. Williamson, 1 Doug. 93 (sufficient, where the witness was shown to have gone to India five years before); 1786, St. 26 Geo. III, c. 57 (where the attesting witness resides in the East Indies, proof of the handwriting of witness and party suffices); 1792, Holmes v. Pontin, Peake 99 (the witness was in France, and would not come over; Kenyon, L. C. J., referring to the preceding case: "It was considered as an innovation at the time; but was found to be so beneficial that it has since been adhered to"); 1793, Cooper v. Marsden, 1 Esp. 1 ("where it appeared that he was abroad," sufficient); 1796, Barnes v. Trompowsky, 7 T. R. 265 ("If residing abroad, by sending out a commission to examine him, or at least, by proving his handwriting, which last indeed is a relaxation of the old rule, and admitted only of late years"); 1798, Adair v. Kerr, 1 B. & P. 360 (out of the jurisdiction, sufficient).

² England: 1802, Prince v. Blackburn, 2 East 250 (here the general doctrine was for the first time definitely established; moreover, mere absence, not necessarily domicile or permanent absence, suffices); 1809, Ward v. Wells, 1 Taunt. 461 (mere absence suffices); 1815, Hodnett v. Forman, 1 Stark. 90 (mere absence, without a request by the party to the witness to attend, sufficient); 1828, Kay v. Brookman, 3 C. & P. 555 (proof of disappearance, with intention of leaving the country, sufficient); 1840, Glubb v. Edwards, 2 Moo. & Rob. 300, Maule, J. (here the point was raised because the Common Law Courts had recently been given power to issue a foreign commission); United States: here the statutes ante, § 1310, are to be compared; the fact of absence was sufficient in the following cases, except as otherwise noted: Ala.: 1851, Foote v. Cobb, 18 Ala. 585, 587 ("residing"); 1881, Allred v. Elliott, 71 id. 224, 226 (residence in another county, insufficient; "absent from the State when last heard from," sufficient); 1884, Guice v. Thornton, 76 id. 466, 473 ("absent from the State"); 1890, Caldwell v. Pullak, 91 id. 353, 359, 8 So. 546 ("residing"); 1897, Smith v. Keyser, 115 id. 455, 22 So. 149; Ark.: 1838, Brown v. Hicks, 1 Ark. 233, 242 (absence from home, to return in a few months, insufficient); 1839, Wilson v. Royston, 2 id. 315, 327 (deed executed in another State; further evidence of witnesses' absence from jurisdiction required); 1860, Tatum v. Mohr, 21 id. 349, 352 ("being out of the jurisdiction"); but

in fact he resided without); Cal.: 1859, Stevens v. Irwin, 12 Cal. 306 (out of the county, not sufficient); Haw.: 1856, Bullions v. Loring, 1 Haw. 209, 213 (residence out of the kingdom, held here sufficient); Ill.: 1844, Wiley v. Bean, 6 Ill. 302, 305 (absence from the State, sufficient); 1848, Mariner v. Saunders, 10 id. 113, 121 (residence in another State, sufficient); Ind.: 1819, Jones v. Cooperider, 1 Blackf. 46 (residence in another State, sufficient); 1828, Ungles v. Graves, 2 id. 191 (same); 1845, State v. Bodly, 7 id. 355, 357 (same); 1881, Herbert v. Berrier, 81 Ind. 1, 7 (will-statute applied); Ia.: 1870, Ballinger v. Davis, 29 Ia. 512 (absence from the jurisdiction in unknown place, sufficient); Ky.: 1812, M'Dowell v. Hall, 2 Bibb 610, 612; 1813, Hart v. Coram, 3 id. 26 ("in a situation which renders his examination impracticable, as being absent in a foreign country or beyond the reach of the process of the Court or the Court's control"; here not shown on the facts); 1815, Clarke v. Bartlett, 4 id. 201, 203 (residence in another State, sufficient); 1816, Sentney v. Overton, ib. 445 (removal to an adjoining State, sufficient); 1817, M'Cord v. Johnson, ib. 531 (in an adjoining State on a transient visit, insufficient, though perhaps not "actual domicile" abroad would be necessary, and "long absence" might suffice); 1817, Creighton v. Johnson, Litt. Sel. C. 240 (transient absence in the adjoining State, insufficient); 1820, Bowman v. Bartlett, 3 A. K. Marsh. 86, 91 ("the absence from a State, or rather his residing abroad," suffices); 1822, Turner v. Turner, 1 Litt. 101, 104 ("out of the State"; sufficient in case of a will, provided one witness has proved the will); 1829, Kemper v. Pryor, 1 J. J. Marsh. 593 (removal from the State, and diligent inquiry, sufficient); La.: 1819, Lynch v. Postlethwaite, 7 Mart. 69, 209 (absence from jurisdiction); 1823, Cronse v. Duffield, 12 id. 539, 542 (same); 1825, Villere v. Armstrong, 4 id. n. s. 21 ("left the State"); Me.: 1840, Emery v. Twombly, 5 Shepl. 65 (absence suffices; even though they lived within 30 miles of the place of trial); Mass.: 1809, Dndley v. Sumner, 5 Mass. 439, 444, 462, semble (absence from jurisdiction); 1814, Homer v. Wallis, 11 id. 309, 311 (same); 1851, Gelott v. Goodspeed, 8 Cush. 411 (same); 1860, Ela v. Edwards, 16 Gray 91, 95 (same); Miss.: 1838, Downs v. Downs, 2 How. 915, 924 (gone from the jurisdiction, sufficient); Mo.: 1826, Little v. Clanvin, 1 Mo. 628, 631 (residence out of the State, sufficient); 1838, Manpin v. Triplett, 5 id. 422 (in another county, not sufficient); 1843, Lawless v. Guelbreth, 8 id. 139 (residence just over the State line, sufficient); 1857, Clardy v. Richardson, 24 id. 295, 296 (residence out of the State, sufficient); Nebr.: 1894, Jewell v. Chamberlain, 41 Nebr. 254, 59 N. W. 784 (absence from the State suffices under Code § 343); N. H.: 1835, Montgomery v. Dorion, 7 N. H.

of phrasing, even within the same Court's rulings, as to the sufficiency of mere temporary absence, and not permanent residence, without the jurisdiction.

It is immaterial that the proponent knew of the witness' intended absence and might have taken his deposition;³ though a collusive procurement of the witness' absence would of course annul the excuse for non-production.⁴ But at least must not the proponent have sought to obtain (by commission or otherwise) his *deposition* while in absence? Can it be said that the witness' testimony is unavailable, so long as it does not appear that his deposition could not with due diligence have been procured? The answer to this was at first given in the negative,—that is to say, in the period when the present excuse was with hesitation beginning to be accepted, this proviso as to taking the deposition was insisted on.⁵ But the extreme inconvenience of sending abroad for the deposition was soon recognized as disproportionate to the benefit obtained; and in most jurisdictions to-day⁶ no such

475, 483 (absence from jurisdiction); 1842, *Dunbar v. Madden*, 13 Id. 311, 313 (same); *N. C.*: 1806, *Baker v. Blount*, 2 Hayw. 404 (the witness had fraudulently evaded process by removing from the county; held sufficient); 1826, *Selby v. Clark*, 4 Hawks 265, 273 (temporary absence without change of domicile, held usually not sufficient, because of the danger of collusion; but absence as a member of Congress, sufficient; permanent absence is always sufficient); 1814, *Allen v. Martin*, 1 Law Repos. 373 ("living beyond the process of the Court," held sufficient); 1832, *Crowell v. Kirk*, 3 Dev. 855, 356, per Daniel, J. (that he "is abroad," is sufficient); 1837, *Bethel v. Moore*, 2 Dev. & B. 311 (living in another State, sufficient); 1848, *Edwards v. Sullivan*, 8 Irel. 302, 305 (same); *Oh.*: 1824, *Clark v. Boyd*, 2 Oh. 280 (57) (absence from jurisdiction); 1853, *Richards v. Skiff*, 8 Oh. St. 586 (same); *Pa.*: 1807, *Engles v. Burlington*, 4 Yeates 345 (will; absence from jurisdiction); 1810, *Clark v. Sanderson*, 3 Binn. 192, 195 (bond; "it is always to be understood that there must be no fraud or collusion in getting the witness out of the way"); 1816, *Hantz v. Rough*, 1 S. & R. 349 (residence without the county, not sufficient); *S. C.*: 1902, *Swanney v. Parrish*, 62 S. C. 240, 40 S. E. 554 (out of the jurisdiction, sufficient); *Tenn.*: 1850, *Jones v. Arterburn*, 11 Humph. 97, 99 (the statutory phrase, for contested wills, "if to be found," includes absence from the State, as exempting from production; but if his deposition has in fact been obtained, it must be read); 1855, *Harrel v. Ward*, 2 Sneed 610, 613 (absence "for a temporary purpose, where the return of the witness within a limited time is reasonably certain," insufficient; though not "as an inflexible rule," e. g. where the absence has been long, no collusion is suspected, and diligence has been used); *Tex.*: 1854, *Frazier v. Moore*, 11 Tex. 755 (absence from jurisdiction); *U. S.*: 1804, *Jones v. Lovell*, 1 Cr. C. C. 183 (removal from the jurisdiction, sufficient); 1805, *Wellford v. Eakin*, ib. 264 (residence without, sufficient); 1809, *Cooke v.*

Woodrow, 5 Cr. 13 (witness going out of district and last heard of in Norfolk; handwriting not allowed, without proof of inability to find at N.); *Vt.*: 1800, *Pearl v. Allen*, 1 Tyl. 4 (if residing within process of the Court, he must be produced); *Va.*: 1826, *Nalle v. Fenwick*, 4 Rand. 585, 589, *semble* (absence from the State, sufficient; but here it was alleged that "every legal means had been taken to procure their attendance"); 1827, *Smith v. Jones*, 6 Rand. 33, 37 ("removed from the State," sufficient); *Wis.*: 1845, *Garrison v. Owens*, 1 Pinney 544 (absence from jurisdiction); 1863, *Silverman v. Blake*, 17 Wis. 213, *semble* (same).

³ 1859, *Jackson v. F. R. W. Co.*, 14 Cal. 18, 22 (lack of diligence, in not obtaining his testimony before departure, immaterial).

⁴ See *Clark v. Sanderson*, *Harrel v. Ward*, and other cases in note 2, *supra*.

⁵ 1748, *Grayson v. Atkinson*, 2 Ves. Sr. 454, 460 (*Hardwicke, L. C.*: "It is not necessary to presume that it is out of your power to get him if you please; . . . you may have a commission to examine the witness beyond sea; for in this Court you are not under the difficulty as in a Court of law where it must be *in vivo*"); 1793, *Fitzherbert v. Fitzherbert*, 4 Bro. C. C. 231 (witness in America; commission required); 1796, *Barnes v. Trompowsky* (see quotation in note 1, *supra*).

⁶ Besides the following cases, compare the statutes *ante*, § 1310; *England*: 1751, *Webb v. St. Lawrence*, 3 Bro. P. C. 640, 645 (witness in Holland; deposition not required); 1752, *Banks v. Farquharson*, 1 Dick. 167 (same; witness in Scotland); 1790, *Wallis v. Delaney*, 7 T. R. 266, note (*Kenyon, L. C. J.*: "The expense of sending out a commission would in many cases be more than the value of the sum in dispute"); 1800, *Carrington v. Payne*, 5 Ves. Jr. 404, 411 (not required; here, a will); *United States*: *Ala. Code* 1897, § 4277 (the judge "may issue a commission"); 1850, *Settle v. Allison*, 8 Ga. 201, 205 (not required); 1819, *Jones v. Coop- rider*, 1 Blackf. 46 (not required); 1845, *State*

proviso is recognized, and it is not necessary to have endeavored to obtain the absent witness' deposition.⁷

The sufficiency of the *proof of absence* at the time of trial has been the subject of many rulings, which cannot profitably be treated as precedents;⁸ the matter should be left entirely to the discretion of the trial Court.⁹ For one detail, however, there seems to have arisen a uniform rule, namely, that the attester's residence abroad at the time of execution — or, in another form, the occurrence abroad of the acts of execution and attestation — is sufficient proof that the attester is out of the jurisdiction at the time of the trial.¹⁰

v. Bodly, 7 Id. 355, 357 (same, even though the opponent has had it taken; but if the proponent uses this deposition, it is not improper to reject proof by handwriting of the witness); 1870, Ballinger v. Davis, 29 Ia. 512 (not required); 1897, Allison's Estate, 104 Id. 130, 73 N. W. 439 (same); even though the deposition is in fact obtainable, and was taken upon other points, proof of handwriting suffices; the fact of non-residence allows the use of the inferior grade); 1816, Sentney v. Overton, 4 Bibb 445, 447 (not required); "though the Court has the power to award the commission, it has no power to coerce its execution"; 1820, Bowman v. Bartlett, 3 A. K. Marsh. 86, 91 (same); 1822, Turner v. Turner, 1 Litt. 101, 104 (same); 1842, Dunbar v. Madden, 13 N. H. 311, 316 (that the witness' whereabouts is known, immaterial); 1798, Irving v. Irving, 2 Hayw. 27 (not required); 1814, Allen v. Martin, 1 Law Repos. N. C. 373 (same); 1837, Bethell v. Moore, 2 Dev. & B. 311, 314 (same); 1810, Clark v. Sanderson, Binn. 192, 196 (same); 1792, Oliphant v. Taggart, 1 Bay 255 (handwriting of the witness usually sufficient; but here, the opponent producing an affidavit of the witness denying it, a commission abroad was ordered); 1804, Price v. M'Gee, 1 Brev. 373, 376 (not required); 1853, Brown v. Wool, 6 Rich. Eq. 155, 165, *semble* (same); 1807, Love v. Peyton, 1 Overt. 255 (if in another domestic State, deposition should be taken); 1809, Shepherd v. Goss, 2 id. 437 (same; otherwise, if he has "removed to some foreign nation"); 1818, Stamp v. Hughes, 5 Hayw. 93 (preceding cases overruled; residence in another domestic State is sufficient, or absence there till the end of the trial; the delay, risk, and inconvenience of sending for a deposition are unnecessary); 1818, Den v. Mayfield, ib. 121 (same; here, absence for 10 years, unheard from); 1838, Crockett v. Crockett, Meigs 95 (neither summons by subpoena nor attempt to get deposition is necessary); 1804, Jones v. Lowell, 1 Cr. C. C. 183 (not required); 1803, Rich v. Trimble, 2 Tyl. 349 (though residing without the State, if his residence is known and is within reasonable distance, deposition required); 1888, Denny v. Pinney, 60 Vt. 525, 527, 12 Atl. 108 (the witness resided in another State, but had stayed for a few days since action begun at the testatrix' town in the State; deposition not required).

⁷ Distinguish, however, the question whether

the absent witness' deposition *may* be taken and used. This depends on the general principles applicable to the use of depositions, *post* §§ 1373, 1402, 1416; statutes sometimes expressly provide for the depositions of attesting witnesses. So far as the deposition is thus allowable, its use satisfies the present rule requiring the attester's "testimony," as noted *ante*, § 1305.

⁸ See the rulings *passim* in note 2, *supra*, and also the following: 1790, Willis v. Delsncey, 7 T. R. 266, note (evidence that there had been abroad in 1774, at the place of execution, a person of the same name, held sufficient to show absence now); 1840, Austin v. Rumsey, 2 C. & K. 736 (inquiry of the witness' parents, sufficient); 1842, Nicks v. Rector, 4 Ark. 251, 277 (departure from the State four years before, and no news from him, sufficient); 1862, Delony v. Delony, 24 id. 7, 11 (evidence of absence insufficient on the facts); 1849, Gordon v. Miller, 1 Ind. 531 (continued residence abroad up to 15 months previous, held sufficient); 1838, Waldo v. Russell, 5 Mo. 387, 394 ("reported and believed to have died in Texas," sufficient); 1802, Rhodes v. Rigg, 1 Cr. C. C. 87.

⁹ For the replies received while searching, as evidence of diligence, see *post*, § 1789, *ante*, § 261. For the admissibility of the witness' declarations of *intent not to return*, see *post*, § 1725.

¹⁰ 1876, Jones v. Roberts, 65 Me. 273, 276.

¹¹ 1864, Landers v. Bolton, 26 Cal. 393, 408 (attestation out of the State by non-residents, sufficient, in the absence of evidence to show that the witness ever was within the State); 1865, McMinn v. O'Connor, 27 id. 238, 245 (same); 1865, McMinn v. Whelan, ib. 300, 310 (same); 1817, Gibbs v. Cook, 4 Bibb 535, 536 (parties' residence abroad, etc., on the facts held to raise presumption of witness' absence); 1820, Bowman v. Bartlett, 3 A. K. Marsh. 86, 91 (residence of the maker abroad, etc., on the facts held to raise presumption of witness' residence abroad); 1823, Crouse v. Duffield, 12 Mart. La. 539, 542 (execution abroad; witnesses presumed abroad); 1832, Barfield v. Hewlett, 4 Ia. 118, 119 (same); 1839, Valentine v. Piper, 22 Pick. 85 ("If the instrument was apparently executed in a foreign country, we think that fact raised a sufficient presumption that the subscribing witnesses were not within the jurisdiction of the Court"); 1857, Clardy v. Richardson, 24 Mo.

§ 1313. Same: (4) **Absence in Unknown Parts.** If the attester's whereabouts cannot be discovered, he is practically unavailable; and this (though historically there was the same hesitation that has been noted for the preceding exemptions¹) is now universally recognized as an excuse for not producing him.² But it is necessary, first, to exclude the suspicion that the witness may be secreting himself by collusion with the proponent,³ and, secondly, to show that the proponent's ignorance of his whereabouts is not due to lack of effort to discover him; accordingly, it must be shown that *honest and diligent search* for the attester has been made.⁴ The sufficiency of this search has been dealt with in a number of rulings, not profitable for use as precedents;⁵ the matter should be left entirely to the determination of the trial Court.⁶ That the search should include a sheriff's search with

295, 297 (non-residence at time of execution raises a presumption of continued non-residence); 1858, *Sherman v. Transp. Co.*, 31 Vt. 162, 163, 174 (witness to document executed out of the State; no evidence of the witnesses having been in the State; held properly dispensed with; *Valentine v. Piper* approved). *Contra*: 1826, *Jackson v. Gager*, 5 Cow. 383, 385 (power of attorney executed in Massachusetts; witnesses not presumed out of the jurisdiction).

¹ 1701, *Anon.*, 12 Mod. 607 ("that he has made strict enquiry after them and cannot hear of them," sufficient); 1796, *Barnes v. Trompowsky*, 7 T. R. 265 (see quotation in note 4, *infra*); 1808, *Crosby v. Percy*, 1 Taunt. 364, 366 (Mansfield, C. J.: "The law has been much relaxed in this particular within the period of my practice; the increased commerce of the country, and the number of persons who every year go out of it, first rendered it necessary to admit secondary evidence in the case of witnesses being abroad; the dispensation was next extended to the case of witnesses who were not to be found").

² 1810, *Wardell v. Fermour*, 2 Camp. 282; 1875, *Hartford L. Ins. Co. v. Gray*, 80 Ill. 28; 1815, *Powers v. M'Ferran*, 1 S. & R. 44, 46; 1855, *Harrel v. Ward*, 2 Sneed 610, 614, *semble*; 1802, *Broadwell v. McClish*, 1 Cr. C. C. 4.

³ 1810, *Ellenborough, L. C. J.*, in *Wardell v. Fermour*, 2 Camp. 283: "I will watch very narrowly your proof of search. . . . If the attesting witness knows too much of the transaction, and his examination would hazard the validity of the deed, he may be sent out of the way, and we may be amused at the trial with an account of his having absconded."

⁴ Various phrases of this requirement are as follows: 1796, *Barnes v. Trompowsky*, 7 T. R. 265 ("If no intelligence can be obtained respecting the subscribing witness after reasonable inquiry has been made"; . . . If he "has been sought for and could not be found, so as to furnish a presumption that he is dead"); 1802, *Cunliffe v. Sefton*, 2 East 183 ("due diligence without effect"; "diligent inquiry"; here the place of execution was unknown, and search at the places of obligor and obligee was held sufficient); 1808, *Crosby v. Percy*, 1 Taunt. 364 (Mansfield, C. J.: "In all cases

it must appear to the Court that there was a fair, serious, and diligent inquiry, and no evasion, or attempt to keep the witness out of the way"; here, on inquiry at the last abode, the party had been told that the witness had absconded to escape his creditors; advertising was not required); 1811, *Waring v. Bowles*, 4 Taunt. 132 (the Court required the party to show, not merely diligent inquiry, but "the particular search that had been made for the witness, and where he had been last seen or known to reside, and when he was last heard of, and what endeavors had been made to find him"); 1853, *Crane v. Ayre*, 2 All. N. Br. 577 ("all the circumstances must therefore be looked to in each case"); 1804, *Mangault v. Hampton*, 1 Nev. S. C. 394 (reasonable diligence required).

⁵ *England*: 1810, *Parker v. Hoskins*, 2 Taunt. 223; 1821, *Burt v. Walker*, 4 B. & Ald. 697 (the witness a clerk to the defendant, and disappearing somewhat suddenly; search held sufficient on the facts); 1822, *Pytt v. Griffith*, 6 Moore 538 (not sufficient where the witness was merely "keeping out of the way to avoid an arrest" for debt, notices at the instance of the opponent; unsound); 1823, *James v. Parnell*, Turn. & R. 417; 1842, *Falmouth v. Roberts*, 9 M. & W. 469, 471; *Canada*: 1846, *Tylden v. Bullen*, 3 U. C. Q. B. 10; 1848, *Doe v. Toigg*, 5 Id. 167, 170; *United States*: 1853, *Powell v. Hendricka*, 3 Cal. 427, 430; 1839, *Thompson v. Wilson*, 13 La. 138, 142; 1820, *Whittemore v. Brooks*, 1 Greenl. 57; 1879, *McMillan v. Larned*, 41 Mich. 521, 522, 2 N. W. 662; 1811, *Milla v. Twist*, 8 John. 121; 1814, *Jackson v. Burton*, 11 Id. 64; 1828, *Jackson v. Cody*, 9 Cow. 140, 149; 1832, *Jackson v. Chamberlain*, 8 Wend. 620, 624; 1833, *Pelletreau v. Jackson*, 11 Id. 110, 123; 1838, *Van Dyne v. Thayer*, 19 Id. 162, 165; 1847, *Truby v. Byers*, 6 Pa. St. 347 (mere ignorance of abode, without search, not enough); 1892, *Gallagher v. Assoc. Co.*, 149 Id. 25, 24 Atl. 115 (search for one having no fixed place of abode and going from place to place to get employment, held sufficient on the facts).

For the admissibility of the replies received in the search, as evidence of diligence, see post, § 1789, *ante*, § 261.

⁶ 1845, *Woodman v. Sagar*, 12 Shepl. 99, 92

subpoena seems unnecessary;⁷ nor, on the other hand, should a sheriff's search and return of "not found" be invariably sufficient.⁸

§ 1314. *Same*: (5) *Witness' Name Unknown, through Loss or Illegibility of Document*. It is clear that where the very name of the attester cannot be ascertained, the attester is unavailable for the purpose of furnishing his testimony. This situation occurs where the document is *lost*; here the proponent is exempt from producing the attester;¹ unless of course the name has otherwise before trial become known to the proponent;² for in that case his testimony, though not of great value without the document before him, might at least help to establish the fact that such a document did or did not once exist.³

Where the name of the attester is *illegible*, the same reason for exemption from production exists.⁴

§ 1315. *Same*: (6) *Illness or Infirmary*; (7) *Failure of Memory*; (8) *Imprisonment*. (6) When the attester is at the time of trial so *ill*, or so *infirm from age*, that it is impracticable, without danger to his life or health, to compel his attendance in Court, his production should be dispensed with.¹ There is little judicial authority on the subject, partly because statutes applicable to will-witnesses have frequently dealt with the point; in applying the statutory terms the analogies of the statutes excusing the non-attendance of deponents (*post*, § 1406) would be useful. But though attendance at the

("in some measure"); 1823, *McGennis v. Allison*, 10 S. & R. 197, 200 (Duncan, J.: "What is reasonable inquiry? There can be no fixed and settled rule; every case must stand on its own bottom; and this point must be left with some latitude of discretion").

¹ 1829, *Dismukea v. Musgrove*, 8 Mart. N. S. 375, 379. *Contra*: 1838, *Crockett v. Crockett*, Meigs 95 (return of subpoena, *semble*, necessary where the witness is not specifically shown to be out of the State).

² 1836, *Jerman v. Hudson*, 2 Harringt. 134 (subpoena, and return "not found," sufficient); 1847, *Sexton v. McGill*, 2 La. An. 190, 195 (same; insufficient); 1833, *M'Donald v. M'Donald*, 5 Yerg. 307 ("if to be found," in St. 1789, c. 23, § 1, as to will-witnesses, is satisfied by a return of "not found" by the officer having the subpoena).

³ 1796, *Keeting v. Bali*, Peake Add. Cas. 88 ("It did not appear that the plaintiff could by any possibility know who the subscribing witnesses were," and proof by the extrajudicial admissions of the maker allowed); 1853, *R. v. St. Giles*, 1 E. & B. 642 (per Erie, J., applying it to the case where the name is known, but the person cannot be found or identified; "it is the case of an attesting witness, unknown"); 1854, *Felton v. Pitman*, 14 Ga. 530, 535 (deed lost and witnesses unknown; exempted); 1887, *Terry v. Rodahan*, 79 id. 278, 294, 5 S. E. 38 (deed lost and witness dead; exempted); 1892, *Turner v. Cates*, 90 id. 731, 744, 16 S. E. 971 (neither witness nor maker is then preferred); 1831, *Hewes v. Wiswell*, 8 Greenl. 94, 96; 1833, *Mellen, C. J.*, in *Kuox v. Sidioway*, 1 Fairf. 201,

219 (even though the witness be present; this seems unsound); 1829, *Hathaway v. Spooner*, 9 Pick. 23, 25; 1875, *Raynor v. Norton*, 31 Mich. 210, 213; 1827, *Coiby v. Kenniston*, 4 N. H. 262, 265; 1835, *Montgomery v. Dorion*, 7 id. 475, 483, *semble*; 1832, *Kingwood v. Bethlehem*, 13 N. J. L. 221, 226 (indenture of apprenticeship; calling excused, "for the knowledge of them had been lost with the indenture itself"); 1819, *Jackson v. Kingsley*, 17 John. 158, 160, *semble* (witnesses' names torn off); 1831, *Jackson v. Vail*, 7 Wend. 125, 129; 1880, *Congdon v. Morgan*, 14 S. C. 587, 593. *Contra*: 1819, *Gillies v. Smithers*, 2 Stark. 528 (Abbott, C. J.: "The evidence of the attesting witnesses is essential to show that the bonds ever existed; here they were said to have been destroyed).

⁴ 1859, *Smith v. Brannan*, 13 Cal. 107, 115 (calling required, where by a copy the names of the witnesses appeared); 1819, *McMahan v. McGrady*, 5 S. & R. 314 (known attester must be called; repudiating the argument that it is needless to call him since there is nothing to testify to).

⁵ *Gillies v. Smithers*, Eng., *McMahan v. McGrady*, Pa., *supra*.

⁶ 1829, *Kemper v. Pryor*, 1 J. J. Marsh. 598.

⁷ 1811, *Jones v. Brewer*, 4 Tannt. 46 ("even perhaps in some instances of sickness," his presence is not required, per Mansfield, C. J.; *contra, semble*, Heath, J.); all agreed in refusing to authorize a deposition to be taken, leaving the matter to be determined at the trial. *Contra*: 1796, *Gordon v. Payne*, 1 Mart. N. C. 72 (the witness when last heard from had been given up

trial would seem properly excused, there is no reason why at least the attester's deposition should not be taken.²

(7) A failure of memory, so far as it involves a general mental disability, organic in its nature, and analogous to insanity (*post*, § 1316), should excuse entirely from production of the person and of his deposition. But a mere casual failure of memory as to the facts of execution obviously cannot excuse; for it cannot be ascertained except after production to testify. When it appears after such production, other principles come into play; (a) the witness may adopt his attesting signature as a record of past recollection, and upon the faith of it verify the facts of execution as thus known to him to have occurred (*ante*, §§ 737, 747); (b) if he fails to do this, his signature may be otherwise proved, and his attestation taken as sufficient evidence of the facts of execution (*post*, § 1511); (c) in any case, upon his failure to recollect, the facts of execution may be proved by other qualified persons (*ante*, § 1302); whether, in case of such a failure to recollect, the other attestors must first be called, is another question (*ante*, § 1309).

(8) Where the attester is imprisoned under sentence of law, and it is thus legally impossible to secure his attendance, it should be excusable for the same reason as in the case of illness;³ but his deposition, if he is qualified to testify, should be taken.

§ 1316. Same: (9) Incompetency, through Interest, Infamy, Insanity, Blindness, etc. Where the attester has become, since the act of attestation, disqualified to give testimony, it would be useless to produce him, and production is therefore excused.

(a) This doctrine as applied to a supervening disqualification by interest has long been recognized, although in some early rulings it has been held not to apply where the interest had been voluntarily acquired by the attester.¹

by his physician; handwriting not allowed). There could be no doubt on this point to-day.

² 1820, *Jackson v. Root*, 18 John. 60, 80 (aged and infirm and unable to attend, but within the jurisdiction; deposition required). Compare § 1404, *ante*.

³ The statutes cited *ante*, § 1310, sometimes specify this cause of excuse.

¹ In the following rulings, subsequently acquired interest in general is treated as an excuse, except where a special proviso is noted: *England*: 1715, *Anon*, cited in 1 P. Wms. 289, *semble*; 1717, *Godfrey v. Norris*, 1 Str. 34 (the witness to a bond became administrator *d. b. n.* of the obligee; his hand allowed to be proved; so also of a witness to a will afterwards becoming devisee); 1798, *Buckley v. Smith*, 2 Esp. 697; 1802, *Cunliffe v. Sefton*, 2 East 183; 1829, *Hovill v. Stephenson*, 5 Bing. 493 ("We do not dispute the authority of any of those decisions," and even an interest acquired in a partnership would not be fatal, but here the interest acquired was purely in the specific contract attested, and "the plaintiff cannot complain that his witness is disqualified, when he himself has been the cause of the disqualification"); *Can-*

ada: 1843, *Hamilton v. Love*, 3 Kerr N. Br. 243, 250, 253 (Parker, J., doubting); 1848, *Boe v. Twigg*, 5 U. C. Q. B. 167, 170; *United States*: 1833, *Bennet v. Robinson*, 3 Stew. & P. 227, 240 (interest as administrator, etc., sufficient, but not as assignee, this being purely voluntary and for personal benefit); 1818, *McKinley v. Irvine*, 13 Ala. 681, 706 (interest acquired by voluntary act; handwriting excluded); 1849, *Robertson v. Allen*, 16 id. 106, 107 (interest as legatee and heir; handwriting allowed); 1850, *Cox v. Davis*, 17 id. 714, 717 (in general; interest sufficient); 1826, *Board v. Board*, 5 Mart. N. S. 132, 134; 1820, *Whittemore v. Brooks*, 1 Greenl. 57; 1809, *Dudley v. Sumner*, 5 Mass. 439, 444, 462, *semble*; 1815, *Sars v. Dillugham*, 12 id. 358, 362 (will); 1811, *Amherst Bank v. Root*, 2 Mete. 522, 532; 1858, *Jones v. Phelps*, 5 Mich. 218, 222 (justice of the peace disqualified as the trial judge; no exemption from calling him, the disability being the result of the party's act); 1856, *Tinnin v. Price*, 31 Miss. 423; 1849, *Holmes v. Holloman*, 12 Mo. 536 (otherwise, "the purpose of a testator might be defeated by events which no precaution on his part could anticipate or prevent");

This limitation is proper enough as a punishment, where by collusion with the proponent of the document the interest has been acquired with the purpose of disqualifying the attester; but otherwise it is harsh and improper, and the disqualification, however occurring, should suffice to excuse, the opponent having liberty to compel the attester to testify if there appears to be a need of it. — Where the disqualification was not acquired subsequently to attestation, but existed at the time of it, the attestation is void as such, and the person does not count for any purpose as an attester (*ante*, § 1292).

(b) Disqualification occurring through *infamy*, subsequently to attestation, is equally an excuse for non-production.²

(c) Disqualification through *insanity*, arising subsequently to attestation, is also an excuse.³

(d) *Blindness* would prevent the attester from identifying the maker's signature and his own; but it would not prevent him from testifying by recollection to the execution of such a document by such a person. Since, therefore, he is still qualified to testify in part at least, there would seem to be no reason for excusing his non-production as a rule, although upon a question purely as to the identity of a signature it would be useless to call him.⁴

§ 1317. **Same: (10) Refusal to Testify, Privileged or Unprivileged.**

(a) Where the attester is *privileged* not to testify, and is thus not compellable, the proponent should be excused from production.¹ Whether it is necessary to call him and learn whether he will claim his privilege in court, or whether it is sufficient if it appears otherwise that he will if called exercise his privilege, should be left to the determination of the trial Court.²

(b) Where the attester, though *not privileged*, nevertheless refuses to tes-

1792, *Nelius v. Brickell*, 1 Hayw. 19, *semble*; 1801, *Hampton v. Garland*, 2 Id. 147; 1804, *Hall v. Bynum*, *ib.* 328 (not received, for a bond, where the witness had become assignee and had then assigned to the plaintiff; reason, the supposed danger of collusion and trickery); 1832, *Crowell v. Kirk*, 3 Dev. 355, 357; 1840, *Saunders v. Ferrill*, 1 *Ired.* 97, 101 (sufficient, whether acquired by law or by his own act; except for negotiable instruments); 1785, *Davison v. Bloomer*, 1 *Dall.* 123; 1813, *Hamilton v. Marsden*, 6 *Binn.* 45, 47 (sufficient, even when acquired by his own act voluntarily); 1851, *Loomis v. Kellogg*, 17 *Pa.* 60, 63 (one who by accepting an executorship becomes incompetent may by his attestation be a "full witness"; when he is objected to as incompetent, "they put him in the predicament of a witness dead or out of reach of process"); 1852, *Kinney v. Flynn*, 2 *R.* 1. 319, *semble* (wife of the maker of a note); 1833, *Lever v. Lever*, 1 *Ill.* 1 *Ch. S. C.* 62, 68 (incompetency as executor, note signed by mark; witness' handwriting insufficient, unless note is shown to have existed before interest accrued); 1850, *Jones v. Arterburn*, 11 *Humph.* 97, 99 (the statutory phrase, "if to be found," for contested wills, "is not to be construed literally," and covers subsequent incompetency, as exempting production).

² 1729, *Jones v. Mason*, 2 *Str.* 833 ("as if dead"); 1815, *Scars v. Dillingham*, 12 *Mass.* 358, 361 (will).

³ 1804, *Bennett v. Taylor*, 9 *Vea. Jr.* 381; 1813, *Currie v. Child*, 3 *Camp.* 283.

⁴ The rulings are not harmonious: 1699, *Wood v. Drury*, 1 *Id.* *Raym.* 734 *semble* (excused); 1833, *Pedler v. Paige*, 1 *Moo. & Rob.* 258, *Parke, B.* (not called; but "there is great weight in the reasons urged for calling the witness," i. e. that "the circumstances attending the execution might be proved by him"); 1839, *Cronk v. Frith*, 9 *C. & P.* 197; *s. c.* as *Cronk v. Frith*, 1 *Moo. & Rob.* 262 (*Abinger, L. C. B.*; "He might from his recollection give most important evidence respecting it"; here the pleas to an action on a bond set up fraud and intoxication at the time of execution); 1847, *Rees v. Williams*, 1 *De G. & Sm.* 311, 320 (not excused); 1806, *Taylor, J.*, in *Baker v. Blount*, 2 *Hayw.* 404 (excused).

¹ 1849, *Holmes v. Holloman*, 12 *Mo.* 635 (heirs claimed privilege as parties; production excused); 1812, *Allen v. Allen*, 2 *Overt.* 172 (under St. 1784 and 1789, a claim of privilege by an interested witness exempts from producing him, even where the will is contested).

² Compare the analogous case of a *privileged document*, *ante*, § 1212.

tify, the proponent should be excused, provided it is made to appear that there is no collusion;² for there is no reason why the innocent proponent should be punished for the witness' fault, especially as the latter's refusal may be designed to aid his own or the opponent's interests.

§ 1318. **Same:** (11) **Document proved by Registry-Copy.** Where a document's execution is allowed to be proved by a certified copy from an official registry, the document's execution having been duly authenticated to an officer before registration (*post*, § 1648), the attester of the document need not be called.¹ This result may be justified on three grounds: (a) The object of the registration system is to provide a convenient and speedy method of authenticating a document duly registered (*post*, § 1648), and among the other advantages thus intended to be secured is the freedom from the inconvenience of searching for and producing the attesters; (b) Since the original document in such a case is not required in such jurisdictions to be produced (*ante*, § 1225), the value of the attester's testimony without the document and the original signatures before him would be slight; (c) In those jurisdictions (*ante*, § 1290) where the present rule is now by statute confined to documents required by law to be attested, the rule cannot apply to documents — for example, conveyances — required to be authenticated before a notary or a registrar by an attesting witness, because that requirement does not make attestation an element in the validity of the conveyance, but merely provides a lawful mode of authenticating the instrument for registration.

But the principle should not apply to a document merely *filed in a public office*; the contents may be provable without production (*ante*, § 1218), but unless a mode of authentication has been provided by statute as a condition precedent to the filing or registration (*post*, § 1680), it would seem improper to dispense with the attester's testimony.²

¹ 1828, *Bomford v. Wilme*, 1 Beatty 252 (the witness refused to be examined, even after attachment for contempt; held, that handwriting could be proved only after a hearing in which the opponent should have an opportunity to show collusion).

² 1844, *Smith v. Millidge*, 2 Kerr N. Br. 408, 413, *semble*; 1893, *Hawkins v. Ross*, 100 Ala. 459, 464, 14 So. 278; 1898, *Foxworth v. Brown*, 120 id. 59, 24 So. 1; 1885, *Fletcher v. Home*, 75 Ga. 134, 137; 1840, *Doe v. Johnson*, 3 Ill. 522, 528; 1848, *Job v. Tebbets*, 10 id. 376, 379 (without any other preliminary proof; repudiating the contrary *obiter dictum* in a. c. 9 id. 143, 151); 1828, *Eaton v. Campbell*, 7 Pick. 10, 12; 1829, *Hathaway v. Spooner*, 9 id. 23, 25, *semble*; 1832, *Powers v. Russell*, 13 id. 69, 75 ("where the production of a deed is dispensed with and an office copy is competent evidence, . . . the necessity of calling them is dispensed with," because the witness could not be expected to remember without seeing the original); 1854, *Com. v. Emery*, 2 Gray 80, per Shaw, C. J. (except where the original's production is re-

quired because in the party's hands as a *g. ante*, according to § 1225, *ante*); 1870, *Samuel v. Borrowscale*, 104 Mass. 207, 209; 1872, *Gragg v. Learned*, 109 id. 167 (if "not made to either party to the action, nor presumed to be in the custody of either"; according to § 1225, *ante*); 1842, *Moss v. Anderson*, 7 Mo. 337, 340 (though evidence of identity may be required; and "cases may arise" in which a Court might require the attesting witness); 1868, *Sharon v. Davidson*, 4 Nev. 416; 1810, *Carkhuff v. Anderson*, 3 Binn. 4, 7, 10; 1821, *Dingle v. Bowman*, 1 McC. 177; 1845, *McLeod v. Rogers*, 2 Rich. 19, 22; S. Car. St. 1731, Gen. St. 1882, § 2226-7, Code 1902, §§ 2898, 2899 (quoted *ante*, § 1290); 1802, *Edmondson v. Lovell*, 1 Cr. C. C. 103; 1892, *Paine v. Trask*, 5 U. S. App. 283, 288; 1830, *Carver v. Jackson*, 4 Pet. 1, 82, *semble*; 1827, *Williams v. Wetherbee*, 2 Aik 329, 335 (here an original); 1864, *Hinchcliff v. Hinman*, 18 Wis. 130, 135.

Compare also the statutes cited *ante*, § 1310.

² *Contra*: 1878, *Lee v. Winner*, 38 Mich. 82, 87 (boud filed in court).

§ 1319. **Same: Summary.** The foregoing various causes for exempting from production of the attester may be grouped under four general heads: (a) Cases where the attester cannot be communicated with at all, either because he is non-existent, or because his whereabouts or his identity is unknown; (b) cases where, though he can be communicated with, he cannot be brought into court; (c) cases where, though he can be brought into court, his testimony cannot be obtained; (d) cases where, though his testimony can be obtained, other considerations excuse its employment. It does not appear, however, that anything turns in practice upon the distinctions between these four classes: except that in cases under the second head, as already noted, the attester's deposition may be required in lieu of his testimony on the stand.

(h) "And also Authenticate his Attestation, unless it is not Feasible."

§ 1320. **If the Witness is Unavailable, must his Signature be proved, or does it suffice to prove the Maker's?** The question here is, as usually put: When the production of the attester is excused because he is unavailable, must at least his signature be authenticated, or may the *maker's signature alone be proved*, without proving that of the attester? The nature of the question, however, can be better understood if we recollect, and force into expression in the question, the true significance of proof of the attester's signature in such a case. What is it to prove his signature? It is in effect to offer in evidence the hearsay statement of the attester. The signing of a document in attestation by a witness, whether or not an express clause of attestation accompanies the signature, involves a statement by the attester that the person purporting to be the maker did then execute the document (*post*, § 1511). This extrajudicial statement, expressed or implied, is always, when the attester is unavailable, admissible by exception to the Hearsay rule (*post*, §§ 1505-1514). The question here is, not merely whether it is admissible, but whether it is preferred to any other testimony to the maker's execution. It is assumed that the attester is personally unavailable (for one of the causes noticed); and that the rule of preference is therefore to that extent disposed of, so that, if nothing more belonged to the rule, use could now be made of any competent testimony to prove the maker's execution. Is it, then, further, a part of the rule of preference that, before thus going to other testimony, the *attester's hearsay statement must be used*?

Stated in this way, the precise and singular nature appears of the supposed requirement of proving the attester's signature. That a preference should be given to any extrajudicial statement over testimony on the stand under cross-examination is an extraordinary measure, assuming for such a statement a value not at all to be attributed ordinarily to such statements. Nevertheless, such a preference unquestionably existed as a part of the orthodox common-law rule in England. The preference seems rarely to have been supported by any reason; and the following seems to be the most distinct effort to that end:

1834, *Tracy, Sen.*, in *Jackson v. Waldron*, 18 Wend. 178, 197: "I acknowledge the reason of this preference is not at first glance perfectly obvious; and that it is not has induced some learned judges, without (I am now satisfied) due reflection, to question the wisdom of the rule, and by their doubts throw over it a shade of discredit. But . . . I am persuaded that good reasons may be found for maintaining it, over and above the consideration of its being so long settled and acknowledged. One of them, which strikes me as very apparent and forcible, is the greater risk a person incurs in forging the signatures of both witnesses and party than of the party alone; coupled with which consideration is the important one that in the suit on the obligation the person whose name was forged as the subscribing witness would be a competent witness to prove the forgery of his signature, while a party might be compelled to sit silently by (as I have myself witnessed) and see an instrument to which he was an utter stranger proved by evidence of his handwriting to have been executed by him."

In the United States, the rule was early perceived to have in most instances no more than a technical and traditional significance, and a number of Courts, believing that "a technical and artificial rule had prevailed over our right reason,"¹ refused to accept it, and declined to require proof of the attester's signature in preference to proof of the maker's. Their reasoning was as follows:

1851, *Trumbull, J.*, in *Newson v. Luster*, 13 Ill. 175: "Why proof of the handwriting of a subscribing witness should be better evidence of the execution of an instrument than that of the obligor is not very apparent, and the attempts to give a reason have not in my judgment been very satisfactory. . . . [Stating the argument of Senator Tracy, quoted *supra*, as to forgery.] No one can doubt that proof of the handwriting of both the subscribing witness and party would be more satisfactory than that of either one. But this is a begging of the question, which is not whether a person would incur greater risk in forging the signature of both witness and party than of the party alone. . . . Surely a person would incur no greater risk in forging his [the witness'] signature than that of the party. . . . Another reason given for the rule is that the witnesses who subscribe at the time of the execution are agreed upon by the parties to be the only witnesses to prove it, which, in the language of the Supreme Court of New York, . . . is an absurdity. . . . Proof of the handwriting of the grantor to a deed furnishes altogether more satisfactory evidence of its execution than would proof of the handwriting of the subscribing witness. When the attesting witness cannot be had, the law requires the next best evidence, which means the next best evidence of those facts to which the attesting witness if present would be called upon to testify,—that is, not merely that he signed the paper as a witness, but that the party executed the instrument. It is difficult to account for the signature of a party to a writing which he did not execute; but it is easy to imagine how a forged instrument might be established against him when it is only necessary to procure the name of a person as a subscribing witness to such an instrument, and then establish it by proof of the handwriting of the witness."

1895, *Atkinson, J.*, in *McVicker v. Conkle*, 96 Ga. 584, 592, 24 S. E. 23: "The real question, then, upon the execution of a deed being as to the actual signing [by the maker], the primary inquiry should be as to the fact. . . . [The witnesses' handwriting] might be proven beyond controversy, and still the deed be a forgery; for, while the persons alleged to be subscribing witnesses may have signed the paper, that does not, except by inference, connect the alleged maker with the transaction, nor otherwise establish the execution of the deed by him. If, however, on the other hand, it be shown that the alleged maker in fact signed the identical paper offered in evidence, such evidence not only establishes directly the execution of the instrument, but likewise connects the maker directly with

¹ 1849, *Lumpkin, J.*, in *Watt v. Kilburn*, 6 Ga. 356, 358.

the transaction to which it relates. In the former case, the fact of execution would be established by inference only; in the latter, by direct evidence, and who will question that a rule is purely artificial and arbitrary which makes the former of higher proof than the latter?"

In order to ascertain the state of the law in the various jurisdictions, the following distinctions should be noted: (1) So far as concerns documents required by law to be attested, *i. e.* chiefly, *wills*, the question is ordinarily of little importance, because the attestation has to be authenticated in any case, as an element of validity. Furthermore, wherever by statutory restriction (*ante*, § 1290) the whole rule preferring the attester is confined to *documents required by law to be attested*, the present question disappears from consideration in regard to any other attested document; for the attester's signature need not be proved at all. Thus, the old controversy would to-day in such jurisdictions be of no consequence whatever, were it not for the will-statutes next to be mentioned.

(2) In many jurisdictions, the *statute* dealing with *proof of wills* lays down an express rule in regard to the proof of signatures where the attester is unavailable. Now some of these statutes prescribe proof of the signatures of "either the testator or the witnesses," "of the witnesses and the testator or any of them," and the like. Thus it may arise that, though (as above noted) the attester's signature ought to be proved as an element of the validity of the execution, yet under such a statute even this seems to be improperly dispensed with; and a Court may in this obscure state of things fall back upon the common-law rule of the jurisdiction.

(3) As regards the *common-law rule* itself, the decisions collected include two classes, — those which require the attester's signature to be proved in preference to the maker's and those which do not require it.² Now from this

² The rule on the present subject in the various jurisdictions may be gathered from the cases and statutes collected below.

For convenience' sake, the *statutes* dealing with the question of § 1306, *ante* (whether all the witnesses' signatures need be proved), and the question of § 1513, *post* (whether the maker's or testator's signature must be proved), have also been placed here once for all, as a single statutory clause usually deals with all three points: *England*: 1796, *Barnes v. Trompowsky*, 7 T. R. 265 (witness' signature preferred); *Canada*: *N. Br. St.* 1898, c. 35, § 39 (proof of "the handwriting of the witnesses and the testator" may be made); *P. E. I. St.* 1873, c. 21, § 24 (quoted *ante*, § 1310); *United States*: *Ala. Code* 1897, § 4276 ("[wills] must be proved by one or more of the subscribing witnesses, or if they be dead . . . then by proof of the handwriting of the testator and that of at least one of the witnesses to the will"); § 4277 (death, etc., must be shown, before proof of "the handwriting of the testator or of any of the subscribing witnesses" is admissible); 1842, *Mardia v. Shackelford*, 4 Ala. 493, 503 (bond; witness' signature not needed); 1843, *Lazarus v. Lewil*,

5 id. 457, 459, *semble* (deed; same; but here one witness was called, though he could not recollect delivery); 1850, *Cox v. Davis*, 17 id. 714, 717 (deed; same; the rule "appears to have been settled here"); 1887, *Snider v. Burka*, 84 id. 53, 56, 4 So. 225 (will; same); *Ariz. Rev. St.* 1887, § 983 (the Court "may admit proof of the handwriting of the testator, and of the subscribing witnesses, or any of them"); *Ark. Stats.* 1894, § 7415 ("when one of the witnesses to such will shall be examined, and the other witnesses are dead, insane, or their residence unknown, then such proof shall be taken of the handwriting of the testator and of the witnesses dead, insane, or absent, and of such other circumstances as would be sufficient to prove such will on a trial at common law"); § 7416 ("If it shall appear to the satisfaction of the Court that all the subscribing witnesses are dead, insane, or absent, the Court or clerk shall take and receive such proof of the handwriting of the testator and subscribing witnesses to the will, and of such other facts and circumstances as would be sufficient to prove such will in a trial at law"); 1839, *Wilson v. Royston*, 2 Ark. 315, 328 (deed; witness' signature required); 1862,

question must be discriminated a question arising under a different principle, namely, whether the *maker's signature must also be proved, i. e.* whether the

Delony v. Delony, 24 id. 7, 11 (not required where witness signed by mark only); *Cal. C. C. P.* 1872, § 1315 (if none are in the county, the Court "may admit the testimony of other witnesses," and "as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses or any of them"); Commissioners' amendment of 1901 (quoted *ante*, § 1310); 1864, *Landers v. Bolton*, 26 Cal. 393, 411 (witness' signature not required; laid down, after deliberation, as "a general rule"; but "this rule might not apply to instruments which the law requires to be attested by witnesses"); 1864, *McMinn v. O'Connor*, 27 id. 238, 245 (same); 1864, *McMinn v. Whelan*, ib. 300, 310 (same); *Colo. Annot. Stats.* 1891, § 4676 ("in all cases where any one or more of the witnesses" are unavailable, evidence is allowable "of the handwriting of any such deceased or absent witness as aforesaid, and such other secondary evidence as is admissible in courts of justice generally to establish written contracts generally, in similar cases"); *D. C. Code* 1901, §§ 131, 132 (quoted *ante*, § 1310); *Del.* 1832, *Boyer v. Norris*, 1 Harringt. 22 (bill; witness' signature required); 1836, *Jerman v. Hudson*, 2 id. 134 (same; assignment of judgment); *Ga. Code* 1895, § 5245 (if the witnesses are unavailable, proof of the maker's signature is "primary evidence"; if that is unavailable, witnesses' handwriting "or other secondary evidence" may be admitted); § 3282 (proof "of their signatures and that of the testator," necessary for wills) 1849, *Watt v. Kilburn*, 7 Ga. 356, 358 (witness' signature a mark only, and therefore "a nullity"; maker's signature sufficient); 1895, *McVicker v. Conkle*, 96 id. 584, 585, 24 S. E. 23 (witness' signature required; rule affirmed as settled; but policy doubted by *Atkinson, J.*); 1896, *Baker v. Adams*, 99 id. 135, 25 S. E. 28 (trial held before the statute, *supra*; the witnesses deceased; the maker's testimony admitted by consent); 1898, *Standback v. Thornton*, 106 id. 81, 31 S. E. 805 (witness' signature not necessary, under the statute); *Ill. Rev. St.* 1887, § 5311 (like *Cal. C. C. P.* § 1315); *Ill. Rev. St.* 1874, c. 143, § 8 (where one or more witnesses are dead, etc., "it shall be lawful . . . to admit proof of the handwriting of any such deceased, insane, or absent witness, as aforesaid, and such other secondary evidence as is admissible in courts of justice, to establish written contracts generally in similar cases"); 1851, *Newson v. Luster*, 13 Ill. 175 (witness' signature not required, for instruments not required to be attested; quoted *supra*); 1865, *Fash v. Blake*, 38 id. 363, 363, *semble* (deed; not required); *Ind. Rev. St.* 1897, § 2805 (if the witnesses are dead, etc., "then by proof of the handwriting of the testator or of the subscribing witness thereto"); 1838, *Bowser v. Warren*, 4 Blackf. 522, 524 (witness' signature required); 1848, *Yocum v. Barnes*, 8 B. Monr. 496, 498 (covenant; witness' signature not required); *La.*: 1832, *Barfield v. Hewlett*, 4 La.

118, 119, *semble* (witness' signature not required); 1845, *Grand Gulf R. & B. Co. v. Barnes*, 12 Rob. 127, 130 (same); *Me.*: 1845, *Woodman v. Segar*, 12 Shepl. 90, 98 (not required; but here it was intimated that the proof of the witness' handwriting was dispensed with merely because he never had been in the State and the proof was not accessible); *Md.* Pub. Gen. L. 1838, Art. 93, § 337 (wills executed out of the State and not there required to be recorded; proof of testator's handwriting or of the subscribing witnesses' or "any of them," sufficient); *St.* 1890, c. 416, *St.* 1892, c. 81 (quoted *ante*, § 1310); 1864, *Keefe v. Zimmerman*, 22 Md. 274, *semble* (not required in certain cases); *Mass.*: 1814, *Homer v. Wallis*, 11 Mass. 309, 314 (witness' signature not required, for documents not required to be attested); 1839, *Valentine v. Piper*, 22 Pick. 85 (not required, the maker's is "more direct and satisfactory than that of the handwriting of the witnesses"); 1851, *Gohut v. Goodspeed*, 5 Cush. 411 (same); 1892, *Smith Charities v. Connolly*, 157 Mass. 272, 276, 31 N. E. 1058 (mortgage; same); *Mich. Comp. L.* 1897, § 9280 (the Court "may admit proof of the handwriting of the testator and of the subscribing witnesses"); *Minn. Gen. St.* 1894, § 4437 (if the witnesses are not resident, the Court "may admit proof of the handwriting of the testator and of the subscribing witnesses"); *Miss. Annot. Code* 1892, § 1816 (if no witnesses can be produced, then "it may be established by proving the handwriting of the testator, and of the subscribing witnesses to the will, or of some of them"); 1838, *Downs v. Downs*, 2 How. 915, 925 (deed; grantor's signature and acknowledgment sufficient); *Mo. Rev. St.* 1899, § 4619 (when one witness is examined, and the others are "dead, insane, or their residences unknown, then such proof shall be taken of the handwriting of the testator and of the witnesses dead, insane, or residences unknown, and of such other circumstances as would be sufficient to prove such will on a trial at common law"); § 4620 (if all the witnesses are dead, etc., then shall be taken "such proof of the handwriting of the testator and subscribing witnesses to the will, and of each other facts and circumstances as would be sufficient to prove such will in a trial at law"); neither of these carelessly constructed sections can be said to be intelligible; both evidently misunderstand the former law; and the words "common law" and "law" are ambiguous precisely where certainty was needed; 1857, *Clardy v. Richardson*, 24 Mo. 295, 297, *semble* (deed; witness' signature not required); *Mont. C. C. P.* 1895, § 2243 (like *Cal. C. C. P.* § 1315); *Nebr. Comp. St.* 1899, § 2656 (if none of the witnesses are resident, etc., the Court "may admit proof of the handwriting of the testator, and of the subscribing witnesses"); *Nev. Gen. St.* 1835, § 2688 (if witnesses are not available, the Court, "as evidence of the execution, may admit proof of the handwriting of the testator, and of the subscribing witnesses, or any

attester's signature alone suffices. This assumes that proof has voluntarily been made of the attester's signature, and asks whether the maker's additionally is needed. This involves the inquiry what is implied by the attestation, and whether proof of it suffices (not whether it is necessary), and is elsewhere considered (*post*, § 1513), in dealing with the Hearsay exception for Attesting Witnesses. Thus, though the question is there sometimes, in form, whether both must be proved, the real inquiry is whether the maker's

of them"); St. 1897, c. 106 (cited *ante*, § 1310; it omits to re-enact the foregoing provision); N. H.: 1834, *Farnsworth v. Briggs*, 6 N. H. 561, 563 (a note; witness' signature required; Parker, J., agreeing solely on authority, and approving the policy of requiring also proof of the grantor's signature); 1848, *Cram v. Ingalls*, 18 id. 613, 616 (possibly dispensable, where attestation is not required by law); N. M. Comp. L. 1897, § 1982 (if the witnesses are not attainable, others shall be examined "to prove their signatures"); N. Y. C. C. P. 1877, § 2620 (a will "may be established" upon proof of the testator's and witnesses' handwriting "and also of such other circumstances as would be sufficient to prove the will upon the trial of an action"); 1834, *Jackson v. Waldron*, 13 Wend. 178, 183, 197 (for a sealed instrument, the witness' signature required; "although many able judges have declared their dissatisfaction with the rule," per Walworth, C.; but Tracy, Sen., approved the rule); 1847, *Willson v. Betts*, 4 Den. 201, 209 (same, applied to a deed); N. C. Code 1883, § 2148 (proof of a will "may be taken of the handwriting, both of the testator and of the witness or witnesses so dead," etc., "and also of such other circumstances as will satisfy" of its execution); 1795, *Jones v. Blount*, 1 Hayw. 238 (grantor's signature objected to because the signature was not essential and did not import delivery; objection repudiated); N. D. Rev. Code 1895, § 6299 (the Court "may admit the testimony of any competent witness respecting the execution of the will, the capacity of the testator, or other material fact, and may also admit proof of the handwriting of the testator or of a subscribing witness and such other evidence as is admissible in courts of justice to establish or disprove written contracts in similar cases"); St. 1897, c. 59, Rev. Code 1899, § 3888 a (instruments in general; "nor shall it be permissible to prove such instrument or contract in any case by proof of the handwriting of said subscribing witness or witnesses as the case may be, but in all cases such instrument or contract must be proved in the same manner as one having no subscribing witness whatever"); *Oh.*: 1824, *Clark v. Boyd*, 20h. 280 (57) ("under proper circumstances . . . either may be sufficient"); *Okl. Stats.* 1898, § 1193 (if the subscribing witnesses are unavailable, the Court "may admit proof of the handwriting of the testator and of the subscribing witness, or any of them"); *Or. C. C. P.* 1892, § 761 ("the handwriting of one of them, and that of the party, shall be proved"); *S. C. St.* 1839, Gen. St. c. 61, §§ 1870, 1871, Rev. St.

1893, §§ 2003, 2004, Code 1902, §§ 2491, 2492 (for probate in common form, handwriting of the testator and the witnesses "or any other secondary evidence admissible and sufficient by the rules of the common law"; for solemn form, handwriting of the witnesses and the testator); 1803, *Taylor v. Meyers*, 2 Bay 506, 1 Brev. 245 (under the statute exempting from calling witnesses to notes and bonds, their handwriting need not be proved; the Court's first opinion, which alone is given in 1 Brev., was to the contrary); 1806, *Gervais v. Baird*, 2 Brev. 37, *semble* (witness' handwriting not needed, under the same statute); 1821, *Cornnell v. Buckley*, 1 McC. 466 (deed; witness' signature required); 1829, *Hill v. Hill*, 2 Hill 542, note (deed; proof of maker's signature not sufficient); *S. D. Stats.* 1899, § 6903 (like *Okl. Stats.* § 1193); *Tex. Rev. Civ. Stats.* 1895, § 1900 (if the witnesses are unavailable, probate may be granted "on proof by two witnesses of the handwriting of the subscribing witnesses thereto, and also of the testator, if he was able to write"); *U. S.*: 1805, *Wellford v. Eakin*, 1 Cr. C. C. 264 (witness' signature not required); 1810, *Whann v. Hall*, 2 id. 4, *semble* (required); 1830, *Walton v. Coulson*, 1 McLean 120, 123 (required); 1831, *Clarke v. Courtney*, 5 Pet. 219, 344 (same); 1882, *Stebbins v. Duncan*, 108 U. S. 32, 2 Sup. 313 (same); *Utah Rev. St.* 1898, § 3792 (like *Cal. C. C. P.* § 1315); *Vt. Rev. St.* 1839, *Stats.* 1894, § 2363 (will-witnesses; if none reside in the State, the testimony of "other witnesses" may be received, and the Court "may admit proof of the handwriting of the testator and of the subscribing witnesses, in cases where the names of the witnesses are subscribed to a certificate stating that the will was executed as required in this chapter"); 1858, *Sherman v. Transp. Co.*, 31 Vt. 162, 165, 175 (handwriting of a grantor, sufficient, where the attestation is "not required to the operative effect of the contract"); *Va.*: 1826, *Gillism v. Perkinson*, 4 Rand. 325 (contract; witness' handwriting dispensed with where he signs by mark only; *semble*, in other cases also); 1829, *Raine v. Phillip*, 1 Leigh 483 (maker's handwriting can be resorted to only when proof of witness' handwriting is unavailable; here, of a bond); *Wash. C. & Stats.* 1897, §§ 6103, 6104 (quoted *ante*, § 1310); *Wis. Stats.* 1898, § 3788 (if the attestors are unavailable, the Court may admit other testimony to prove sanity "and the execution of the will, and may admit proof of his handwriting and of the handwriting of the subscribing witnesses"); *Wyo. St.* 1891, c. 70, chap. III, § 3 (quoted *ante*, § 1310).

(not the witness') signature must additionally be proved. Courts requiring the maker's also, when the attester's is offered, need not be Courts requiring the attester's also if only the maker's is offered, though they frequently coincide; i. e. a Court might conceivably require a party proving the attester's to add the maker's, because of the insufficiency of the former (under § 1513, *post*), while the same Court, under the present principle, might not require the attester's if the maker's is offered. Accordingly, so far as such decisions require "both," in the sense that the attester's is needed, even when the maker's is offered, they belong here; while so far as they require "both," in the sense that the maker's is needed, even when the attester's is offered, they belong there (*post*, § 1513). Nevertheless, comparison should be made of the two sets of rulings in examining the law upon either point.

§ 1321. **Proof of Signature dispensed with, where not Obtainable.** Just as the rule of preference for the attester's testimony on the stand is not enforced where it appears that his testimony cannot be had (*ante*, § 1308), so also, in those jurisdictions where proof of his signature is next preferred, this requirement is abandoned where it appears that such proof cannot be had.

(a) The most common instance is that in which testimony to the identity of the handwriting cannot by *honest and diligent search* be obtained. The sufficiency of the search ought to be left to the determination of the trial Court; the rulings can seldom be taken as binding precedents; it seems generally accepted, however, that the search need not extend out of the jurisdiction.¹

(b) Where the witness has *subscribed by mark*, it may be thought impracticable to attempt to identify it in the same way as handwriting; and it is on this ground that a few Courts have dispensed with such evidence in the case of a subscription by mark.²

(c) Where the attesting signature is not to be had for purposes of authentication, either by the *loss of the document* or the *illegibility* of the writing, evidence of the attester's signature is impracticable.³

¹ Cal. : 1864, *Landers v. Bolton*, 26 Cal. 393, 409 (attestation and residence out of the State, sufficient to show non-availability; approving *Newsom v. Luster*, Ill. *infra*); 1865, *McMinn v. O'Connor*, 27 Id. 238, 245 (same); 1865, *McMinn v. Whelan*, ib. 300, 310 (same); Ill. : 1851, *Newsom v. Luster*, 13 Ill. 175 ("all that can be required in any case is that reasonable diligence should be used to procure evidence of the handwriting"; here a search for the witness in the neighboring State, where the deed was executed, or throughout the former State, was held unnecessary); Ind. : 1838, *Bowser v. Warren*, 4 Blackf. 522, 525 (diligence not shown on the facts; mere fact of delivery in Illinois near the border, insufficient to exempt from search); Ky. : 1824, *Ford v. Hale*, 1 T. B. Monr. 23 (need not go out of the State for testimony); N. Y. : 1833, *M'Pherson v. Rathbone*, 11 Wend. 96, 99 (search for evidence held sufficient on the facts); 1833, *Pelletreau v. Jackson*, ib. 110, 123 (search held insufficient); 1834, *Jackson v. Wal-*

dron, 13 id. 178, 200, 223 (same); 1844, *Northrop v. Wright*, 7 Hill 476, 485 (a will more than 30 years old; no presumption of inability to find handwriting witnesses, and search held insufficient); 1847, *Willson v. Betts*, 4 Den. 201, 210 (such a presumption doubted; here search held sufficient); N. C. : 1840, *McKinder v. Littlejohn*, 1 Ired. 66, 71 (no "precise rule of law" can be made; and the trial Court's discretion as to the ability to find evidence should control); Pa. : 1820, *Miller v. Carothers*, 6 S. & R. 215, 223 (search held sufficient on the facts); S. C. : 1798, *Hopkins v. De Graffenreid*, 2 Bay 187, 192 (search to prove the hand of an old woman "who did not sign her name more than once probably in 50 years," held not necessary in the present case; here, the grantor's signature); 1839, *Dawson v. Dawson*, Rice Eq. 243, 254 (proof of witness' handwriting, unavailable on the facts).

² See the cases *passim* cited in § 1320.

³ 1796, *Keeling v. Ball*, Peake Add. Cas. 86

(d) Distinguish the case where the attestation is to be proved as an element in the *validity of the document*; for here (apart from any such express statutory exemption as is noted in the preceding section) the genuineness of the attester's signature must somehow be proved, like any other element; and if evidence is not offered, the proponent fails, even though it was out of his power to obtain it.⁴

(the witnesses being unknown, proof by the maker's admissions was allowed); 1853, *R. v. St. Giles*, 1 E. & B. 642 (Erie, J., declaring squarely that "in no case whatever, where the instrument is lost and the attesting witness is dead, can it be necessary to prove his handwriting"; *Wightman and Crompton, JJ.*, merely holding that proof of the fact of attestation, and of identity of an attesting person

and a deceased person, was in this case equivalent to proof of handwriting of the witness). Compare the general principle as to *lost documents* (*ante*, § 1314).

⁴ 1848, *Cram v. Ingalls*, 18 N. H. 613, 616 (not excused, *semble*, where instruments are required by law to be attested); and compare § 1513, *post*.

TOPIC I (continued): PROVISIONAL TESTIMONIAL PREFERENCES.

CHAPTER XII

SUB-TOPIC B: PREFERRED REPORTS OF PRIOR TESTIMONY.

§ 1325. Introductory.
 § 1326. (a) Magistrate's Report of Accused's Statement; General Principle.
 § 1327. Same: Magistrate's Report not required if lost or not taken.
 § 1328. Same: Written Examination usable as Memorandum or as Written Confession.

§ 1329. (b) Magistrate's or Coroner's Report of Witness' Testimony.
 § 1330. (c) Report of Testimony at a Former Trial.
 § 1331. (d) Deposition taken *de bene esse*.
 § 1332. (e) Dying Declarations, and other Extrajudicial Statements.

SUB-TOPIC C: SUNDRY PREFERRED WITNESSES.

§ 1335. Official Certificates.
 § 1336. Same: Celebrant's Certificate of Marriage as preferred to Other Eye-witnesses.
 § 1337. Same: Official or Certified Copies of Documents, as preferred to Examined or Sworn Copies.
 § 1338. Presence of Copy-Witness to Recollection-Witness.

§ 1339. Sundry Preferences for Eye-witnesses and other Non-Official Witnesses (Writer of a Document, to prove Forgery; Bank President or Cashier, to prove Counterfeiting; Surveyor, to prove Boundary; etc.).

Sub-topic B: PREFERRED REPORTS OF PRIOR TESTIMONY.

§ 1325. **Introductory.** As another exception to the general principle (*ante*, § 1286) that no classes of witnesses are preferred in our law, there is a well-established doctrine preferring a certain kind of witness in proving the terms of another person's testimony delivered infra-judicially prior to the trial in which it is offered. In determining the scope of this doctrine it is necessary to discriminate between five different sorts of prior testimony, (a) the examination of an accused person before a committing magistrate, (b) the examination of a witness before a committing magistrate, a coroner, or the like, (c) the testimony of a witness at a former trial, (d) the deposition of a witness taken *de bene esse* before an official for the purposes of the present trial, (e) dying declarations, or other statements admissible under Hearsay exceptions.

§ 1326. (a) **Magistrate's Report of Accused's Statement; General Principle.** The theory here is that, since the magistrate is required by law to take down in writing the statement of the accused, the written report thus made at the time is preferred to mere oral (or recollection) testimony of the terms of the statement; *i. e.* the official report is preferred not only to the recollection of any ordinary hearer but even to the recollection of the magistrate himself:

1722, *Eyre, J.*, in *R. v. Reason*, 16 How. St. Tr. 35: "That which is set down in writing, if it be an examination taken in writing of a prisoner before a justice of the peace, you cannot give evidence of that examination *viva voce*, unless the examination be lost."

Ante, 1726, Chief Baron *Gilbert*, *Evidence*, 59: "What is reduced to writing by an officer sworn to that purpose, from the very mouth of the witness, is of more credit than

what a stander-by retains in memory of the same oath; for the images of things decay in the memory, by the perpetual change of appearances, but what is reduced to writing continues constantly the same."

1839, *Parke, B.*, in *Leach v. Simpson*, 5 M. & W. 309, 312: "The written deposition is the best evidence of what was said, and must first be produced before you can inquire by other means as to what passed on the occasion."

1850, *Wilde, C. J.*, *R. v. Christopher*, 2 C. & K. 904, 1000, 4 Cox Cr. 81: "The reason why a deposition is the primary evidence of what passes before the magistrate is that the law casts a duty on the magistrate of taking down what the witnesses say, and the presumption is that he has done it. And therefore that which he so does becomes the best evidence."

Considering the easy accessibility of the testimony thus preferred, and the slightness of the burden imposed in preferring it (*ante*, § 1286), the rule may be regarded as a sound and satisfactory one.

But it will be noticed that it rests on two assumptions,—first, that the written report contains the *entirety of what was said*, and, secondly, that the report was made *in pursuance of an official duty* expressly imposed by law.¹

¹ The following list of statutes includes also those affecting other kinds of testimony, and will be from time to time referred to in the ensuing §§ 1327-1332, 1349: *England*: 1554, St. 1 & 2 P. & M. c. 13, § 4 ("Justices of the peace . . . shall before any bailment or malprize 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"); 1555, 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"); 1826, St. 7 Geo. IV, c. 64, § 2 (the justice shall take the examination of the prisoner "and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing"); 1849, St. 11 & 12 Vict. c. 42, § 17 (the justices shall "take the statement on oath" of the witnesses, and "shall put the same into writing," and cause the witnesses to sign these depositions); § 18 (the justice shall read these depositions to the accused and ask him whether he wishes to say anything in answer, "and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him and shall be signed by the said justices"; provided that nothing herein shall prevent the prosecution from introducing "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"; for other parts of this statute, see the quotation *ante*, § 848); *Canada*: *Dom. Crim. Code* 1892, § 590 (the testimony before a committing magistrate "shall be taken down in writing in the form of a deposition"); § 591 ("whatever

the accused then says in answer thereto [the magistrate's warning] shall be taken down in writing"); *N. Sc. Rev. St.* 1900, c. 36, § 5 (the coroner "shall reduce the statement on oath of any witness to writing"); c. 100, § 121 (similar, for prosecutions for illegal sale of liquor); *United States*: *Ala. Code* 1897, § 5236 (committing magistrate must reduce testimony to writing); *Alaska C. Cr. P.* 1900, §§ 311, 315 (like *Or. Annot. C.* 1892, §§ 1598, 1602); §§ 273, 335, 338, 371 (like *ib.* §§ 1549, 1623, 1627, 1665); *Ariz. P. C.* 1887, §§ 1270, 1345, 1356 (committing magistrate is to reduce deposition to writing at time of complaint; but not at time of commitment, except by way of deposition *de bene*); *St.* 1903, No. 25, amending *Rev. St.* 1901, P. C. § 765 (examination of witnesses before the magistrate "must be reduced to writing as a deposition" in homicide, and in other cases on demand of the prosecuting attorney; the certified report "shall be *prima facie* a correct statement of such testimony"); *Ark. Stat.* 1894, § 1997 (committing magistrate in his minutes shall "make a general statement of the substance of what was proved"); § 756 (testimony before coroner of suspected persons "may be . . . reduced to writing"); § 757 ("the testimony of each witness, if material, shall be reduced to writing"); *Cal. P. C.* 1872, § 702 (threatened offence; the magistrate "must take their depositions in writing" of the informer and his witnesses); § 704 (if the charge is controverted "the evidence must be reduced to writing and subscribed by the witnesses"); § 869 (in cases of homicide, before the committing magistrate, "the testimony of each witness . . . must be reduced to writing; and in other cases, upon the demand of the prosecuting attorney, or the defendant, or his counsel"; it must be "corrected or added to until it conforms to what he [the witness] declares is the truth"; when taken in shorthand and transcribed and "certified as being a correct state-

(1) As to the first requirement, its non-fulfilment would perhaps not affect the propriety of the present rule of mere preference so much as the propriety

ment of such testimony," it "shall be *prima facie* a correct statement of such testimony and proceedings"; *Colo. Annot. Stata. 1891*, § 226 (examination of complainant and accused in bastardy "shall be taken down in writing"); § 874 (testimony before coroner "shall be reduced to writing"); *Conn. Gen. St. 1887*, § 2011 (coroner "shall reduce to writing" the testimony before him); § 157 (testimony at fire inquest to be reduced to writing and subscribed); § 3105 (illegal liquor-selling; testimony by intoxicated person "shall be taken down in writing by the magistrate or clerk," and subscribed); *D. C. Comp. St. 1894*, c. 14, § 2 (coroner "shall put in writing the effect of the evidence . . . being material"; and justices binding over witnesses "shall certify as well the same evidence as such bond or bonds in writing as he shall take"); *Code 1901*, § 194 (for the coroner, "it shall be his duty . . . to reduce the testimony of the witness to writing"); *Del. Rev. St. 1893*, c. 33, § 4 (coroner; testimony of each witness "if material, shall be reduced to writing" and signed; voluntary examination of suspected person shall "be reduced to writing" and signed by him if willing); c. 97, § 18 (committing magistrate shall reduce to writing the voluntary examination of accused, in cases of felony; he shall also reduce the witness' testimony to writing, "if material," and have it signed); *Fla. Rev. St. 1892*, § 3018 (at coroner's inquest, "the evidence of such witnesses shall be in writing, subscribed by him or her"); *Ga. Cr. C. 1895*, § 910 (defendant's statement; "it shall be the duty of the Court to reduce it to writing"); § 911 (in felony charge, "the Court shall cause an abstract of all the evidence to be made and returned"); § 1265 (coroner "shall commit to writing the substance of the testimony"); *Haw. Penal Laws 1897*, § 979 (testimony at an inquest "shall be reduced to writing by the Coroner or some other person by his direction"); *Ida. Rev. St. 1887*, § 8382 (testimony at coroner's inquest "must be reduced to writing"); § 7576 (before committing magistrate, testimony "must be reduced to writing, as a deposition"); § 7383 (testimony on information of threatened offence "must be reduced to writing"); § 7516 (information before magistrate; he "must" take witness' depositions in writing"); *Ill. Rev. St. 1874*, c. 38, §§ 320, 348 (complaint to magistrate shall be reduced to writing); c. 32, § 18 (coroner is to have testimony of each witness "written out and signed by said witness"); *Iad. Rev. St. 1897*, § 1004 (justice must reduce to writing the woman's examination in bastardy); § 8324 (Court taking examination of witness brought by prosecuting attorney to complain "shall cause so much of said testimony as amounts to a charge of a felony or misdemeanor to be reduced to writing and subscribed and sworn to"); *Ia. Code 1897*, § 520 (testimony before coroner shall be reduced to writing); § 5227 (committing magistrate "shall" cause the "substance of the testimony"

to be written out); § 5239 (when defendant waives examination, magistrate "shall take the evidence in writing of the State's witnesses," on county attorney's demand); *Kan. Gen. St. 1897*, c. 102, § 81 (committing magistrate shall reduce testimony to writing "when he shall think it necessary"); c. 27, § 141 (testimony before coroner "shall be reduced to writing"); *Ky. Stats. 1899*, § 830 (coroner shall "commit to writing the substance of the evidence"); *La. Rev. L. 1897*, § 662 (testimony at coroner's inquest "shall be reduced to writing"); *Me. Pub. St. 1883*, c. 139, § 7 (testimony at inquest "shall be in writing and signed by them"); c. 133, § 12 (at preliminary examination, magistrate may reduce to writing and have signed any witness' testimony, "when he thinks it necessary"); *Mass. Pub. St. 1882*, c. 212, § 32, *Rev. L. 1902*, c. 217, § 39 (witness' testimony is to be reduced to writing, and, if the Court requires, to be signed by witness); *Mich. Comp. L. 1897*, § 11801 (magistrate examining complainant shall "reduce such examination to writing"); § 11823 (testimony before justice at an inquest "shall be reduced to writing"); § 11853 (testimony before committing magistrate "shall be reduced to writing"); *Miss. Gen. St. 1891*, § 849 (testimony before coroner "must be reduced to writing"); § 7146 (testimony before committing magistrate "shall be reduced to writing"); *Miss. Annot. Code 1892*, § 823 (coroner "shall put in writing so much of the evidence given to the jury before him as shall be material"); *Mo. Rev. St. 1899*, § 2454 ("in cases of homicide, but in no other," the evidence before a committing magistrate "shall be reduced to writing"); § 4621 (testimony of probate in support of will "shall be reduced to writing"); *Mont. P. C. 1895*, §§ 1431, 1680 (like Cal. P. C. §§ 702, 899); § 2795 (testimony before coroner "must be reduced to writing"); *Neu. Gen. St. 1885*, §§ 2689, 2704 (testimony at probate of will "shall be reduced to writing"); § 2262 (testimony before coroner "shall be reduced to writing"); §§ 4929, 4930 (so also for testimony compelled to be given in certain cases where privilege is abolished); § 3926 (threatened offences; magistrate shall take "deposition in writing" of complainant and his witnesses); § 3922 (when person complained of is brought before magistrate, he shall reduce to writing the evidence); § 3988 (complaint of offence committed; magistrate "may require their depositions to be reduced to writing"); § 4036 (at examination of defendant before committing magistrate, testimony by consent of parties "may be reduced to writing"); § 4041 (accused's statement must be reduced to writing"); § 4056 (deposition taken by magistrate conditionally "shall be reduced to writing"); *N. H. Pub. St. 1891*, c. 252, § 7 (testimony "may be reduced to writing by the magistrate, or under his direction, when he deems it necessary, and shall be signed by the witness"); §§ 8, 9 (magistrate "may take the examination in writing of the

of the rule of the conclusiveness of the report (*post*, § 1349). Moreover, although the statute do not in all cases expressly require the whole to

accused person " where the case requires it, " if the accused after being cautioned consents thereto"; the caution warning him that " the questions and answers will be written and preserved and may be evidence upon his trial"; c. 262, § 12 (testimony before coroner " shall be drawn up in writing and subscribed"); *N. J. Gen. St.* 1896, Coroners § 14 (the coroner " shall put in writing the effect of so much of the evidence given to the jury before him as shall be material"); *N. M. Comp. L.* 1897, § 3379 (magistrate committing for felony; testimony is to be " reduced to writing" by stenographer for transmission to grand jury); § 1982 (testimony of all witnesses shall be " reduced to writing"); *N. F. C. Cr. P.* 1881, § 87 (testimony before magistrate must " be reduced to writing" and subscribed); § 778 (testimony before coroner " must be reduced to writing" by him); § 204 (testimony before committing magistrate must be reduced to writing and subscribed); *N. C. Code* 1883, § 1147 (testimony of accused before magistrate " shall be reduced to writing"); § 1150 (same for witnesses); *N. D. Rev. C.* 1895, § 7767 (threatened offences; evidence before magistrate " must on demand of the defendant be reduced to writing"); § 7941 (like *Okl. Stats.* § 5004); § 2019 (testimony before coroner " must be reduced to writing"); *Ok. Rev. St.* 1898, § 5615 (magistrate is to reduce to writing testimony of bastardy complainant); § 6055 (same for proceedings against one embezzling decedent's property); § 1221 (same for witnesses before coroner); *St.* 1903, Mar. 14, p. 56, § 3, amending *Rev. St.* § 1221 (the testimony before the coroner " shall be reduced to writing"); *Okl. Stats.* 1893, § 4890 (threatened offence; evidence must " on demand of the defendant be reduced to writing"); § 5005 (before committing magistrate, on defendant's demand " all the testimony in the case must be reduced to writing in the form of depositions"); § 1192 (testimony of subscribing witnesses to will " must be reduced to writing"); § 1207 (so also for witnesses to lost or destroyed will); § 4382 (so also for examination of insolvent debtor); § 1750 (testimony before coroner " shall be reduced to writing"); *Or. C. Cr. P.* 1892, § 1598 (statement of defendant before committing magistrate " must be reduced to writing"); § 1602 (testimony of witnesses " need not be reduced to writing," except that depositions are taken at time of complaint made); §§ 1549, 1623 (complaints must be reduced to writing and witnesses' depositions taken); § 1665 (testimony before coroner " must be reduced to writing"); *Pa. St.* 1869, P. & L. Dig., Fires § 4 (testimony of witnesses at fire inquest " shall be reduced to writing"); *R. I. Gen. L.* 1896, c. 287, § 17 (coroner " shall cause the testimony to be reduced to writing" and subscribed); *S. C. St.* 1839, Gen. St. 1882, § 2675, C. Cr. P. 1893, § 591, *Crim. Code* 1902, § 712 (the coroner is to take testimony of witnesses in writing); *C. Cr. P.* 1893, § 23 (the justice " may take " a witness' examination and

have it subscribed; but this is apparently repeated in *Vr. Code* 1902, § 21); *S. D. Stats.* 1899, § 8301 (like *N. D. Rev. C.* § 7767); § 8419 (like *N. D. Rev. C.* § 7961); § 6904 (at a will-probate, " the testimony of each witness, reduced to writing and signed by him, shall be taken"); § 8897 (testimony on search-warrant proceedings must be reduced to writing); § 993 (testimony before coroner " shall be reduced to writing"); *Tenn. Code* 1896, §§ 7017, 7021 (accused's statement to be taken in writing by magistrate, and signed by accused or refusal noted; witness' testimony to be taken in writing by magistrate or under his direction, and signed by witness); *Tex. Rev. Civ. Stats.* 1895, § 1907 (testimony on will-probate " shall be committed to writing"); *C. Cr. P.* 1895, § 283 (accused's statement before magistrate " shall be reduced to writing"); § 288 (the witnesses' testimony also " shall be reduced to writing"); § 941 (justice of the peace examining witness for disclosure of crime " shall reduce said statements to writing"); § 1028 (testimony at coroner's inquest " shall be reduced to writing"); § 1049 (so also at fire inquest); *Utah Rev. St.* 1898, § 4523 (threatened injury; magistrate " may take their depositions in writing" of complainant and his witnesses); § 4528 (on the hearing, " the evidence, on demand of the person complained of, must be reduced to writing"); § 4670 (preliminary examination; like *Cal. P. C.* § 869, omitting " or the defendant or his counsel"); § 1229 (coroner " may require the testimony to be written"); § 3793 (testimony at will-probate " shall be reduced to writing"); *Vt. Stats.* 1894, § 4715 (justice at inquest " shall take the substance of the testimony of each witness in writing"); *Va. Code* 1887, § 3968 (committing magistrate may reduce testimony to writing if he " deems it proper"); § 3942 (coroner " shall " reduce testimony to writing); *W. Va. Code* 1891, c. 155, § 4 (testimony before coroner " shall be reduced to writing" and subscribed); c. 156, § 14 (testimony before committing justice shall be, " when the justice deems it proper or the accused shall desire it"); *Wash. C. & Stats.* 1897, § 6105 (" all the testimony adduced in support of the will [at probate] shall be reduced to writing, signed by the witnesses, and certified by the judge of the court"; so also § 6117); § 6682 (threatened offence; magistrate shall reduce testimony to writing); § 6699 (preliminary examination; testimony " shall be reduced to writing by the magistrate, or under his direction, when he shall think it necessary"); § 6708 (witness before magistrate, recognizing for appearance; magistrate " shall immediately take the deposition of such witness"); § 532 (testimony before coroner " shall be reduced to writing" " in all cases where murder or manslaughter is supposed to have been committed"); *Wis. Stats.* 1898, § 4790 (testimony before committing magistrate " shall be reduced to writing"); § 4818 (threatened offence; magistrate shall " reduce such

be taken down, it is also true that the original English statutes under which the rule grew up did not require the whole to be taken. (2) As to the second requirement, it is clear that there is no general principle in the law of evidence which makes an official report a preferred testimony to the facts reported (*ante*, § 1286). On the contrary, the official duty leading to the report is merely that which suffices to make the report admissible at all, under an exception to the Hearsay rule (*post*, § 1632), instead of calling the reporter to the stand; the fact of an official duty barely suffices to secure admissibility, and cannot be thought in itself and in general to go so far as to create a preference. While it may be conceded, then, that the preference for the magistrate's report is in the specific instance a satisfactory rule, this result is to be regarded as an exceptional and unusual step, taken solely because of the official duty requiring the report; and therefore it is at least necessary that such an official duty should be expressly imposed by law. A report made merely by custom, or casually, and not under such a statutory duty, is not to be accorded such a preference. The terms of the statutes in the various jurisdictions have therefore to be kept in mind.

This rule of preference, then, though not conceived of in England until the second century following the enactment of the first statute requiring the magistrate's report in writing,² has long been there established.³ In the United States, it seems to be generally accepted (with variances) wherever a statute makes it the magistrate's duty to report the statement in writing.⁴

Whether the report is *conclusive*, *i. e.* may be shown to be erroneous or incomplete, is a question dealt with elsewhere (*post*, § 1349).

§ 1327. *Sams: Magistrate's Report not required if lost or not taken.* The notion of conditionally preferred testimony (*ante*, § 1286) is that it must be used before any other, *if it can be*. Hence, if the preferred testi-

complaint to writing"); § 4872 (testimony before coroner "shall be reduced to writing," "in all cases where murder or manslaughter is supposed to have been committed"); *Wyo. Rev. St.* 1887, § 1882 (testimony before coroner "shall be reduced to writing").

² The doctrine first appears about 1720, in the time of *R. v. Reason* and *Gilbert's treatise*, quoted *supra*; before that time the magistrate came on the stand and testified orally, usually referring to his notes of the examination; for example: 1679, *Green's Trial*, 7 *How. St. Tr.* 159, 192, 194 (the officer taking the examination testifies to the utterances without reading the examination); 1682, *Coningsmark's Trial*, 9 *id.* 1, 23 (same); though the written examinations were in Court).

³ See the cases cited in the ensuing sections.

⁴ 1792, *Benedict v. Nichols*, 1 *Root* 434 (defendant's examination on oath touching possession of deceased's effects; being "officially taken," it was "not to be proved by parol testimony"); 1896, *Leggett v. State*, 97 *Ga.* 426, 24 *S. E.* 165 (magistrate's report of accused's testimony, preferred to oral evidence); 1874, *Wright v. State*, 50 *Miss.* 332 (written examina-

tion by justice must be used); 1835, *People v. White*, 14 *Wend.* 111, 123 (statements at examination not orally provable, unless the examination was never reduced to writing); 1836, *People v. Moore*, 15 *id.* 419, 421, *amb.* (deposition must be produced, if taken); 1853, *Alfred v. Anthony*, 2 *Swan* 581, 590 (magistrate's writing preferred); 1902, *Grimsinger v. State*, — *Tex. Cr.*, — 69 *S. W.* 533 (confession reduced to writing by the clerk of the grand jurors; writing not required to be put in). See also the cases in the ensuing sections, where the doctrine is assumed to exist; and also the cases requiring the written examination to be produced in proving an inconsistent statement to *impeach the accused's testimony* (*ante*, §§ 1262, 1263).

It has been sometimes improperly preferred where no statutory duty exists: 1879, *State v. Branham*, 13 *S. C.* 389, 396 (deposition of accused, taken without statutory authority; writing must be produced as preferred testimony, "where there was no obstacle"). But see this case explained *post*, § 1328.

The magistrate, if it is his duty, is *presumed* to have made a written report; *post*, § 1327.

mony is unavailable, either because it is lost or otherwise inaccessible, or because it never existed, the requirement of its use ceases. The magistrate's report, then, is not required, and any other testimony to what was said may be used, if the magistrate's report is lost or otherwise inaccessible,¹ or if it was irregularly taken so as to be inadmissible,² or if it was never taken in writing at all.³ But the party wishing to use such other testimony *must show* that the preferred testimony is unavailable; for, if a law imposed a duty for the magistrate to report in writing, it is properly assumed that the magistrate performed his duty and that such a report exists.⁴

§ 1328. **Same: Written Examination usable as Memorandum or as Written Confession.** If the magistrate's written report is inadmissible as such, because not taken regularly under the statute, it may still be employed in other aspects. (1) It may be referred to by the magistrate as *refreshing his present memory* or as a record of his past recollection (*ante*, § 737, 761).

1722, *Pratt, C. J.*, in *Layer's Trial*, 16 How. St. Tr. 214: "Your objection . . . will if they were going to read a confession as evidence which was neither . . . signed by him. But if there is no examination reduced into writing and signed by the party, the consequence of that is that the witness is at liberty to give an account of what was said, and he may look to his notes to refresh his memory. . . . You say there is no precedent for it; for God's sake, recollect yourself; it is every day done at the Old Bailey; if a person confesseth and it be not in writing, they do prove his confession *via record*."

(2) It may have been *orally acknowledged by the accused* to be correct, after it was read over to him, and may thus be receivable, not as the magistrate's report of the accused's statement, but as the statement itself in writing; an

¹ *R. v. Reason*, quoted *ante*, § 1326; and the citations in the next section; and the following cases: 1899, *R. v. Troop*, 50 N. Sc. 339 (witness' contradictory testimony at the preliminary hearing, allowed to be proved by one present, the magistrate's report being lost; good opinion by Henry, J.; two judges thought that its loss was immaterial); 1901, *Marx v. Hart*, 166 Mo. 503, 66 S. W. 260 (statements of the opponent, at the time of taking his deposition, admitted, the deposition being lost).

² 1791, *Lambe's Case*, 2 Leach Cr. L. 3d ed. 625 (quoted in the next section); 1829, *R. v. Hayman, M. & M.* 403; 1838, *R. v. Wilkinson*, 9 C. & P. 662 (other evidence of a defendant's statement admitted, where a magistrate had merely returned a subsequent memorandum noting that the defendant had said nothing); 1813, *Jenns v. Wheelon*, 2 Moo. & Rob. 486.

³ 1722, *Layer's Trial*, 16 How. St. Tr. 214 (quoted in the next section); 1835, *People v. White*, 14 Wead. 111, 123; 1794, *State v. Irwin*, 1 Hayw. 112 ("There is certainly an impropriety in saying that evidence may be received of a confession made before a private man and that the same confession made before a justice shall not [be] because he hath omitted to perform his duty. This would put it in the power of a justice to make the confession evidence or not, at his election, and is a power the law never meant to give him. The Act is only

directory; and if the Justice should not do his duty in the obeying it, that shall not be of so much prejudice to the State that the evidence shall be lost by it"); 1853, *State v. Parish*, Buabee L. 239 (oral evidence allowed, where the examination was not reduced to writing).

⁴ 1779, *Jacob's Case*, 1 Leach Cr. L., 3d ed., 347 (as also in *Hinxman's Case* and *Fisher's Case*, cited in a note); 1850, *R. v. Hollingshead*, 4 C. & P. 242; *Phillips v. Wimburn*, ib. 273; 1857, *R. v. Coveney*, 6 Bl. 667 (it is presumed that all was taken); 1848, *R. v. Martin*, 6 State Tr. N. S. 925, 989; 1852, *R. v. McGovern, Ire.*, 5 Cox Cr. 506, *Torrans, J.* (with hesitation); 1899, *Overtoom v. R. Co.*, 181 Ill. 323, 54 N. E. 898 (a coroner, required by law to take in writing); 1874, *Wright v. State*, 60 Miss. 332, 335.

⁵ *Accord*: 1819, *R. v. Telicote*, 2 Stark. 483 (noting its availability as a memorandum for the clerk); 1825, *Dewhurst's Case*, 1 Lew. Cr. C. 46 (the accused neither signing nor admitting the truth of the writing, oral evidence of the accused's oral statement was given by the clerk, using the writing to refresh his memory; two other cases noted, *accord*); 1831, *R. v. Bell*, 5 C. & P. 162 (the clerk reading in the third person); 1833, *R. v. Pressley*, 6 id. 183; *R. v. Tarrant*, ib. 182; 1851, *R. v. Watson*, 3 C. & K. 111.

oral acknowledgment and adoption of its terms being the same in effect as a signing of it. In such a case, if the writing is produced, it is not as the preferred magistrate's report, but as the confession itself made in writing :

1791, *Grose, J.*, in *Lambe's Case*, 2 Leach Cr. L. 3d ed. 625, 630 (an examination before a magistrate reduced to writing, but not signed by magistrate or recused, but orally acknowledged by the latter to be true when read over to him by the clerk): "The intention of the Legislature in passing the statute is clear and obvious. Its only object is to enable Justices of the Peace to take such information and to transmit what passes before the committing magistrate to the Court of Oyer and Terminer or Gaol Delivery, to enable the judge and jury before whom the prisoner is tried to see whether the offence is bailable, and whether the witnesses are consistent or contradictory in the evidence they give. . . . There is not a single expression in either of the statutes from which it is to be collected that the examination was directed to be taken merely as evidence against the prisoner. Nor indeed is the examination in practice ever given in evidence as a matter so required by the statutes, but containing a detail of circumstances taken under the solemnity of a public examination for a different purpose, it is more authentic on account of the deliberate manner in which it is taken. . . . The examinations which they directed to be taken became evidence, where they contained confessions, by operation of law, leaving all other confessions, good or bad, as they were before those statutes were made. . . . The examination, or paper-writing, . . . was under the circumstances of the case well received."²

If, then, this written confession is desired to be proved, the writing must be produced or accounted for (*ante*, § 1230). Nevertheless, it would seem that the oral statement of the accused and his subsequent adoption of the written report are in fact two distinct statements, and therefore if it were desired to prove the first and oral one, it would not be necessary to produce the second and written one.³

It should be noted, however, that so far as the accused's statement as such is inadmissible by the rules applicable to confessions before a magistrate (*ante*, §§ 842-852), then both the official report and the oral acknowledgment of it are alike inadmissible.

§ 1329. (*b*) **Magistrate's or Coroner's Report of Witness' Testimony.** So far as the law imposes on a committing magistrate or a coroner the duty of making a written report of the testimony delivered before him, the principle just examined (*ante*, § 1326) makes this official report a preferred testimony, to be used in preference to any other :

1742, *Annesley's Trial*, 17 How. St. Tr. 1121; a deposition before the coroner was read; the coroner was asked: "Are these all the minutes that you took?" *Coroner*: "If I may say anything more from my memory, I will do it;" *Counsel*: "Then we will go upon the parole evidence;" *Counsel for the opponent*: "When an officer has taken things down in writing, it is of dangerous consequence to admit parole evidence to be given of the same things;" *Counsel*: "We do not insist upon it."

1839, *Abinger, L. C. B.*, in *Leach v. Simpson*, 7 Dowl. Pr. 513, 515: "When testimony

² *Accord*: 1794, *R. v. Thomas*, 2 Leach Cr. L. 3d ed. 727 (after a first reading, the accused acknowledged its correctness; upon a later reading, he denied it; admitted); 1827-8, *Foster's Case* and *Hirat's Case*, 1 Lew. 46 (a confession read over, the accused not signing nor asked to sign; excluded, because "there was

nothing to show that she admitted it to be true").

³ *Contra*: 1879, *State v. Branham*, 13 S. C. 389, 397 (though the magistrate has no duty to examine and report in writing, yet if he does, and the accused signs, the writing must be produced).

has been reduced to writing by a person of competent authority, the writing is in the first instance, the only proper evidence of that testimony"; *Parke, B.*: "That deposition is the best evidence of what was said."

1875, *Brett, J.*, in *R. v. Taylor*, 13 Cox Cr. 77: "Being before the magistrates, and the law saying that the deposition is primary evidence, the deposition should be put in; but for that reason only."

This application of the principle, like the preceding one, was not recognized till the 1700s;¹ but since that time it has been unquestioned in England.² In the United States also it is accepted, with only an occasional contrary ruling; for there is no reason to discriminate between an accused's statement and a witness' testimony, except so far as the statute may in the latter case not impose the duty of reporting it in writing.³

The same qualifications here apply that have been noted for the case of an accused's statement in the preceding sections. The preference being only conditional upon the availability of the magistrate's report, any qualified witness is receivable if the official written report is lost or otherwise inaccessible,⁴ or if it is inadmissible because irregularly taken,⁵ or if it was never

¹ 1679, *Wakeman's Trial*, 7 How. St. Tr. 591, 651 (Oates' examination before the Council, proved orally by one of the Councillors); 1679, *Knox's Trial*, ib. 763, 789 (justice's examination proved orally by the justice).

² 1789, *Warron Hastings' Trial*, *Lords' Journal*, May 27 (Nuncoinar's examination having been taken down in writing, an oral report of it was excluded); 1839, *R. v. Taylor*, 8 C. & P. 726; 1839, *Leach v. Simpson*, 5 M. & W. 309, 7 Dowl. Pr. 513 (applied to civil and criminal cases equally); 1877, *R. v. Dillon*, 14 Cox Cr. 4 (an information in writing before a magistrate, the charge itself being made orally; the written information required).

³ To the following, add the cases, cited *ante*, §§ 1262, 1263, requiring a deposition to be produced for contradicting a witness, and the cases in the next notes *infra*: *Ark.*: 1839, *Dunn v. State*, 2 Ark. 229, 248 (defendant's affidavit before coroner, and coroner's testimony on the stand as to the examination before him, excluded, the written report of the examination being available); 1855, *Atkins v. State*, 16 id. 568, 588 (witness' prior inconsistent testimony before magistrate; deposition must be produced if available); 1876, *Talbot v. Wilkins*, 31 id. 411, 421 (testimony before bankruptcy-commissioners; written deposition "the only admissible evidence"); 1878, *Shackelford v. State*, 33 id. 539, 542 (deceased witness before examining magistrate, the law requiring only a reduction of the substance in general to writing; oral evidence allowed); 1894, *Cole v. State*, 59 id. 50, 52, 28 S. W. 377 (defendant's inconsistent testimony at inquest; coroner's report required); *Cal.*: 1866, *People v. Robles*, 29 Cal. 421, *semble* (magistrate's report not required); 1872, *Hobbs v. Duff*, 43 id. 485, 490, *semble* (written record necessary; here it showed that there had been nothing to record); 1872, *People v. Devine*, 44 id. 452, 458 (contradiction in deposition; showing the deposition not required); 1875,

People v. Curtis, 50 id. 95 (under P. C. § 869, the magistrate's report is not preferred); *Ga.*: 1875, *Cicero v. State*, 54 Ga. 156, 158 (magistrate's examination, if taken, preferred to oral report, and must be accounted for); 1882, *Williams v. State*, 69 id. 11, 30 (whether the magistrate's report of testimony is preferred to any other, left undecided); 1900, *Haines v. State*, 109 id. 526, 35 S. E. 141 (magistrate's report, not preferred); *Ill.*: 1899, *Overtoom v. R. Co.*, 181 Ill. 323, 54 N. E. 898 (coroner's report of inquest-testimony, preferred to party's stenographer's report); *Ind.*: 1878, *Woods v. State*, 63 Ind. 353, 357 (oral testimony excluded, where the examination had been reduced to writing, in accordance with the law; unless the writing is unavailable); *Mich.*: 1868, *Lightfoot v. People*, 16 Mich. 507, 513 (said to be "presumptively the best evidence"); 1889, *People v. Hinchman*, 75 id. 587, 589, 42 N. W. 1006 (preliminary examination; report in the "only admissible evidence," when "present in Court"); *N. J.*: 1824, *State v. Zellera*, 7 N. J. L. 220, 236 (coroner being obliged to take the testimony in writing, other evidence of it was rejected); *S. C.*: 1868, *State v. Jones*, 29 S. C. 201, 227, 7 S. E. 296 (coroner's report of testimony, termed the "best evidence"; *Branham case*, *ante*, § 1328, approved); *Tenn.*: 1872, *Wade v. State*, 7 Baxt. 80, 81, *semble* (any one may report the testimony, even if the magistrate has taken it in writing); 1872, *Titua v. State*, ib. 132, 137 (magistrate's writing is the "best evidence of what she did say").

⁴ 1722, *R. v. Reason*, 16 How. St. Tr. 31, 35 (magistrate's report required, "unless you show you are disabled to do it by some accident or other"; "unless the examination be lost"); 1844, *Pearce v. Furr*, 2 Em. & M. 54, 58 (lost report of examination by magistrate; magistrate allowed to testify to the witness' testimony itself; but the Court assumed this to be equivalent to the contents of the paper).

⁵ 1881, *Roberts v. State*, 68 Ala. 515, 525

taken in writing at all;⁶ and it is assumed, until the contrary is shown, that the magistrate has done his duty by making a written report.⁷

Whether the report may be shown to be erroneous or incomplete is another question (*post*, § 1349).

§ 1330 (c) **Report of Testimony at a Former Trial.** (1) There has never been, in the practice of the common law, any person required or even authorized by law to take in writing the testimony of the witnesses. Hence, the rule from the beginning has always been that no preferred witness is recognized, in proving testimony given at a former trial; in other words, any one who heard it may testify from recollection, with or without the aid (*ante*, §§ 737, 761) of written notes:

1810, *Mansfield, C. J.*, in *Doncaster v. Day*, 3 Taunt. 262: "What a witness has sworn . . . may be given in evidence either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given."¹

(2) The report of a *stenographer* is no doubt more trustworthy in the ordinary case than mere recollection; but regard being had to the serious burden of searching for a preferred source of evidence and of showing it to be unavailable (*ante*, § 1286), the advantage to be gained by requiring a stenographic report to be used if available does not seem worth the inconvenience; and such an innovation is properly discouraged by the Courts:

1891, *McIver, J.*, in *Brice v. Miller*, 35 S. C. 537, 549, 15 S. E. 272: "While it may be true that what a witness writes down himself, or what is contained in some paper written by another and signed by himself, may be the best evidence of what the witness has said on a former occasion, it does not follow that where a third person, be he stenographer or not, takes down in writing what a witness said, this writing is the best evidence, in such a sense as to exclude any other. Stenographers are no more infallible than any other human beings, and while as a rule they may be accurate, intelligent, and honest, they are not always so; and therefore it will not do to lay down as a rule that the stenographer's notes when translated by him are the best evidence of what a witness has said, in such a sense as to exclude the testimony of an intelligent bystander who has heard and paid particular attention to the testimony of the witness."²

(reduced to writing, but not signed; any one who heard, admissible); 1880, *Brown v. State*, 71 Ind. 470, 475 (the testimony being taken irregularly in writing, oral report was admitted); 1840, *People v. White*, 24 Wend. 520, 533 (the witness' statement before the coroner may be proved orally to contradict him, where the coroner's writing was inadmissible); 1874, *Alston v. State*, 41 Tex. 40 (irregularly taken; oral report admissible).

⁶ 1877, *Nelson v. State*, 32 Ark. 192, 196 (perjury before a coroner; the testimony not being reduced to writing, oral evidence allowed); 1882, *Robinson v. State*, 68 Ga. 833; 1872, *Wade v. State*, 7 Baxt. 80, 81.

⁷ 1779, *R. v. Fearshire*, 1 Leach Cr. L. 3d ed., 240; and cases cited *ante*, § 1327. *Contra*: 1875, *People v. Curtis*, 50 Cal. 95, *semble*.

¹ *Accord*: 1685, *Fernley's Trial*, 11 How. St. Tr. 381, 434; Ga. Code 1895, § 5186, Cr. C.

§ 1001 (provable by "any one who heard it"); 1870, *Roth v. Smith*, 54 Ill. 431; 1871, *Hutchings v. Corgan*, 59 id. 70 (by a juror, admitted); Oh. Rev. St. 1893, § 5242 a; 1850, *Kendrick v. State*, 10 Humph. 479, 488.

Whether in *malicious prosecution* the former testimony can be proved only by the witness himself involves another question (*post*, § 1416).

² *Accord*: 1895, *Sanders v. State*, 105 Ala. 4, 16 So. 935, *semble*; 1893, *Maxwell v. R. Co.*, 1 Marv. 199, Del. Super., 40 Atl. 945 (report of testimony taken before grand juryman; a jurymen may testify to testimony there given yet not found in the report); 1894, *German N. Bank v. Leonard*, 40 Nebr. 676, 684, 59 N. W. 107; 1891, *Brice v. Miller*, 35 S. C. 537, 549, 15 S. E. 272 (quoted *supra*); 1898, *Garrett v. Weinberg*, 54 id. 127, 31 S. E. 341 (stenographer's report not preferred to counsel's notes); 1897, *Kellogg v. Scheuerman*, 18 Wash. 293, 31

That the *stenographer* is an *official one* does not make the case any stronger so far as concerns the probable accuracy of the report; nor does it bring the case within the principle of the preceding sections, for the stenographer does not act as an independent officer of the Court, but only under the orders of the judge or the State's counsel; in most jurisdictions the official duty of the stenographer has not even sufficed to admit the reports as an exception to the Hearsay rule (*post*, § 1669), and there seems little judicial disposition to require such reports to be produced as preferred testimony.³—Whether former testimony *may* be proved at all by a judge's notes or by any other hearsay reports is another question (*post*, §§ 1666-1669).

§ 1331. (d) **Deposition taken de bene esse; Affidavit.** A deposition, in the narrow sense of the word, *i. e.* testimony given extrajudicially before a specially authorized officer for the purpose of subsequent use at a trial, stands upon a footing entirely different from that of the preceding sorts of testimony. In a deposition, the testimony *is* the writing taken down by the officer and signed by the deponent. The officer's writing is not his report of the witness' oral deposition; there is only one testimonial utterance,—the writing. It is on its face singular that this difference of theory should be so solidly established between a deposition in the narrow sense and the testimony before a committing magistrate, because in both cases the writing is commonly required to be signed by the witness. But the explanation seems to lie in the history of the two kinds of testimony. In the common-law theory of trials, the testimony was what the witness said orally before the jury or the magistrate. In the statute of 1554 (quoted *ante*, § 1326) the magistrate was required to reduce it to writing; but the general theory continued unaltered. But at that time, and until the 1800s, there were in common-law practice no depositions *de bene* (*post*, § 1376). The power to order these taken was conceived to be exercisable in Chancery alone, and the statutory conferring of these powers on the common-law Courts in the 1800s was merely a grant of such power and practice as had been recognized in Chancery. Now the Chancery practice was moulded after the practice of the Canon law in the Ecclesiastical Courts; and in this practice all testimony was taken in writing, and in the theory the testimony or deposition was the writing and nothing else. The result was that the statutory adoption of the Chancery deposition-practice in the common-law Courts involved naturally the adoption of its theory of testimony as applied to depositions. Thus, side by side, in the common-law Courts, was found one theory for ordinary testimony and another for depositions *de bene*.

Pa. 314 (stenographer's report of testimony of defendant in malicious prosecution, not preferred to defendant's own account of it); 1883, *Rounds v. State*, 57 Wis. 45, 51, 14 N. W. 865 (stenographic report of testimony of defendant and witnesses, not preferred). Compare the cases of *contradictory testimony* (*ante*, § 1263).

³ *Not required*: 1886, *Brown v. State*, 76 Ga. 626; 1897, *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 157; 1876, *State v. McDonald*, 65 Me.

467 (it "may be proved by any one who heard and recollects it"). *Required*: 1894, *Carrico v. R. Co.*, 39 W. Va. 86, 90, 19 S. E. 571 (but where the witness made an illustration not reported, it was shown by other testimony). Compare Pa. St. 1887, P. & L. Dig. Witnesses, § 6 (notes of former testimony may be used; but oral proof suffices where the testimony is used merely to contradict); and the cases cited *ante*, § 1263.

It results from this, of course, that the written deposition, being itself the only testimonial utterance, must be produced, like any other writing, — a rule unquestioned. Furthermore, if the written deposition is lost, the whole is lost, for there is no other testimonial utterance; hence, the terms of the lost writing are the thing to be proved, not the oral answers to the questions.¹ So, too, if the written deposition, being irregularly taken, is inadmissible, the oral answers cannot be proved.

For an *affidavit*, as for a deposition, the writing is the sole testimonial utterance; and the deductions from this theory applies equally to affidavits.²

§ 1332. (e) **Dying Declarations, and other Extrajudicial Statements.** Here it is necessary to notice three discriminations. (a) Where A orally makes a statement, and afterwards makes in writing a statement on the same subject, the two are distinct, and the oral one may be proved without regard to the writing. (b) Where A makes an oral statement, and B writes down its terms, B's writing is merely B's statement of what A has said; and unless B is a preferred witness, A's oral statement may be proved by any hearer without calling for B's writing. (c) Where A and B are negotiating, and the terms of the transaction are reduced to a writing adopted by both, the oral negotiations become immaterial and the writing, being the only act recognized in law, may alone be used, on the principle of integration (*post*, § 2425). With these distinctions in mind, it remains to examine the rules applicable to written testimonial statements admissible under Hearsay exceptions.

(1) *Dying declarations.* (a) Where an auditor has made a written statement of the declarant's oral utterances, this written statement is not preferred testimony, and therefore need not be produced;¹ for there never was any principle in the law of evidence preferring one person's written memorandum of testimony to another's oral or recollection testimony. Nor is the case changed because the person thus making a written statement was a magistrate having power to administer oaths or take testimony on a preliminary hearing;² for such a person has no duty or authority by law to report dying declarations, and it is solely by virtue of an express duty, as we have seen, that a magistrate's report of testimony is preferred to other witnesses. (b) Where a written memorandum thus taken down is read over to the declarant and *signed by him*, the writing becomes a second and distinct declaration by him, and therefore on principle his first and oral declaration is provable by any auditor without producing the second and written one. Such is the result accepted by a few Courts;² but the majority, misapprehending the nature of the written utterance, and proceeding apparently on the mistaken analogy of a deposition, require the writing to be produced.² Of course, if the written one is desired to be proved, it must be produced.

¹ 1840, *Com. v. Stone*, Thacher Cr. C. 604, 608 (a deposition *in perpetuum* was not recorded in season; on a charge of perjury in it, the deposition not being receivable, the parol testimony was excluded).

² 1877, *State v. Kirkpatrick*, 32 Ark. 117, 119 (perjury by affidavit; production required).

¹ Cases cited *post*, § 1450.

² Cases cited *post*, § 1450.

(e) Where the declarant makes one oral statement, and afterwards on a separate occasion a second statement, the latter being in writing or orally made but taken down in writing and signed, there are here clearly two distinct statements (whatever view may be held as to (b) *supra*), and therefore the first or oral statement may be proved without producing the other or written statement; this is generally accepted.³ Distinguish from this question the operation of the principle of Completeness (*post*, § 2099), which requires the whole of a single utterance to be proved, and not merely fragments; this principle has nothing to do with the mode of utterance as written or oral; it requires that the whole, whether written or oral, be proved, and it permits one separate utterance to be proved without regard to another separate utterance, whether either or both are oral or written.

(2) *Other statements admitted under Hearsay exceptions.* In general, as already noted, the writing down of one person's hearsay statement by another person without a legal duty to report, cannot make the latter's writing a preferred testimony.⁴ It need only be added that the statements admissible under exceptions to the Hearsay rule are in many instances originally and solely written statements, — as, entries in the course of business, certifications of copies, and the like, — so that the writing is required to be produced as the statement itself, and not merely as one person's report of another's statement.

Sub-topic C: SUNDRY PREFERRED WITNESSES.

§ 1335. *Official Certificates.* In general, our law of evidence regards with no special favor the certificate of an official as to a thing done or seen by him. It does not ordinarily even admit such a certificate as evidence under an exception to the Hearsay rule (*post*, § 1674). But so far as statutory provision has cured the objection of the Hearsay rule and made them admissible, it has done nothing more; no such weight attaches to them that in general they become a preferred source of testimony. The effect of such statutes is occasionally misunderstood, and their purpose as curing the Hearsay defect is exaggerated into a purpose to prefer them as testimony; but such rulings must be looked upon as heterodox.¹ Barring these heterodox rulings, the general principle is so well established as to need only occasional decision, that an official certificate is not a preferred source of testimony as against other witnesses.² It follows, in the spirit of the same

³ Cases cited *post*, § 1450.

⁴ 1855, *Fackler v. Chapman*, 20 Mo. 249, 253 (declarations of slaves written down by persons questioning them; writing not preferred).

¹ 1876, *Fornette v. Carmichael*, 41 Wis. 200 (official sealing of logs, preferred testimony); 1882, *Steele v. Schrieker*, 55 id. 134, 140, 12 N. W. 396 (same).

In Louisiana, where Continental legal traditions prevail and the exaltation of documentary evidence is noticeable, this doctrine has been applied to prefer the register of baptism as proof

of birth: 1829, *Broussard v. Mallet*, 8 Mart. N. S. 269; 1834, *Duplessis v. Kennedy*, 6 La. 231, 242; 1836, *Stein v. Stein*, 9 id. 278, 280. *Contra*: 1886, *Com. v. Stevenson*, 142 Mass. 466, 8 N. E. 341; 1888, *Hermann v. State*, 73 Wis. 248, 41 N. W. 171 (baptismal certificate or register, not preferred to the mother's testimony).

² 1880, *Com. v. Damou*, 123 Mass. 423 (like the next case); 1899, *State v. Vaughan*, 152 Mo. 73, 53 S. W. 420 (coroner's report of post-mortem autopsy not preferred to an attendant physician's testimony); 1897, *Duren v. Kee*, 50

general notion, that such a certificate is not preferred to the testimony on the stand of the official himself.³

The practical difficulty, however, lies in distinguishing the application of this settled principle from the principle of the "parol evidence" rule, or rule of Integration (*post*, §§ 2427, 2450). By the latter principle, when an act is done in writing or is required by law to be done in writing, the only thing that can be material and provable is the writing itself. A parol act is nothing, has no legal effect, and therefore cannot be proved. The question thus often arises whether a particular official writing is merely an official report of a distinct act done in parol and legally effective in parol, or whether the official writing is the sole effective act; for in the former aspect, the official report of it is not a preferred testimony, and the parol act may be proved by any competent witness; while in the latter aspect the official writing, being exclusively the act itself, must be produced. The solution of such a question depends entirely on the substantive law defining the nature of the act; it is enough here to point out the nature of the problem.⁴

§ 1336. **Same: Celebrant's Certificate of Marriage as preferred to Other Eye-witnesses.** In spite of long tradition to the contrary, the effort is frequently made to persuade a Court to declare the celebrant's *register* or *certificate of the performance of a marriage ceremony* to be a preferred testimony to that of other eye-witnesses of the ceremony. No doubt the evidence of a certificate is more trustworthy, in that to be false its falsity would involve either forgery or a crime equivalent to perjury, while that of a witness on the stand would involve only perjury. But this relative advantage is not to be considered (*ante*, § 1286) in view of the serious burden of search or proof of loss involved in preferring its production; while the testimony of the celebrant is in itself no more valuable than that of any credible eye-witness. That the register or certificate of marriage is not preferred to testimony of other eye-witnesses has long been settled:

S. C. 444, 27 S. E. 875 (survey by judicial order not preferred). So also a publisher's *statutory affidavit of publication* is not preferred: 1882, *Matthews v. Supervisors*, 48 Mich. 587, 12 N. W. 863; 1893, *Seattle v. Doran*, 5 Wash. 482, 484, 32 Pac. 105, 1002 (similar; repudiating *Wilson v. Seattle*, 2 id. 543, 549, 27 Pac. 474). But distinguish *Iverslie v. Spaulding*, 1873, 32 Wis. 394, 396 (affidavit of posting of notice of tax-sale; being a part of the record of proceedings, its production was required).

³ 1830, *Jackson v. Russell*, 4 Wend. 543, 547 (statutory certificate of a Surrogate that no will was filed, not preferred to other testimony; "his certificate was made evidence for greater convenience, not because it was a higher species of evidence than his oath in open court"); 1889, *People v. Paquin*, 74 Mich. 34, 36, 41 N. W. 852 (non-payment of liquor-tax; county treasurer's record not preferred to oral testimony of his deputy); 1824, *Perry v. Block*, 1 Mo. 484 (survey-plat not preferred to testimony of surveyor). Whether the official may *contra-*

dict his own certificate is a different question (*ante*, § 530).

⁴ The following cases will serve as illustrations: compare the cases cited *post*, §§ 1352, 2427, 2453; 1859, *Stearns v. Doe*, 12 Gray 482, 486 (register of ship not preferred to prove ownership; possession or acts of ownership held competent); 1870, *Wayland v. Ware*, 104 Mass. 46, 51 (record at the War Department of enlisted volunteers credited to a town, not preferred evidence as to D.'s having been included in that enlistment; the fact being one "which may exist in and be proved by a record, but which is not necessarily so to be proved"); 1895, *Com. v. Walker*, 163 id. 226, 39 N. E. 1014 (prison-keeper's record of prisoner's account of himself, not preferred); 1892, *Curtis v. Wilcox*, 91 Mich. 229, 237, 51 N. W. 992 (clerk's note of filing of mortgage, treated as the best evidence); 1895, *Neison v. Bank*, 16 C. C. A. 425, 69 Fed. 800, 32 U. S. App. 554 (notary's certificate not required in proving demand, presentment, and notice).

1840, *Dr. Lushington, in Woods v. Woods*, 2 Curt. Ecol. 516, 522: "A register is not to be considered the best evidence of a marriage, nor has it ever been so considered in the books and authorities bearing on the question. The rule respecting best evidence is that you are not allowed, where there is evidence of a superior character, to give inferior evidence, unless you account for the non-production of the best evidence; the effect of which is to exclude all other evidence till the absence of the best evidence is accounted for. But I am of opinion that the register is not in contemplation of law the best evidence, for these reasons: first, that registration is not necessary for the marriage itself; secondly, that no error or blunder in the register could affect the validity of the marriage; and thirdly, that registration is not like an agreement or a deed in writing and the contents of which cannot be proved by *viva voce* evidence, but it is a mere record afterwards of what has been done, . . . not the compact itself."¹

It has also been at times maintained that the particular persons signing the register as attesting witnesses preferred to other eye-witnesses. This, and the supposed rule that in actions for criminal conversation and prosecutions for bigamy the eye-witnesses of the marriage-ceremony must be produced (in the old phrase, that a "marriage in fact" must be proved), are in essence rules of Quantity, not of Preference, and are therefore elsewhere examined (*post*, §§ 2085-2088).

§ 1337. **Same: Official or Certified Copies of Documents, as preferred to Examined or Sworn Copies.** There have also been occasional attempts to introduce a rule of preference for an official or certified copy of a public document as against a sworn or examined copy. In the traditions of the common law, the former sort was given so little regard, obnoxious as it was to the Hearsay rule, that only in a narrow class of cases — since much enlarged by statute in later times — was it admitted at all (*post*, § 1677); much less did it receive recognition as a preferred source of testimony. The reasons for this, and the occasional success of the effort to lay down a rule of preference, have already been dealt with in considering the rules for proving the contents of documents (*ante*, § 1273).¹

§ 1338. **Preference of Copy-Witness to Recollection-Witness.** In proving the terms of a document not available in court, there is a decided difference of value between a witness who has written down the terms directly upon reading the original — *i. e.* has made a copy — and a witness who trusts wholly to recollection. Whether in any or in all cases the superior value of a copy-witness should so outweigh the burden of requiring his production that a rule of preference should be established (*ante*, § 1286) is a matter that has much concerned the Courts. All the questions that concern rules of preference as between copy-witnesses and recollection-witnesses, and between different kinds of copy-witnesses, have already been considered elsewhere (*ante*, §§ 1265-1275), in dealing with the modes of proving the contents of documents. It need here only be said that to a limited extent, and depending on special considerations, in harmony with those here noted (*ante*, § 1286), there is a rule of preference for copy-witnesses over recollection-

¹ The authorities are more conveniently collected in one place, with other rules for proof of marriage (*post*, § 2088). For cases preferring a certificate or register of baptism or birth, see *ante*, § 1335.

¹ The authorities are there collected.

witnesses. This forms therefore the third established specific rule of conditional preference.

§ 1339. **Sundry Preferences for Eye-witnesses and Other Non-Official Witnesses (Writer of a Document, to prove Forgery; Bank President or Cashier, to prove Counterfeiting; Surveyor, to prove Boundary; etc.).** It has already been seen (*ante*, § 1286) that there is in general no principle of preference among witnesses; that such rules of preference are limited to a few definite cases, of which the attesting-witness to a document's execution, the magistrate's official report of testimony, and the copy-witness to a document's contents are the only established ones, — each of these resting on a peculiar tradition or policy. Apart from these cases, a few attempts are recorded, from time to time, to establish a rule of preference in sundry situations where one class of persons is presumably better equipped testimonially than another. These attempts for the most part invoke as authority a ruling¹ delivered under the influence of that indefinite "best evidence" notion so often invoked for various purposes up to the end of the 1700s (*ante*, §§ 1173, 1174). This ruling in *Williams v. East India Co.* has long been repudiated in England;² but for a time it tended to produce considerable effect upon the law of evidence in this country. In a few distinct lines of cases its authority was thought particularly suggestive:

(1) It was thought that for proving the *genuineness of a document* the alleged writer was a preferred witness;³ but it is generally conceded that no such rule of preference exists.⁴

(2) As a specially fitting application of the preceding rule, it was for a long time (until the era of State bank-currency ended) a much-agitated question whether in proving the *forgery* of a document — particularly a *bank-note* — the person whose name was forged (for example, the president or the cashier of the bank) was not a preferred witness, as against (for example) one who was familiar with the signature. This requirement received scanty judicial support,⁵ and was generally negated.⁶ Yet statutes were in many

¹ 1802, *Williams v. East India Co.*, 3 East 193 (injury by an explosive put on board a ship without due notice; the defendant's officer delivered it, and the first mate, deceased, received it; the plaintiff was held bound to call the defendant's officer, as the only remaining eye-witness; and his failure to call him was held ground for a non-suit).

² 1828, *Koster v. Reed*, 6 B. & C. 19 (insurance on a ship that never arrived; a rumor being offered that the ship had foundered but the crew escaped, held that it was not necessary to call some of the crew or show diligent search for them; repudiating such an application of the best-evidence principle; *Williams v. E. I. Co.* was cited in argument).

³ 1798, *Grose, J.*, in *Stone's Trial*, 25 How. St. Tr. 1313 ("Whenever you bring evidence for the purpose of proving a fact, you must give the best evidence. The fact intended to be proved to the jury is that this came from Mr. Stone, written by his order. Who is the best evidence

to prove that? Why, the man who wrote it, in this and in every case, whether the matter be criminal or civil").

⁴ 1885, *Royce v. Gazan*, 76 Ga. 79; 1821, *Abat v. Riou*, 9 Mart. La. 465, 466 (not decided); 1873, *Smith v. Valentine*, 19 Minn. 452, 454 (proving a decree signed by a judge; the judge not preferred to the clerk of the court); 1836, *Osborne v. State*, 9 Yerg. 488 (issuing justice not preferred to a constable, to authenticate an execution); 1848, *McCully v. Malcom*, 9 Humph. 187, 192 (genuineness of a warrant; the issuing justice not a preferred witness, though present in court).

⁵ 1830, *Cayford's Case*, 7 Greenl. 57, 60 (president or cashier of a domestic bank must be called; but not of a bank in another State).

⁶ 1801, *R. v. M'Guire*, 1 Leach Cr. L. 4th ed., 311, note, *Chambre, J.*; 1802, *R. v. Hughes, ib.*, *Le Blanc, J.* (cashier, not preferred); 1886, *Lefferts v. State*, 49 N. J. L. 26, 27, 6 Atl. 521 (testimony of the supposed signer of a document,

jurisdictions thought necessary for repudiating it.⁷ To-day, it may be supposed that no Court would sanction such a rule.

(3) It was suggested in a few jurisdictions that the *surveyor of a boundary* was to be preferred to any other competent witness; but this never received any sanction.⁸

as to the signature's genuineness, not preferred to one who knows his handwriting); 1831, *Hess v. State*, 5 Oh. 5, 7 (teller of a bank, admitted to testify for forgery of signatures of president and cashier; "there is not such a distinction between one whose knowledge is of his own handwriting and the knowledge of another's on the same subject as constitutes the former evidence of a superior degree to the latter"); 1843, *Foulke's Case*, 2 Rob. Va. 838, 841. Compare also the cases cited *ante*, §§ 570, 705, some of which imply the same result, and arose out of the same controversy.

A few of these statutes, however (as in Florida and Massachusetts), still recognize a modified preference: *Can. Crim. Code* 1892, § 692 (on a trial involving counterfeit coin, "any other credible witness suffices," and no mint officer, etc., need be called); *Ariz. P. C.* 1887, § 1657 (forgery, etc., of bill or note of corporation or bank; "persons of skill," competent to prove forged nature of document); *Cal. P. C.* 1872, § 1107 (forgery, etc., of bank-bill; "persons of skill," admissible to prove counterfeit nature of bill); *Colo. Annot. Stata.* 1891, § 1268 ("persons of skill," admissible to prove forgery of bill or note of bank or company on prosecution thereof); *Fla. Rev. St.* 1892, § 2910 (in prosecutions for forgery, etc., of bank-notes, "the testimony of the president and cashier of such banks may be dispensed with, if their place of residence is out of the State or more than 40 miles from the place of trial; and the testimony of any person acquainted with the signature of such president or cashier, or who has knowledge of the difference in the appearance of the true and counterfeit bills" is admissible); *Ila. Rev. St.* 1887, § 7868 (forging, etc., a bill, etc., of an incorporated company or bank; "persons of skill," admissible to prove forgery); *Ind. Rev. St.* 1897, § 1892 ("cashier of a bank purporting to have issued" a note, bill, draft, certificate of deposit, or other instrument, is a sufficient witness to genuineness); *Ia. Code* 1897, § 4870 (forgery of bank-bill, etc.; "persons of skill," admissible to prove bill, etc., to be counterfeit); *Kan. Gen. St.* 1897, c. 102, § 226 ("persons of skill, or experts" may testify to genuineness of bill, etc., "or other writing"); *Mass. Pub. St.* 1882, c. 204, § 10, *Rev. L.* 1902, c. 209, § 11 (in charges connected with counterfeit bank-bills, the testimony of president or cashier is not preferred if residing out of the State or more than 40 miles from place of trial, and testimony of other persons competent to distinguish the forgery is admissible); *Mich. St.* 1851, *Comp. L.* 1897, § 11668 (in prosecutions for forgery, etc., of bank-bills, "the testimony of the president and cashier of such bank may be dispensed with, if their place of residence

shall be out of this State or more than 40 miles from the place of trial, and the testimony of any person acquainted with the signature of the president or cashier of such banks, or who has knowledge of the difference in appearance of the true and counterfeit appearance of such bills or notes" may be admitted); *Minn. Gen. St.* 1894, § 5763 (substantially like *Mich. Comp. L.* § 11668); *Mont. P. C.* 1895, § 2084 (like *Cal. P. C.* § 1107); *Nev. Gen. St.* 1885, § 4646 ("persons of skill," admissible to prove forged nature of bill or note of incorporated company or bank, on trial for forgery, etc.); *N. M. Comp. L.* 1897, § 1178 (substantially like *Mich. Comp. L.* § 11668); *N. D. Rev. C.* 1895, § 8216 (like *Cal. P. C.* § 1107); *Okla. Stats.* 1893, § 5229 (like *Cal. P. C.* § 1107); *Or. Cr. C.* 1892, § 1819 (in prosecutions for forging, etc., bank-bill, "the testimony of any person acquainted with the signature" of the officer authorized to sign, "or who has knowledge of the difference in appearance of the true and counterfeit bills or notes thereof," is admissible to prove the bill's counterfeit character); *Pa. St.* 1852, P. & L. Dig. Witnesses, § 7 (testimony of expert witnesses to counterfeit paper, or coin, admissible, without requiring proof "of the handwriting or the other tests of genuineness" as heretofore); *R. I. Gen. L.* 1896, c. 280, § 6 (counterfeit bank-bill; testimony of purporting signer shall not be required when he is out of the State or resides out of it or more than 30 miles distant, but any competent witness knowing his hand, or familiar with the difference between false and true bills and skilled therein, is admissible); *S. D. Stats.* 1899, § 8673 (like *Cal. P. C.* § 1107); *Utah Rev. St.* 1898, § 4857 (like *Cal. P. C.* § 1107); *Wash. C. & State.* 1897, § 7132 ("Persons of skill shall be competent witnesses to prove a forgery"); *Wis. Stats.* 1898, § 4626 (substantially like *Mich. Comp. L.* § 11668); *Wyo. Rev. St.* 1887, § 934 (on trial for forgery, etc., of bill or note of incorporated company or bank, "any person of skill may be witness" to prove the forgery).

Add also the statutes which admit the *affidavit of a State or Federal treasurer* to prove the forgery of government paper (*post*, § 1710).

⁷ 1809, *Bowling v. Helm*, 1 Bibb 86 (the surveyor running a boundary, not preferred to any other witness); 1818, *Grubb v. Pickett*, 1 A. K. Marsh. 253 (surveyor not preferred to prove boundary-correspondence); 1860, *Richardson v. Millburn*, 17 Md. 87 (line of a fence-survey; the testimony of the surveyor held not preferable to that of an eye-witness); 1853, *Weaver v. Robinett*, 17 Mo. 459 (boundary lines provable by any one knowing them; field notes, survey, surveyor, or a witness of the survey, not preferred); 1892, *King v. Jordan*, 46 W. Va.

(4) Where lack of consent was an essential element in a crime, — as, the owner's lack of consent, in larceny, — it was suggested that the only person who could certainly know the fact was the owner himself, and that he should be called. This rule, however, which obtained a foothold in a few jurisdictions, seems not to be in truth a rule of Preference, and is elsewhere dealt with (*post*, § 2089).

(5) That which was merely a common practice in England came to be in a few American jurisdictions a fixed rule; namely, that *all the eye-witnesses of a crime*, so far as available, must be called by the prosecution, — a rule particularly invoked in prosecutions for homicide. It is not a rule of Preference, however, but a rule of Quantity, and is elsewhere dealt with (*post*, §§ 2079–2081).

(6) In a few casual instances, attempts have been made, usually unsuccessful, to introduce some specific rule of preference for which no authority exists.⁹

From all such suggested rules of preference should be distinguished (as already noted in § 1335) questions involving the principle of "parol evidence" or *Integration* (*post*, §§ 2425, 2429), *i. e.* whether in a given instance the act was done in writing. If an act is done in writing, the writing must be produced in order to prove the terms of the act; but if the act as legally done and effective was in parol, and the doer merely wrote down a memorandum of it, then the parol act may be proved without producing the writing, because there are no rules of preference which can require it instead of other testimony. In which of these aspects a given transaction is properly to be viewed depends entirely on the intent of the parties and the substantive law applicable; it is enough here to call attention to the nature of the problem.¹⁰

106, 32 S. E. 1022 (in ejectment, a plat or survey of the lines is not essential evidence).

That a map need not be official, nor a photograph be proved by the photographer, is noticed *ante*, § 794.

⁹ 1814, *Boeler v. Young*, 3 Bibb 520 (in proving age, a family Bible entry is not preferred to oral testimony); 1875, *Elliott v. Van Buren*, 33 Mich. 49, 52 (fact and condition of bodily injuries; medical testimony not preferred); 1825, *Buckner v. Armour*, 1 Mo. 535 (book-entrant not preferred, to prove items of goods sold, etc.); 1896, *Domschke v. R. Co.*, 148 N. Y. 337, 42 N. E. 804 (the testimony of an owner, collecting his rents by an agent, as to their amount, excluded in the absence of a reason for not producing the agent, "who had personal knowledge," the former's testimony being "not the best evidence of the fact"); 1840,

Vairin v. Ins. Co., 10 Oh. 223, 225 (authority by vendee to vendor to hold a boat as collateral security; vendee not a preferred witness to the facts).

¹⁰ The following cases will serve as illustrations: 1841, *Pharr v. Bachelor*, 3 Ala. 237, 246 (written appraisal of value, not preferred); 1850, *Sparka v. Rawls*, 17 id. 211, 212 (invoice of goods; testimony by maker as to value, received without producing invoice); 1890, *Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353, 356, 13 S. W. 1103 (inventory required by insurance policy to be kept; upon its loss without fault, other evidence of amount of goods lost is admissible); 1899, *Risale v. Ins. Co.*, 150 Mo. 366, 51 S. W. 755 (account-books not preferred as evidence of sales); 1834, *People v. Peck*, 11 Wend. 604, 611 (register of authorized church-voters, authorized by statute, not preferred to other evidence).

SUB-TITLE II (continued): RULES OF TESTIMONIAL PREFERENCE.

TOPIC II: CONCLUSIVE (OR ABSOLUTE) PREFERENCES.

CHAPTER XLII.

§ 1345. Nature of a Conclusive Testimonial Preference.

§ 1346. Cases involving the Integration ("Parol Evidence") Principle, distinguished (Corporate Records, Judicial Records, Contracts, etc.).

§ 1347. Cases involving the Effect of Judgments, distinguished (Judgments, Certificates of Married Women's Acknowledgments, Sheriffs' Returns, Judicially Established Copies, Land Office Rulings, etc.).

§ 1348. Genuine Instances of Rules of Conclusive Preference; General Considerations of Policy and Theory applicable.

§ 1349. Same: (1) Magistrate's Report of Testimony.

§ 1350. Same: (2) Enrolled Copy of Legislative Act; may the Journals override it?

§ 1351. Same: (3) Certificate of Election.

§ 1352. Same: (4) Sundry Official Records and Certificates (Certificates of Jurat, of Acknowledgment of Deed, of Record of Deed, of Ship Registry, of Protest of Commercial Paper; Legislative Recitals in Statutes).

§ 1353. Constitutionality of Statutes making Testimony Conclusive; General Principles.

§ 1354. Same: Application of the Principles (Liability in Tort, Contract, or Crime; Presumptions as to Tax-Collectors' Deeds, Railroad Commissioners' Rates, Immigration Officers' Certificates, Referees' Reports, Insolvency, Gaming, etc.).

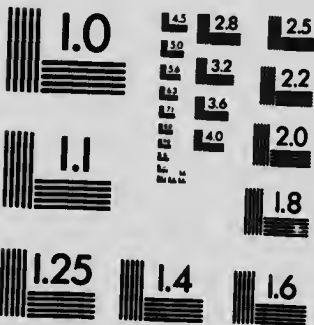
§ 1345. **Nature of a Conclusive Testimonial Preference.** The nature of a conclusive preference as distinguished from a provisional preference (*ante*, § 1285) is in itself simple. In the latter, the preferred witness is to be called first, so that his knowledge, whatever it amounts to, may be availed of; but when this has been done, the field is still open for other witnesses; these may support or they may contradict the preferred witness; his testimony is in no sense final. In short, the preference for him is *provisional* only, and as against other witnesses it lasts only until his testimony is finished. But in the former class, the preferred witness is not merely called first; his testimony, when produced, is taken as final. No other witnesses will be allowed; the error of his testimony, if any, cannot be shown by other and contradicting witnesses. In short, his testimony is *conclusive*.

That such a strict and absolute effect should be conceded to any human being's testimony is indeed extraordinary, and it may well be asked whether our law of evidence recognizes any rule of preference of the conclusive sort. May not the apparent cases of conclusive preference be explainable as in truth results of other independent principles of substantive law, sometimes loosely dealt with in terms of "conclusive evidence"? No doubt this is the true explanation of most of the instances in which such a term is employed, and it remains to ascertain whether, after all such explanations, there exist any instances of conclusive preference in the shape of genuine rules of evidence. The various instances to which the term "conclusive evidence" has been more or less plausibly applied may be grouped into three classes, *i. e.* two classes of rules clearly non-evidential,



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and one class clearly evidential (so far as it has any recognition). The first two must here be briefly considered.

§ 1346. **Cases involving the Integration ("Parol Evidence") Principle, distinguished (Corporate Records, Judicial Records, Contracts, etc.).** There are innumerable cases in which a writing is regarded as the sole and exclusive object of proof because of the "parol evidence" or Integration principle (*post*, §§ 2400, 2478). This principle assumes that, by some provision of law, or by the parties' intent, the act effective in law is a single written memorial, and that no parol act is to be regarded as of any effect for the purpose. Where this is the situation, it is obvious that the terms of the writing are alone to be proved; the writing must be produced, or, if it is unavailable, its terms must be proved. Here it is clear that the writing is not "evidence," nor "conclusive evidence," of the act; for it is the act. That the writing cannot be shown to represent inaccurately some prior parol conduct, is not because the writing is conclusive evidence of what that parol conduct was, but because the parol conduct is immaterial and ineffective, and therefore (*ante*, § 2) cannot be proved at all. It is not because we trust conclusively to the writing's testimony of what the parol conduct was, but because we do not care what the parol conduct was, and are not allowed to ascertain.

In consequence of this principle of Integration, then, the question is constantly presented whether a specific writing has become the sole act material to the case; and this is purely a question of the substantive law applicable to the kind of transaction involved. It is not a question of a rule of evidence, — as later more particularly noted (*post*, § 2400). The treatment of such questions would be here out of place and impracticable. It will be enough to note some illustrations of the kind of problem presented. For example, whether a corporate record can be shown to be incorrect depends on whether by the substantive law a corporate doings to be effective must be done in writing, — even though the question may be expressed by asking whether the written record is conclusive.¹ So where a surety gives bond to answer for an official's defalcation, to hold that the State auditing books are not conclusive is to say that he, the surety, has contracted to be responsible for the actual amount missing, and not for the amount recorded in the books as missing.² So where a statute prohibited a town to maintain as a schoolmaster a person not having a certain certificate of qualifications, to hold that those qualifications could not be shown by evidence without producing the certificate is not to hold the certificate conclusive evidence of them, but to hold that the only fact material under the law was the possession of a specific writing.³ So, in a prosecution for publishing a seditious article in a newspaper, to hold that the proprietor's filing

¹ 1851, *Greeley v. Quimby*, 22 N. H. 335, 338 ("as the law required that the return of the selectmen laying out the road should be in writing, no other proof can be substituted for it"); and cases cited *post*, § 2451.

² 1878, *State v. Newton*, 33 Ark. 276, 284.

³ 1819, *Com. v. Dedham*, 16 Mass. 141.

a sample copy at the registry-office as required by statute is "conclusive of publication" is merely to hold that the filing of such a copy is an act of publication for the purposes of the penal law.⁴ Again, in an issue over the boundary of land granted by the Government, a ruling that the official survey is conclusive is not necessarily a ruling as to its conclusive testimonial effect, but signifies that the survey is a part of the grantor's description of the land conveyed, and is therefore part of the deed of grant.⁵ Other illustrations are furnished in those cases where certain judicial action will be taken according as a specific document does or does not exist, irrespective of any attempt to ascertain and establish the truth of the assertions in the document. For example, a person claiming to be a foreign envoy will be treated judicially as such if the Executive has recognized him as such, irrespective of the truth of the case;⁶ a foreign commission carried by a ship will be held "conclusive" of its national character, *i. e.* no attempt to investigate further will be made;⁷ a judge's certificate as to what passed at a trial will be treated as "conclusive" in an application for a new trial,⁸ *i. e.* so far as concerns the terms for granting a new trial, one of them is that the trial judge's certificate shall state certain things. In some jurisdictions the answer of a garnishee as to how far he is chargeable shall be "conclusive,"⁹ *i. e.* for the purpose of allowing the use of garnishee-process, one of the terms of its allowance is that the garnishee's statements, whether true or not, shall be the basis of action. Finally it may be noted that a Court record is "conclusive" as to the proceedings of the Court, not because it is a preferred source of evidence of the things actually done in parol, but because it is itself the judicial act and the parol matters are not the judicial acts.¹⁰

§ 1347. **Cases involving the Effect of Judgments, distinguished (Judgments, Certificates of Married Women's Acknowledgments, Sheriffs' Returns, Judicially Established Copies, Land Office Rulings, etc.).** In considering the effect to be given to a judgment in another Court or cause, and especially a foreign judgment, when offered to sustain an action brought to enforce it or pleaded in defence to another action brought for the same claim, it is common to speak of the judgment in terms of evidence and to describe its effect by the phrase "conclusive evidence."¹ Is a judgment, then, an instance of a rule of conclusive preference, making the other Court's certificate that Doe has or has not a certain cause of action a conclusive testimony to that fact? By no means. The theory of the use of judgments is not a matter to be lightly dogmatized about; yet it seems clear that the operation of recognizing it in

⁴ 1848, *R. v. O'Doherty*, 6 State Tr. n. s. 831, 874.

⁵ 1901, *Allmendinger v. McHie*, 189 Ill. 308, 59 N. E. 517 (refusing to let a surveyor impeach a recorded plat made by statute equivalent to a deed); 1814, *Ringgold v. Galloway*, 3 H. & J. 451, 461; 1897, *Carter v. Hornback*, 139 Mo. 239, 40 S. W. 893.

⁶ *Post*, § 2574.

⁷ 1822, *Santissima Trinidad*, 7 Wheat. 283, 335.

⁸ 1718, *R. v. Mothersell*, 1 Stra. 93; 1874, *Exp. Gillebrand*, L. R. 10 Ch. App. 52.

⁹ 1896, *Phillips v. Meagher*, 166 Mass. 152, 44 N. E. 136.

¹⁰ *Post*, § 2450.

¹ *E. g.* *Ellenborough, L. C. J.*, in *Hell v. Obder*, 11 East 118 ("evidence of the debt"); *Brougham, L. C.*, in *Houlditch v. Donegall*, 2 Cl. & F. 470 ("a foreign judgment is only *prima facie*, not conclusive evidence of a debt").

support of a plaintiff or in defence of a defendant is upon analysis not at all an employment of evidence. It is rather the lending of the Court's executive aid, on certain terms, to a claimant or a defendant, without investigation of the merits of fact. The closest analogy is that of an *alias* execution; when the legal effectiveness of a first execution has expired without the party's obtaining satisfaction of the judgment, he may without a new trial reinvoke the executive aid of the Court and obtain a second writ of execution, because the original judgment or order of the Court to make satisfaction has not yet been fulfilled. In such a case the Court lends its executive aid because of its own order or judgment already rendered; there is no question of re-trying the facts of the claim, but merely of whether and on what terms it will grant anew its executive aid. Now the act of the Court in giving effect through its own officers to a judgment in another Court or cause does not in its nature differ from the issuance of an *alias* execution; it differs only in regard to the terms upon which this effect and aid will be granted. Not upon the mere existence of another Court's judgment will the second Court lend its own aid; but only for certain kinds of judgments from the other Court. If the present Court believes that there was in the other Court a fair and full investigation of the facts, including a due summoning of parties bound to obey the summons, an opportunity for the full hearing of evidence on both sides, and an honest and intelligent deliberation by the tribunal over the evidence, then the present Court will lend its enforcing aid as if to its own judgment. The fairness, fulness, and legality of the other Court's investigation are merely the main circumstances affecting the present Court's willingness to lend its judicial aid and to treat the other Court's judgment or order as its own. That a domestic judgment is ordinarily conclusive and cannot be collaterally attacked involves in truth merely a general duty and practice of domestic Courts to aid in enforcing one another's judgments without attempting to investigate anew the truth of the facts thereby adjudged to exist. That a foreign judgment by a Court not having jurisdiction, or by a Court imposed upon by fraud, or by a Court acting itself fraudulently, will not be enforced, is a proposition which in legal theory is precisely what it purports to be; namely, not the declining to take certain testimony as conclusive, but the failure to give enforcement to an order by another Court which cannot be enforced by this Court's officers unless this Court chooses to order it. The important feature is that in either case — whether treating or not treating the judgment as conclusive — there is no process of judicial investigation, resulting in taking the judgment as the conclusive testimony to some ulterior and main issue before the Court, but there is merely a declining or a granting the Court's aid to carry out an order of another Court. If the judgment is recognized as conclusive, then the plaintiff offering it is given an order to enforce it, or, when it is pleaded in bar, is denied an order to enforce his claim. If the judgment is not recognized as conclusive, then an action or a defence based on it is rejected, and the state of facts as to the original claim is investigated in a practically distinct proceeding, in which the prior judgment

plays no part except in sometimes affecting the burden of proof. The mode of dealing with a judgment, therefore, involves two alternatives. On the one hand, the Court may act upon and enforce the other Court's judgment without investigating the facts adjudged. On the other hand, it may decline to aid in enforcing the other Court's order, and may investigate the facts for itself. In neither alternative is the judgment used as conclusive evidence.²

It follows, then, that so far as any certificates, orders, findings, or other official determinations are to be assimilated to judicial judgments, they will be accepted by the Court and acted on as "conclusive," *i. e.* without allowing a new investigation of the facts. How far certain kinds of official determinations are thus to be assimilated to judicial judgments because of the judicial nature of the proceedings in the course of which they were rendered, is a question belonging to the law of Judgments, and not to the law of Evidence. It may, however, be noted here that there are five sorts of such documents (other than formal judgments of other Courts) as to which this question of "conclusiveness" has been most commonly raised.

(1) The certificate of the magistrate, notary, justice, or other officer, taking the *privy examination and acknowledgment of a married woman* that a deed signed by her was executed of her own free will and with full knowledge, was at common law not open to disproof of its correctness, because it was regarded as in the nature of a judicial determination; but other views have in some jurisdictions prevailed, often in virtue of express statutory provision.³

(2) A *sheriff's return*, besides being admissible as an official statement (*post*, § 1664), is also usually treated as conclusive (*i. e.* not to be shown erroneous) to the same extent that the other parts of the same judicial proceeding are conclusively determined by the judgment, *i. e.* as against the parties and their privies; while as against the sheriff himself it will be affected by the doctrines of estoppel.⁴

² This theory of the nature of the act of enforcing another Court's judgment seems to harmonize with that of Mr. F. Piggott in his acute and philosophic treatise on Foreign Judgments, p. 20.

³ See the different theories expounded in the following cases: 1828, *Elliott v. Peirsol*, 1 Peil. 328; 1880, *Johnson v. Van Velsor*, 43 Mich. 298, 219; 1843, *McNely v. Rucker*, 6 Blackf. 391; 1870, *Woodhead v. Foulds*, 7 Bush 222; 1898, *Heaton v. Bank*, 59 Kan. 281, 52 Pac. 876 (citing cases); 1840, *Harkins v. Forsyth*, 11 Leigh 294, 301; 1861, *Dodge v. Hollinshead*, 6 Minn. 25, 39; 1898, *Davis v. Howard*, 172 Ill. 340, 50 N. E. 258.

The following list will give a clue to the chief distinctions and authorities: 1893, *Edinburgh A. L. M. Co. v. People*, 102 Ala. 241, 14 So. 656; 1885, *Petty v. Grisard*, 45 Ark. 117; 1856, *Woods v. Polhemus*, 8 Ind. 60, 66; 1859, *Tatum v. Goforth*, 9 Ia. 247; 1870, *Ford v. Teal*, 7 Bush 156; 1877, *Pribble v. Hall*, 13 id. 61, 65; 1873, *Lockhart v. Camfield*, 48 Miss. 470, 489; 1888, *Mays v. Pryce*, 95 Mo. 603, 612, 8 S. W. 731; 1897, *Spivey v. Rose*, 120 N. C. 163, 26

S. E. 701; 1862, *Truman v. Lore*, 14 Oh. St. 144, 151; 1903, *Western Loan & S. Co. v. Waisman*, — Wssh. —, 73 Pac. 703.

⁴ The following cases will give a clue to the distinctions and authorities: 1809, *Gyfford v. Woodgate*, 2 Camp. 117 (not conclusive as to the consent of the plaintiff to an *alias f. fa.*); 1848, *State v. Lawson*, 8 Ark. 380, 384 (conclusive against himself, and in actions between third persons, but not against the plaintiff in action against the sheriff for wasting goods levied on); 1882, *Hunt v. Weiner*, 39 id. 70, 75 (creditor's bill; return of *nulla bona* conclusive); 1827, *Watson v. Watson*, 6 Conn. 334 (not conclusive on execution or mesne process); 1842, *Niles v. Hancock*, 3 Metc. 568, 569 (return of service of copy of citation; conclusive as to the copy's correctness); 1849, *Browning v. Flanagan*, 22 N. J. L. 567, 573 (held conclusive as between debtor and creditor and their privies, and also against the sheriff himself always, but not in the sheriff's favor; here, not in an action for escape; cases copiously cited); 1897, *Campbell Co. v. Marder*, 50 Nebr. 283, 69 N. W. 774 (not conclusive).

(3) The establishment of a *copy of a lost deed* by judicial proceedings allowed by statute for that purpose might be regarded as conclusive of the terms of the deed, provided the result of the proceeding were regarded as a judgment affecting all persons concerned; but such does not seem to be the effect generally conceded.⁵

(4) The obsolete "*trial by certificate*" (as when the fact of bastardy was determined by certificate of the bishop offered in a common-law court) was in reality the acceptance of a judgment of an ecclesiastical or other tribunal upon a matter committed to its jurisdiction.⁶

(5) The certificate or ruling of an officer of the *Federal land office* is, upon certain matters, in effect the judgment of a competent tribunal, and is therefore "conclusive."⁷

§ 1348. **Genuine Instances of Rules of Conclusive Preference; General Considerations of Policy and Theory applicable to them.** After thus discriminating those instances of conclusiveness which in reality involve some application of the principle of Integration or the principle of Judgments, it is practicable to examine the cases in which some genuine rule of conclusive testimonial preference is put forward for recognition. Certain general considerations must first be noticed.

(1) The practical mark of *distinction between* instances of the "*parol evidence*" (or *Integration*) principle and genuine instances of *conclusive preferences* is this: When the writing in the former instance is *lost or otherwise unavailable* in Court, then its terms must be proved by copy or otherwise, and if it never existed as required by law, then nothing can be proved (*post*, §§ 2425, 2453); while in a case of conclusive testimonial preference, if the preferred testimony is not to be had, then the field is open to any other evidence of the fact. For example, if a *judicial record* never was made, the oral proceedings cannot be proved, because the only effective judicial act is the writing;¹ and if the record was made but has been lost, then the terms of the lost writing, not the parol proceedings, must be proved.² But in the case of a *magistrate's report* of testimony taken before him,³ or an election commission's certificate of the result of the election,⁴ or the official enrolment of a legislative act,⁵ the effective and material legal act is still the testimony uttered, or the vote cast, or the yeas and nays voiced. Though conclusive credit may be given to the report by the magistrate, or the commission, or the presiding officer, still his document can never be legally anything more than a testifying to the act of another person; hence, though this report if available may be treated as conclusive, yet if the report was never made, then the effective act of testifying or voting may be otherwise proved,

⁵ Cases cited *ante*, § 1273; *post*, § 1660.

⁶ 1591, Abbot of Strata Mercella's Case, 9 Co. Rep. 31 a; 1628, Coke upon Littleton, 74 a; 1768, Blackstone, Commentaries, III, 333; 1793, Ilderton v. Ilderton, 2 H. Bl. 145, 156 (trial by bishop's certificate, held not applicable in a Scotch dower case; the opinion brings out the jurisdictional nature of the controversy).

⁷ 1903, De Cambra v. Rogers, 189 U. S. 119, 23 Sup. 519.

¹ Sayles v. Briggs, 4 Metc. 421; *post*, § 2450.

² Mandeville v. Reynolds, 68 N. Y. 528, 533; *post*, § 2450.

³ *Ante*, § 1327; *post*, § 1349.

⁴ *Post*, § 1351.

⁵ *Post*, § 1350.

and if the report was made but is unavailable through loss or destruction, then also the testifying or voting may be otherwise proved. The preference applies only when there exists a testimony available for the purposes of preference; and the loss of the preferred testimony therefore leaves the testifying or voting (since it is throughout the effective act for legal purposes) still provable by such evidence as remains available.

(2) Upon what *general considerations of policy*, if at all, should any rule of conclusive preference be recognized? It is obvious that the recognition of such a rule is an extreme step to take. It amounts almost to an abdication of the Court's judicial functions (*post*, § 1353). To forego investigation into the existence of a fact because a certain officer not having judicial powers or opportunities of investigation has declared it to exist or not to exist, and to accept his statement as conclusive and indisputable, is in effect to refuse to exercise, as regards that specific fact, that function of the investigation and final determination of disputes which is the peculiar attribute of the Judiciary as distinguished from the Executive and the Legislature. That the Court may, if it chooses, in dealing with evidence, take such a step seems clear, — though whether the Legislature may constitutionally oblige it to do so is another question (*post*, § 1353). But obviously it is a step which will not be taken except when clearly indispensable as the best practical method of settling disputes and giving stability to the interests of all concerned. It would seem, *a priori*, that such a rule does become the most practical solution in two kinds of situations, and in two only:

(a) A judicial judgment binds only the parties to the specific litigation, and therefore the same question of fact must be investigated anew, even innumerable times, between parties not affected by prior judgments. There may therefore be an analogous situation in which *innumerable parties will be affected by a fact common to the rights or duties of all*; and this fact, in the absence of a judicial proceeding binding on all, may be from time to time differently determined by different juries and judgments in successive litigations. In such a case, all the rights of the innumerable parties affected by this fact might be doomed to a perpetual instability; for no one concerned can predict what the issue will be in the possible litigation of innumerable successive adversaries. It would therefore be highly desirable, if a definite and trustworthy official certification of the fact had been authentically and openly made, for the judiciary to announce as a settled rule that this official certification would invariably be accepted in a judicial investigation as conclusive. Thus all the vital advantages of stability would be secured, and the disadvantages of possible error could be regarded as comparatively trifling. The typical, perhaps the sole case illustrating these conditions is that of the officially enrolled copy of a legislative act, used as conclusive evidence of the terms of the legislative enactment and the proceedings of its adoption (*post*, § 1350).

(b) It may occur that shortly after the doing of a legal act *all ordinary evidence* of its doing and its terms is likely to become *practically unavailable*,

either because documents are destroyed or lost, or because witnesses are tampered with or become incompetent or non-compellable to testify. If a class of cases existed in which this dearth of satisfactory evidence habitually occurred, and if at the same time a trustworthy official statement of the fact as it was had been made close to the time of the fact and with the most satisfactory data before the officer, it might well be thought that on the whole a closer approach to the truth could be reached by accepting the official statement as conclusive, instead of by making the attempt to weigh the scanty or untrustworthy evidence that might be available for the purposes of the subsequent judicial investigation. It would be essential for such a situation that the official statement should be especially trustworthy, that the ordinary evidence subsequently available should be especially untrustworthy or scanty, and that both of these features should habitually be present in that class of disputes; but, given these three conditions, the case would seem to present a fair justification for refusing to investigate in the ordinary way and for taking the official statement as conclusive testimony to the fact in issue. The typical, and perhaps the sole case, illustrating these conditions, is that of an election officer's certificate as to the number and tenor of votes cast and the qualifications of the voters (*post*, § 1351).

It may be added, finally, that wherever a rule of conclusive preference can be laid down at all, it can apply only to a *written official statement*, not to *testimony on the stand*. The statement must be *official*, because the sanctions of the official oath should at least be present, or else the statement is no more trustworthy than any other person's. The statement must be in *writing*, because otherwise the recollection-testimony, even of an official, is no better than another's recollection. No one has ever thought of suggesting a rule of conclusive preference for any testimony other than official written statements.

§ 1349. **Same: (1) Magistrate's Report of Testimony.** Where a committing magistrate is required by law to make a written report of the statement of the accused person under examination and of the testimony of the witnesses, this report, as already noticed (*ante*, §§ 1326-1329), must be produced as a preferred testimony to the words of the statement and the testimony. But is this report to be given such further and paramount weight that it is to stand as *conclusive* and irrefragable by any evidence of its error? In the first place, it can hardly be contended that the express legal duty of the magistrate to make the report invests it with such conclusiveness; there is certainly no such general principle applicable to statements made under official duty. In the next place, the magistrate's report is not governed by the "parol evidence" theory of judicial records (*post*, § 2450); for testimony is not a judicial act; and the theory of judicial records is merely that the judicial act is originally done and constituted in writing, and the testimonial utterance of a witness or the accused is distinct from any judicial act done as a part of the record. Furthermore, neither of the general considerations of necessity and policy (mentioned in § 1348, *ante*) can apply to the present

case to make it desirable to take the magistrate's report as conclusive. Finally, considering the circumstances under which such reports are drawn up and the unfair consequences that may often follow from the inability to expose their errors, policy seems rather to require that they should not be treated as conclusive:

1844, *Reporter's Note*, to 2 Moody & Robinson 487 (approved by Alderson, B., in 1 Den. Cr. C. 542, as "admirably discussed"): "[Questions may arise] as to the extent to which other evidence is to be excluded; in the determination of which the necessity of the case, in some instances, the purposes of the enactment, in others, must be looked to. Thus, judicial records are not only primary, but from their nature conclusive evidence of the decisions of Courts of justice. . . . [But as to depositions taken in criminal trials,] evidence is admissible by way of explanation, or to prove that the party made other statements besides those reduced into writing; otherwise the safety of prisoners and the credit of witnesses would depend on the honesty and accuracy of the clerks who take the examination. . . . Even if the entire examinations of the witnesses and the committal of a prisoner take place at the same time, it would seem most inconvenient, as well as unreasonable, to make the written examination conclusive as to all the preliminary statements of the witnesses on which it is founded."

The precedents on the subject must be considered separately for the case of an *accused person's* statement and that of a *witness's* testimony; for the doctrine has received different treatment in the two cases. In connection with both, it is to be remembered that the statutes on the subject of the magistrate's duty (*ante*, § 1326) often require him to take down no more than "the substance" of what was said or "so much as may be material":

(a) The rule seems to have become settled in England during the 1800s that the magistrate's report is *conclusive* as to the *statement of the accused*.¹ But this rule has been accepted in only a few American jurisdictions.² The rule, as accepted, applies only to such utterances as the magistrate has *purported to take down*; hence, utterances made at another time than the formal statement, or at that time but apart from the formal statement, may be proved by other testimony; the general notion being that so far as the magistrate's report goes, it is not to be contradicted.³ It must be noted, on the

¹ 1816, *R. v. Smith*, 1 Stark. 242 (evidence denying the administration of the oath to the defendant when examined, excluded; Le Blanc, J., "could not allow that which had been sent in under the hand of a magistrate to be disputed"); 1833, *R. v. Bentley*, 6 C. & P. 148 (mistake in entering the defendant's statement as a complaint, not allowed to be shown); 1833, *R. v. Lewis*, ib. 161; 1836, *R. v. Walter*, 7 id. 267; 1839, *R. v. Pikesley*, 9 id. 124 (that the accused had been sworn).

² See the cases in the next note, and also these: 1874, *Wright v. State*, 50 Miss. 332 ("no parol evidence of what the prisoner may have said on that occasion can be received"; unless the writing cannot be had); 1898, *Powell v. State*, — id. —, 23 So. 266 (other testimony inadmissible, where this is available; it is "exclusive"); 1901, *Cunning v. State*, 79 id. 234, 30 So. 658 (*Wright v. State* approved).

³ Such seems to be the principle of the some-

times obscure precedents: 1835, *R. v. Spilshury*, 7 C. & P. 187 (remarks by the defendant during the examination of the witnesses, and not when himself examined, admitted); 1838, *R. v. Morse*, 8 id. 605 (blanks cannot be filled; certain names here omitted in the clerk's written report of the testimony); 1846, *R. v. Weller*, 2 C. & K. 223 (remark of the defendant made while a witness was testifying, excluded); 1850, *R. v. Christopher*, ib. 994 (the magistrate's notes having been given to the clerk to write them up; in deposition-form, the clerk at his office asked some additional questions, and wrote them in; then in Court the depositions were later read over before the defendant and signed by the witnesses; held that the answers made to the clerk could be asked for orally, as no part of the depositions); 1881, *Griffith v. State*, 37 Ark. 332 (testimony not allowed for answers not recorded, but allowed for magistrate's warning questions not recorded); 1790, *State v. Wells*,

one hand, that even such utterances are not admissible if by the principles of confessions (*ante*, §§ 842-852) the whole statement is not receivable.⁴ On the other hand, where the report has been read over to the accused and he has expressly assented to its correctness by oral acknowledgment or by signature, the writing is thus adopted as his own and becomes a statement by him in writing; he thus can no longer deny that it represents what he said.⁵ In the absence of such an acknowledgment, the whole doctrine that the report is conclusive is (as already noted) ill-founded, and should be repudiated. It may be added that the doctrine itself applies only so long as the conclusively preferred testimony is available (*ante*, § 1348); and therefore if the magistrate's report was *never taken* or if it was *lost*, the case is open for ordinary testimony.⁶

(b) The doctrine was also applied in England⁷ to the magistrate's report of the testimony of a *witness*, but was strictly confined to the testimony taken in a criminal case before the committing magistrate.⁸ It has been occasionally recognized in this country.⁹ The limitations already noted for the report of an accused's statement would generally apply here also, *mutatis mutandis*; in particular, other testimony may be used to prove utterances made on a distinct occasion, or on the same occasion but not as a part of the formal testimony, or even during the formal testimony but on matters additional to and not purporting to be covered by the magistrate's report.¹⁰ The

⁴ N. J. L. 424, 429 (other confessions at other times receivable; but not other testimony of the statements deposed to the magistrate).

⁵ 1833, R. v. Lewis, 6 C. & P. 161; and cases cited *ante*, § 1328.

⁶ 1840, State v. Eaton, 3 Harringt. 554 (preferred and conclusive, but only when signed by the accused or expressly admitted true); State v. Harman, *ib.* 567 (same); 1896, State v. Steeves, 29 Or. 85, 43 Pac. 947 (the written record of an oral statement made by an accused, not under any statute, to a chief of police, and signed by the former; "Oral statements, intended to be reduced to writing, when committed to paper and signed by the person making them, are supplanted, and must of necessity be excluded, by the writing").

Nevertheless, on principle, the two are distinct statements (as noted *ante*, § 1332); and if the attempt is not to contradict the writing, but to show what the first and oral statement really was, this would seem proper. Compare the cases on *dying declarations* (*post*, § 1450).

⁷ Cases cited *ante*, §§ 1327, 1329, and the notes *supra*.

⁸ But not originally; see § 1326, *ante*, and the following: 1679, Langhorn's Trial, 7 How. St. Tr. 417, 467 (the Lords' Journal of an examination before them was offered to show that Bedlow, the informer, did not there charge the defendant; L. C. J. Scroggs: "It is but a memorial taken by a clerk, and do you think that his omission shall be conclusive to us?").

⁹ 1838, Robinson v. Vaughton, 8 C. & P. 252, 254 (applicable only in felony, "because by an act of Parliament magistrates are bound

to take down what the witnesses say"); 1813, Jeans v. Wheldon, 2 Moo. & Rob. 486, Cresswell, J., *semble* (not applicable in malicious prosecution); 1860, Filipowski v. Merryweather, 2 F. & F. 235, 237 (where the plaintiff's silent acquiescence, as an admission of the witness' statements, was to be shown, the deposition was not required); 1896, R. v. Erdheim, 2 Q. B. 260, 269 (statute providing for the taking down of a bankrupt's examination, reading over, and signing by him; held, not exclusive of other reports of the examination; here, of oral testimony of the shorthand-writer; compare Rowland v. Ashby, *infra*).

¹⁰ 1874, Broyles v. State, 47 Ind. 251, 254 (after using report of examination before justice, oral evidence not allowed). *Contra*: 1881, Griffith v. State, 37 Ark. 324, 332, *semble* (contradicting a deceased witness by prior inconsistent statements; the magistrate's writing did not show that he had been asked about them on the examination; oral evidence of bystanders that he was asked, allowed; the preferable mode being to have the magistrate amend his return); 1875, People v. Curtis, 50 Cal. 95 (not conclusive, under P. C. § 869; at any rate, when not signed by the witness); 1868, State v. Hull, 26 Ia. 293, 297 (not conclusive).

¹¹ 1825, Rowland v. Ashby, Ry. & Mo. 231, Best, C. J. (commissioners in bankruptcy; additions allowed, but the remarks must be shown by "clear and satisfactory evidence"); 1832, R. v. Harris, Mood. Cr. C. 338, by all the Judges (additions allowed); 1833, Venafra v. Johnson, 1 Moo. & Rob. 316, C. P. (held proper to prove "anything the party had said as a part

whole doctrine of conclusiveness, in the present application, as in the preceding, is unsound.

(c) A magistrate's report of a *dying declaration* involves somewhat different considerations.¹¹

(d) A magistrate's report of a *deposition de bene* involves a distinct theory.¹²

§ 1350. **Same:** (2) **Enrolled Copy of Legislative Act, may the Journals override it?** After a proposed bill has been reported, amended, read on different occasions, passed by the originating House, sent to the other House and there dealt with in the same way, the document thus enacted into a statute consists of one or more sheets of the original paper together with other writings or printings containing the tenor of the various legislative dealings with them. This complex, representing the net result of those dealings, is then copied out as a single document, and is certified by the presiding officers of each House, in England also by the Great Seal, and in this country usually by the Governor or President, and sometimes by a Secretary, to be the act as passed. This certified copy, or enrolment, was by English practice deposited in Chancery, but is in American practice usually deposited with the Secretary of State. When the precise terms of the act are in issue, or the legislative proceedings affecting its validity, is this enrolled copy conclusive?

(1) It seems clear, at the outset, that the *enrolment is only somebody's certificate and copy*, because the effective legal act of enactment is the dealing of the Legislature with the original document, *i. e. the viva voce vote*. The Legislature has not dealt by vote with the enrolled document; the latter therefore can be only a certificate and copy of the transactions representing the enactment.¹ The enrolment is thus not a record in the sense of a judicial record, *i. e. the act done in writing (post, § 2450)*.

(2) Furthermore, it is clear that the *legislative journals are not the original enactment*, for the *viva voce* vote is not given upon them. They are but official statements of what has been done at a prior time, although the House may have heard them read and approved them as correct. Thus, the question whether the enrolled copy shall be conclusive as against the journal is only a question whether an official report and copy of one degree of solemnity and trustworthiness is to be preferred against another of a less degree.

of his information, beyond what was put in writing, either for the purpose of explanation or addition"; 1837, *R. v. Coveney*, 7 C. & P. 667, Alderson, B., and Patteson, J. ("There is a difference between adding and contradicting; I apprehend the object was to see that witnessa did not swear a thing before the magistrate and contradict it at the trial"); 1837, Resolutions of Judges, *ib.* 676, Rule 3 (where a deposition does not mention a statement as having been made at the examination, either the witness may be asked to admit it, or, if he denies it, other witnessa may prove it); 1839, *Leach v. Simpson*, 7 Dowl. Pr. 513, 5 M. & W. 309, 312 (Parke, B.: "If it appear, on production of the

deposition, that any particular statement alleged to have been made is not contained in it, you may add to it by parol evidence of that statement").

¹¹ Cases cited *post*, § 1450.

¹² Examined *ante*, § 1331.

¹ 1875, *Moore, J.*, in *Biessing v. Galveston*, 42 Tex. 641, 656 ("the signature of its officers and the approval of the Governor cannot, unquestionably, make that law which has not been enacted by the Legislature. They only furnish evidence, conclusive or otherwise, as may be held, of the enactment of the alleged law by the Legislature").

(3) On the other hand, it is well settled that the enrolled copy cannot be shown erroneous or invalid by *any other testimony than that of the journal* — for example, the oral testimony of a member as to the number of votes or readings, or the terms of an amendment, or a draft bill.³ Furthermore, it is equally conceded on all hands that the journal cannot be shown erroneous by similar testimony.³

With this preliminary survey of the limits of the problem,⁴ we are in a position to consider the question whether the copy enrolled under the hand of the presiding officers authorized thereto is conclusive in every sense so as to exclude contradiction by the testimony of the official journal:⁵

³ 1498, *Cutcher v. Crawford*, 105 Ga. 180, 31 S. E. 139 (whether a preliminary local election had been held; the statutory preamble not to be contradicted by a minority report in the journal nor by an election return); 1890, *Speer v. Athens*, 85 Ga. 49, 11 S. E. 802 (that public notice had not been given for a local act; not admitted); 1884, *Passaic Co. v. Stevenson*, 46 N. J. L. 173, 184 (under a constitutional provision requiring public notice of a local bill, and the preservation of the evidence of notice, the fact of notice may be proved otherwise than by the act and the journals; *Dixon, J., diss.*); 1870, *Brodnax v. Groom*, 64 N. C. 244, 248 (fact of no public notice of a local bill, not provable); 1855, *Pease v. Peck*, 18 How. 595 (whether the manuscript of a statute as reported by the commissioners should control the printed law as sanctioned by the Legislature in repeated revisions).

⁴ 1896, *Fullington v. Williams*, 95 Ga. 807, 27 S. E. 183 (as to notice of intention required before offering a bill); 1897, *Cohn v. Kingsley*, — *Ida.* —, 49 Pac. 985 (whether a bill was read the second time); 1853, *McCulloch v. State*, 11 Ind. 424, 430 (though where they are silent, lawful action will be presumed); 1900, *Taylor v. Beckham*, 108 Ky. 278, 58 S. W. 177; 1883, *Koehler v. Hill*, 60 Ia. 543, 560, 14 N. W. 738, 15 N. W. 609 (oral testimony by a member of the Senate, not receivable to contradict the journal, if in existence); 1887, *Attorney-General v. Rice*, 64 Mich. 385, 389, 31 N. W. 165 (whether a bill's title expressed its object; parol testimony to contradict the journal, inadmissible); 1889, *Sackrider v. Supervisors*, 79 *id.* 59, 66, 44 N. W. 165 (same); 1898, *Re Granger*, 56 *Nebr.* 260, 76 N. W. 588 (journals not allowed to be contradicted by original draft of bill with indorsements); 1903, *Wilson v. Markley*, — *N. C.* —, 45 S. E. 1023; 1832, *Stats v. Moffitt*, 5 *Oh.* 223, 5 *Hamm.* 353; 1886, *State v. Smith*, 44 *Oh. St.* 348, 364, 7 N. E. 417, 12 N. E. 829. *Adi* also the cases as to *bribery*, *post*, note 11.

⁵ The following questions are also to be distinguished: (1) Whether the *enrolled copy* overrides a *printed copy*: 1853, *Pacific R. Co. v. Seifert*, 79 *Mo.* 210, 212 (a printed law imposed a fine of \$20; the statute-roll reading "\$90," held not to override this in action for penalty); 1896, *Bruce v. State*, 48 *Nebr.* 570, 67 N. W. 454 (the enrolled act, properly certified, approved, and deposited, is conclusive as against the official

statute-book); 1870, *Central R. Co. v. Houston*, 32 *Tex.* 516, 562 (certified copy of the enrolled act is the "best evidence," as against a printed copy); (2) Whether the journal is receivable for other purposes than to overthrow the enrolled copy: 1878, *State v. Smalls*, 11 S. C. 262, 286 (authority by a member of the Senate; the journal received to show the matter pending); (3) Whether the original of the journal must be produced: *ante*, § 1212; (4) Whether the printed copy of the journals is admissible: *post*, § 1684; (5) Whether the journal may be consulted, if omissions are to be fatal or may be cured by presumption: 1898, *Re Taylor*, 60 *Kan.* 87, 55 *Pac.* 340; 1898, *State v. Long*, 21 *Mont.* 26, 52 *Pac.* 645 (under the constitutional rule requiring the fact of the signing of a bill to be entered on the journal, the omission of the journal to show the fact of signature was held immaterial); and cases cited *infra*, note 5; (6) Whether the enrolled copy may be impeached in a collateral proceeding: 1870, *Brodnax v. Groom*, 64 N. C. 244, 247 (whether 30 days' notice of application for a private act had been given; the certified copy not impeachable collaterally; here, not in an application to enjoin the collection of a tax under the statute); (7) Whether a recital of preamble in a statute is conclusive: *post*, § 1352; (8) Whether by stipulation, or judicial admission, an unconstitutional defect in the enrolled copy can be waived: *post*, § 2591.

⁶ In the following summary most of the rulings against conclusiveness proceed upon the ground that the Constitution expressly requires certain legislative proceedings to be done or to appear to be done; this, as above noted, ought properly not to affect the result; nevertheless, such Courts might at the same time hold the enrolment conclusive as to the tenor of the act, the nature of the fact to be proved has for the reason been noted below; but lack of space forbids noting the constitutional provisions. At the point of numbers, the jurisdictions are divided almost equally *pro* and *con* the general principle (of these two or three have changed from their original position); two or three adopt a special variety of view (as in Illinois), three or four are not clear, and more than a dozen have not yet made their decision: *England*: 1600, *the Prince's Case*, 8 *Co. Rep.* 13, *semble* (enrolment conclusive); 1617, *B. v. Arundel*, 10 *Hob.* 10 (whether a certain provision was in a private act, such acts being filed without enrolment but

The arguments in favor of allowing the journals to be consulted for that purpose are sufficiently stated in the following passage, and in the succeeding quotations dealing with the answers to them:

1852, *Murray, C. J.*, in *Fowler v. Pierce*, 2 Cal. 163, "If such matters cannot be inquired into, the wholesome restrictions which the Constitution imposes on legislative and

under the Great Seal; "Now suppose that the journal were every way full and perfect, yet it hath no power to satisfy, destroy, or weaken the act, which being a high record must be tried only by itself, *teste scriptis*. Now journals are no records, but remembrances for forms of proceeding to the record; they are not (kept) of necessity, nor have they always been. They are like the docket of the prothonotaries or the particular to the King's patents. . . . The journal is of good use for the observation of the generality and materiality of proceedings and deliberations as to the three readings of any bill, the intercourses between the two houses, and the like; but when the act is passed, the journal is expired"; 1837, *Hampden's Trial*, 3 How. St. Tr. 825, 1153, 1236 (the statute *de tallagio non concedendo*, conceded to be a statute, though not found on the Rolls of Parliament); 1849, *Bowes v. Broadhead*, Style 155 ("Upon view of the Parliament Roll, . . . It was found that the Statute was rightly recited, notwithstanding what had been objected and the journal-book of Parliament produced to the contrary; . . . and the Court said they were to be ruled by the Parliament Roll, and not the journal-book"; and in another case the same day the Roll was ordered produced, "to make it appear whether an adjournment of Parliament was well recited," and the Court "would not credit the journal-book"); 1850, Jurisdiction of the Court of Chancery, 1 Ch. Rep., App. 52 (an account of the making up of a statute-roll and of the mode of determining a disputed text; nothing said of the journals); 1853, *Streater's Trial*, 5 How. St. Tr. 365, 387; L. C. J. Roll: "Now whereas you say, it is but an order of Parliament, and has not been three times read in the House; how can you tell but that it has been three times read? . . . But if it were but once read, we cannot call it into question, but must conceive it was on just grounds"; 1725, L. C. *Maclefield's Trial*, 16 Id. 767, 1334, 1382 (here it appears that under the original system there was a "parliament-roll" and a "statute-roll," but the former, from which the latter was made up, appears to have been entirely distinct from the journal); *ante*, 1726, *Gilbert, Evidence*, 7, 10 ("the memorials of the legislature . . . are authentic beyond all manner of contradiction"); 1764, *R. v. Kbotham*, 3 Burr. 1472 (a clear mistake of words in the enrolment appeared, but no resort was had to the journals); 1831, *R. v. Middlesex*, 2 B. & Ad. 818, 821 (until a certain statute, "if two acts of Parliament passed in the same session were repugnant, it was not possible to know which of them received the royal assent first, for there was then no indorsement on the roll of the day when bills received the royal assent"); for the modern method of drafting and

enacting a bill in England, see *Ilbert's Legislative Methods and Forms* (1901), 89, 105; *Alabama*: 1808, *Jones v. Hutchinson*, 43 Ala. 721, 723 (whether a portion of a bill had been concurred in, etc.; journals consulted, "to ascertain whether it has a legal existence"; citing only the California and Illinois cases, with *P. v. Purly*, New York, but affirming the doctrine as "well settled"); 1872, *Moody v. State*, 48 Id. 116 (whether certain amendments as passed were omitted; journals examined); 1875, *State v. Buckley*, 54 Id. 599, 613 (whether yeas and nays were taken; journals consulted); 1876, *Harrison v. Gordy*, 57 Id. 49 (doctrine applied to notice of a bill); 1877, *Walker v. Griffith*, 60 Id. 361, 364 (journals may be looked to, for ascertaining the constitutional requirements; but their silence does not require investigation; though in constitutionally specified cases their silence is conclusive); 1884, *Sayre v. Pollard*, 77 Id. 608 (doctrine applied to error in enrolment); *Moog v. Randolph*, *ib.* 597, 600 (same); 1885, *Abernathy v. State*, 78 Id. 411, 414 (same); *Stein v. Leeper*, *ib.* 517, 521; 1886, *Hall v. Steele*, 82 Id. 562, 565, 2 So. 650 (doctrine applied to notice of a bill); 1898, *Ex parte Howard H. I. Co.*, 119 Id. 484, 21 So. 516 (terms of an act; journals consulted); 1899, *O'Hara v. State*, 121 Id. 28, 25 So. 622 (whether a bill was properly signed and voted for; journals consulted); 1900, *Montgomery B. B. W. v. Gaston*, 128 Id. 425, 28 So. 497 (whether a bill was duly passed; journals consulted; another case illustrating the practical disadvantages of this rule); 1901, *Robertson v. State*, 130 Id. 164, 30 So. 494 (journals consulted); 1902, *Jackson v. State*, 131 Id. 21, 31 So. 380 (same; terms of an amendment); *Arizona*: 1876, *Graves v. Alsap*, 1 Ariz. 274, 282, 310, 318, 25 Pac. 836 (whether a statute not found among the certified files was in existence; journals not examined; *Dunne, C. J.*, diss., because the attempt was merely to show the contents of the certified statute as a lost document and not to question its evidential force); 1895, *Harwood v. Wentworth*, — Id. —, 42 Pac. 1025 (journals not to be consulted; here the purpose was to show that two sections were omitted from the bill after passing and before enrolling); *Arkansas*: 1857, *Burr v. Ross*, 19 Ark. 250 (whether a bill was voted to passage; journals examined); 1871, *Knox v. Vinsant*, 27 Id. 266, 278 (whether a bill was read three times; journals consulted); 1873, *English v. Oliver*, 28 Id. 317, 320 (whether a bill was read three times, etc.; journals consulted); 1877, *State v. R. Co.*, 31 Id. 701, 711, 716 (whether an act took effect within a certain time after adjournment; journals consulted to learn the time of adjournment; whether a bill was

executive action become a dead letter, and Courts would be compelled to administer laws made in violation of private and public rights, without power to interfere. The fact that the law-making power is limited by rules of government, and its acts receive judicial exposition from the Courts, carries with it, by implication, the power of inquiring how far

read three times, etc.; journals consulted); 1877, *Worthen v. Balgett*, 32 id. 496, 511 (whether a bill was read three times, etc.; journals consulted); 1878, *Smithee v. Garth*, 33 id. 17, 23 (whether the votes had been entered, etc.; journals consulted); 1879, *State v. Crawford*, 35 id. 237, 243 (whether a bill was properly read; journals consulted); 1882, *Clifton Co. v. Davies*, 40 id. 200, 205 (whether a bill was read three times; journals consulted; whether the enrolled act corresponded to the bill passed; journals and original draft consulted); 1883, *Smithee v. Campbell*, 41 id. 471, 475 (whether an amendment was enacted; journals consulted); 1884, *Webster v. Little Rock*, 44 id. 536, 547 (whether a bill had been duly read; journals consulted; rule treated as settled, but disapproved); 1886, *Davis v. Gaines*, 48 id. 370, 384, 3 S. W. 184 (doctrine not applied to notice of a bill required by Constitution); 1887, *Dow v. Beidelman*, 49 id. 325, 333, 5 S. W. 297 (doctrine applied to error in enrolment); 1889, *Glidewell v. Martin*, 51 id. 559, 566, 11 S. W. 882 (doctrine applied to question of due reading; but disapproved); *California*: 1852, *Fowler v. Pierce*, 2 Cal. 165 (whether an act was approved after adjournment; oral evidence received; quoted *supra*); 1863, *Sherman v. Story*, 30 id. 253, 256 (whether a rejected amendment had been incorporated in the act; journals not to be consulted, nor the original bill; as to *Fowler v. Pierce*, "possibly it may be distinguished, . . . but if not, it must be overruled"); 1872, *People v. Burt*, 43 id. 560, 564 (*Sherman v. Story* approved); 1880, *Weill v. Kenfield*, 54 id. 111 (whether there was due reading; journals consulted; prior rulings ignored); 1882, *Railroad Tax Case*, 8 Sawyer 238, 293, per Sawyer, J. (whether a bill was finally passed; journals consulted); 1886, *Oakland P. Co. v. Hilton*, 69 Cal. 479, 489, 496, 11 Pac. 3 (constitutional amendment required by Constitution to be entered on journals when proposed; journals consulted; but *Sherman v. Story* treated as law); 1889, *People v. Dunn*, 80 id. 211, 22 Pac. 140 (question not decided); 1896, *Hale v. McGettigan*, 114 id. 112, 45 Pac. 1049 (question reserved); 1901, *Yolo Co. v. Colgan*, 132 id. 265, 64 Pac. 403 (whether the required number of votes had been given; journals not consulted; *Sherman v. Story* followed); 1901, *People v. Harlan*, 133 id. 16, 65 Pac. 9 (preceding case approved); *Colorado*: 1881, *Re Roberts*, 5 Colo. 525 (due passage; journals may be consulted); 1888, *Hughes v. Felton*, 11 id. 489, 492, 19 Pac. 444 (doctrine implied); 1894, *Nesbit v. People*, 19 id. 441, 446, 451, 36 Pac. 221 (whether proposed constitutional amendments were validly passed; journals consulted); 1894, *Robertson v. People*, 20 id. 279, 283, 38 Pac. 328 (due concurrence of vote of Houses; journals consulted); *Connecticut*: 1849, *Eld v. Gorham*, 20 Conn. 8, 16 (certified published copy of revised statutes, deposited with the Secretary

of State and legislatively declared authentic, is the sole record of the law); *Dakota*: 1889, *Tarr v. O'Connor*, 5 Dak. T. 397, 415, 41 N. W. 716 (question reserved); *Florida*: 1884, *State v. Brown*, 20 Fla. 407, 419 (whether an amendment had been omitted from the enrolment, and whether due reading had occurred; journals consulted); 1888, *State v. Deal*, 24 id. 293, 294, 4 So. 899 (error in enrolment; journals consulted); 1893, *Mathis v. State*, 31 id. 291, 303, 12 So. 681 (due enactment of revised statutes; journals consulted); 1895, *State v. Hocker*, 36 id. 358, 18 So. 767 (that an act was not read in the Senate, and was not read by sections in either house; journals consulted); *Iowa*: 1895, *Wright v. Kelly*, — id. —, 43 Pac. 565 (journals not to be examined in a collateral proceeding; here, mandamus against county officers); 1896, *Bisins Co. v. Heard*, — id. —, 45 Pac. 890 (journals may be examined to see whether constitutional requirements were complied with); 1897, *Cohn v. Kingsley*, — id. —, 49 Pac. 485 (journals may be consulted); 1897, *State v. Boise*, — id. —, 51 Pac. 110 (in passing upon constitutionality, copy of the journals must be produced); *Illinois*: 1846, *People v. Campbell*, 8 Ill. 466, 468 (journals referred to on the question of a third reading, and a joint resolution held invalid); 1853, *Spangler v. Jacoby*, 14 id. 297 (whether a final vote was had; journals consulted, because the Constitution required the votes on final passage to be entered in the journal); 1855, *Turley v. Logan*, 17 id. 151 (whether a bill was properly read; journals consulted); 1857, *Prescott v. Board*, 19 id. 324 (whether a bill had been amended and enacted; journals consulted); 1861, *Board v. People*, 25 id. 181 (whether a bill was read three times; journals consulted); 1863, *People v. Hatch*, 33 id. 9, 132 (adjournment before executive disapproval; journals consulted); 1864, *People v. Starns*, 35 id. 121, 135 (whether a bill was acted on; journals consulted; doctrine rested on the constitutional requirement as to enactment, and doubted as a matter of policy); 1865, *Wabash R. Co. v. Hughes*, 38 id. 174, 185 (whether a bill was presented to the Governor and returned; journals consulted); 1867, *Illinois C. R. Co. v. Wren*, 43 id. 77 (whether the yeas and nays were called; journals may be consulted); 1867, *Bedard v. Hall*, 44 id. 91 (same doctrine implied); 1871, *Peoples v. DeWolf*, 62 id. 253 (whether a majority had concurred; journals consulted); 1872, *Hensoldt v. Petersburg*, 63 id. 157 (doctrine implied); 1873, *Ryan v. Lynch*, 68 id. 160, 164 (due reading; doctrine applied); 1873, *Müller v. Goodwin*, 70 id. 659 (whether a statute was properly passed; journals consulted); 1874, *Plummer v. State*, 74 id. 361, 362 (propriety of act's title; journals consulted); 1875, *Larrison v. R. Co.*, 77 id. 11 (whether a bill was properly read, etc.; journals consulted); 1876, *Binz v. Weber*, 81 id. 288 (propriety of title;

those exercising the law-making power have proceeded constitutionally. . . . It is said that parties would in every case dispute the existence of the law, and that such practice would lead to confusion and perjury. I have already said that this is a question for the Court. And why should not the citizen whose life, property, or liberty is made forfeit

journals consulted); 1870, *People v. Loewenthal*, 93 id. 191, 205 (due passage of amendment; journals consulted); 1876, *Ottawa v. Perkins*, 94 U. S. 260 (the Illinois rule declared to admit reference to the journals to overthrow the enrolled act; four judges dissenting, but on the question whether the journals must be offered in evidence); 1881, *Post v. Supervisors*, 105 id. 667 (same decision); 1881, *Wenner v. Thornton*, 98 Ill. 156, 163 (due passage; journals consulted); 1887, *Burritt v. Conrs*, 120 id. 323, 332 (due passage; journals consulted); 1902, *Chicago Telephone Co. v. Northwestern T. Co.*, 199 id. 324, 65 N. E. 329 (prior doctrine applied); *Indiana*: 1851, *Skinner v. Dening*, 2 Ind. 558 (whether a two-thirds vote had been given; journals consulted; purporting to follow *Purdy v. People*, N. Y.); 1856, *Coleman v. Dobbins*, 8 id. 156, 159 (whether a bill was read three times; journals proper to be examined); 1858, *McCulloch v. State*, 11 id. 424, 429, 435 (whether a constitutional majority voted; journals examined); 1869, *Evans v. Browne*, 30 id. 514 (whether a constitutional quorum had voted; journals not allowed to overthrow the duly certified act; preceding rulings repudiated); 1876, *Beuder v. State*, 53 id. 254 (whether an act was duly presented to the Governor before adjournment; enrolment conclusive); 1880, *Edger v. Board*, 70 id. 331, 333 (rule maintained; but journals consulted to interpret); *Iowa*: 1857, *State v. Clare*, 5 Ia. 508 (verified act on file is the "ultimate proof of the law"; here, as against a printed copy); 1859, *State v. Donehey*, 8 id. 396 (similar); 1861, *Duncombe v. Prindle*, 12 id. 1, 11 (whether a passage was omitted from the original bill; "behind this [the enrolled act] it is impossible for any Court to go for the purpose of ascertaining what the law is"); 1883, *Koehler v. Hill*, 60 id. 543, 558, 591 (contents of a constitutional amendment, under a requirement that the terms be entered at length upon the journal; the journal held to override the enrolled act; *Beck, J.*, diss., in a valuable opinion); *Kansas*: 1874, *Haynes v. Heller*, 12 Kan. 381, 383, 393 (question not decided); 1875, *Division of Howard Co.*, 15 id. 194, 211 (error in enrolment; journals may be consulted, but not engrossed bill); 1876, *Commissioners v. Higginbotham*, 17 id. 62, 78 (whether a bill was duly passed; journals consulted); 1881, *Constitutional Prohibitory Amendment*, 24 id. 700 (proposed constitutional amendment required to be entered on journals; journals consulted); 1882, *State v. Francis*, 26 id. 724, 731 (whether a majority voted; journals consulted); 1882, *Vanderberg's Petition*, 28 id. 243, 254 (whether a two-thirds majority voted; journals consulted); 1886, *Weyand v. Stover*, 35 id. 545, 553, 11 Pac. 355 (whether a due reading, etc., occurred; journals consulted); 1889, *State v. Robertson*, 41 id. 200, 204, 21 Pac. 382 (dates of origin and passage, etc.; journals consulted);

1898, *Re Taylor*, 60 id. 87, 55 Pac. 340 (where certain parts of an act were duly passed; journals consulted); 1902, *State v. Andrews*, 64 id. 474, 67 Pac. 870 (conformity of a title; journals consulted; *Ellis, J.*, for the majority, doubts the propriety of this rule); *Kentucky*: 1869, *Conn. v. Jackson*, 5 Bush 680, 684 (question not decided); 1878, *Auditor v. Hayeralt*, 14 id. 284, 288 (same); 1892, *Norman v. Kentucky Board*, 93 Ky. 537, 546, 563, 20 S. W. 901 (same; but *Pryor, J.*, explicitly declared in favor of holding the enrolment conclusive); *Louisiana*: 1871, *Louisiana State Lottery Co. v. Richoux*, 23 La. An. 743 (whether a bill was properly read, etc.; journals not to be consulted); *Maine*: 1889, *Weeks v. Smith*, 81 Me. 538, 18 Atl. 325 (whether a bill was approved; enrolled act conclusive); *Maryland*: 1858, *Foike v. Douglass*, 13 Md. 392, 412 (the engrossed and the printed statute corresponded; the legislative journals held not to override this); 1870, *Mayor v. Harwood*, 32 id. 471, 477 (the final engrossment as constitutionally attested, held conclusive as to the statute's contents); 1874, *Berry v. R. Co.*, 41 id. 446, 463 (terms of act; journals consulted); 1874, *Legg v. Annapolis*, 42 id. 203, 220 (substitution of false bill in second House; journals consulted); 1877, *Strauss v. Heiss*, 48 id. 292, 295 (general doctrine approved; governor's testimony to time of signing; two bills, received); *Michigan*: 1844, *Green v. Graves*, 1 Doug. 351, 372 (whether a two-thirds majority had been given; journals consulted, but present question not discussed); 1865, *People v. Mahaney*, 13 Mich. 481, 491 (whether the vote included members not lawfully seated; journals may be consulted in general to determine validity of statutes); 1867, *People v. Onondaga*, 16 id. 254, 257 (error in engrossment of title; journals consulted); 1882, *Paek v. Barton*, 47 id. 520, 11 N. W. 367 (whether a bill was introduced in time; journals consulted); 1884, *Attorney-General v. Joy*, 55 id. 94, 100, 20 N. W. 806 (whether a two-thirds vote had been given; journals consulted); 1886, *Callaghan v. Chipman*, 59 id. 610, 617, 26 N. W. 806 (whether a bill was introduced in time; journals consulted); 1887, *Attorney-General v. Rice*, 64 id. 385, 31 N. W. 203 (whether a bill's title expressed its object; journals consulted); 1888, *Hart v. McElroy*, 72 id. 446, 40 N. W. 750 (whether the proper readings were had; journals consulted); 1889, *Sackrider v. Supervisors*, 79 id. 59, 66, 44 N. W. 165 (like *A. G. v. Rice*); 1890, *Stow v. Grand Rapids*, ib. 595, 597, 44 N. W. 1047 (whether an error had occurred in engrossment; journals consulted); *Rode v. Phelps*, 80 id. 598, 608, 45 N. W. 493 (whether errors occurred in engrossment; journals consulted); *Caldwell v. Ward*, 83 id. 13, 46 N. W. 1024 (whether a bill was introduced in time; journals consulted); 1891, *People v. Burch*, 84 id. 408, 411, 47 N. W. 765 (whether

by the operation of a particular law, be allowed to show to the Court, if it is not advised of the fact, that the same was passed in violation of his constitutional rights, or that it has been placed among the archives of government by fraud or mistake, and never had a legal existence? Is there no way of ascertaining whether the approval of the executive

bill had been properly voted on; journals consulted; *Minnesota*: 1853, *Board v. Heenan*, 2 Minn. 330, 338 (whether a bill had been properly read; journals consulted); 1877, *State v. Hastings*, 24 id. 78, 81 (whether a bill was properly read; journals consulted); 1884, *Burt v. R. Co.*, 31 id. 472, 477, 18 N. W. 285, 289 (whether a two-thirds vote had been given; journals may be offered in evidence); 1888, *State v. Peterson*, 38 id. 143, 145, 36 N. W. 443 (whether a bill was properly read; journals consulted); 1891, *Lincoln v. Haugan*, 45 id. 451, 48 N. W. 196 (whether a proper vote was had; journals consulted); *Mississippi*: 1856, *Green v. Weller*, 32 Miss. 650, 684, 702, 735, 33 id. 735 (whether an act had been voted by the required number; journals not to overthrow the enrolled act; careful opinion; *Smith, C. J.*, and *Fisher, J.*, diss.); 1836, *Swann v. Buck*, 40 id. 263, 295 (whether a bill was properly read; enrolled act conclusive); 1874, *Brady v. West*, 50 id. 68, 77 (errors in enrolment; journals consulted; "qualifying" *Green v. Weller*); 1886, *Ex parte Wren*, 63 id. 512, 523 (whether amendments were omitted; enrolled act held conclusive in a weighty opinion by *Campbell, J.*, quoted *supra*; *Brady v. West* repudiated); *Missouri*: 1821, *Douglas v. Bank*, 1 Mo. 24 (whether an act was duly passed; journals consulted, as "better and higher testimony"); 1833, *State v. McBride*, 4 id. 303 (whether a proper majority had voted; journals consulted to overthrow the enrolled document); 1856, *Pacific R. Co. v. Governor*, 23 id. 353, 362 (propriety of proceedings after a veto; journals not to control; opinion careful and detailed); 1875, *Bradley v. West*, 60 id. 83, 44 (doctrine implied that journals might be consulted); 1879, *State v. Mead*, 71 id. 266, 270 (whether a bill was properly read and signed; journals consulted under new Constitution); 1893, *State v. Field*, 119 id. 593, 606, 24 S. W. 752 (whether a bill's title was contained during passage; journals examined); *Nebraska*: 1876, *Hull v. Miller*, 4 Nebr. 508, 505 (whether an act was properly voted upon; journals consulted); 1879, *Cottrell v. State*, 9 id. 125, 128, 1 N. W. 1008 (whether a bill was properly signed and voted on; journals consulted); 1830, *State v. Liedtke*, ib. 462, 4 N. W. 63 (question not decided); 1885, *Ballou v. Black*, 17 id. 389, 393, 23 N. W. 3 (whether a bill was properly entitled and amended; journals consulted); 1885, *State v. McLelland*, 18 id. 236, 25 N. W. 77 (whether an error occurred in enrolment; journals consulted); 1886, *State v. Robinson*, 20 id. 96, 29 N. W. 246 (similar); 1888, *State v. Van Duyn*, 24 id. 586, 590, 39 N. W. 612 (whether certain parts of an enrolled act were properly voted upon; journals consulted); 1893, *State v. Moore*, 37 id. 13, 15, 55 N. W. 299 (whether an error of terms was made in the engrossment; journals consulted); 1894, *Ames v. R. Co.*, 64

Fed. 165, 168 (journals may be consulted under Nebraska law); 1898, *Re Granger*, 56 Nebr. 260, 76 N. W. 588 (terms of an act; journals consulted); 1898, *Webster v. Hastings*, ib. 669, 77 N. W. 127 (journals may be consulted; *Irving, C.*, and *Sullivan, J.*, diss.); 1899, *State v. Abbott*, 59 id. 103, 80 N. W. 499 (whether certain appropriatious were made in an act; journals may be referred to, but nothing else, *e. g.* original bill, etc.); 1900, *Webster v. Hastings*, 59 id. 563, 81 N. W. 510 (change of title after passage; journals consulted); 1900, *State v. Frank*, 60 id. 327, 83 N. W. 74 (same rule reiterated; but held not to allow the silence of a mutilated journal to overthrow the enrolment; the facts and opinion well illustrate the dangers and uncertainties to which the rule leads; that in these days the journals could be kept in the manner shown in this case is a disgrace to the State and a warning to others); 1901, *Stinson v. Union Stockyards Co., C. C.*, 110 Fed. 789 (enrolled bill is controlled by the journals; here said of a Nebraska act); 1901, *State v. Frank*, 61 Nebr. 679, 85 N. W. 956 (approving the original decision, *supra*); *Nevada*: 1875, *State v. Swift*, 10 Nev. 176, 179 (whether a bill as enrolled was properly passed; journals not to be consulted; full and careful opinion by *Beatty, J.*); 1883, *State v. Glenn*, 18 id. 34, 38, 1 Pac. 186 (preceding case affirmed); 1887, *State v. Tuffy*, 19 id. 391, 12 Pac. 835 (whether a proposed constitutional amendment was entered upon the journals; journals consulted); 1895, *State v. Nye*, 23 id. 99, 101, 42 Pac. 866 (same as *State v. Glenn*); 1899, *State v. Beck*, 25 id. 68, 56 Pac. 1008 (whether a bill was properly read; journals not consulted); *New Hampshire*: 1858, *Opinion of the Justices*, 35 N. H. 579 (the journals are the authentic records, to be resorted to for determining whether the two Houses concurred in assent to the law); 1872, *Opinion of the Justices*, 52 id. 622 (same); *New Jersey*: 1866, *Pangborn v. Young*, 32 N. J. L. 29 (whether amendments made in the Senate were contained in the bill as approved; the filed and authenticated document held conclusive, and the journals not to be considered as evidence to the contrary; quoted *supra*); *New York*: 1839, *Thomas v. Dakin*, 22 Wend. 9, 112 (whether a law had been passed by a two-thirds vote; conclusiveness of the printed statute or of the certified original, expressly left undecided); 1840, *Warner v. Beers*, 23 Wend. 103, 125, 137, 168, 190 (whether a law had been passed by a two-thirds vote; *Walworth, C.*, left the question undecided whether the printed statute's correctness could be examined on demurrer to a plea; *Verplanck, Sen.*, was for examining both the certified original and the journals; *Bradish, Pres. Sen.*, was for taking the certified original as conclusive, under R. S., tit. 4, ch. 7, § 11, making it "conclusive evidence"; the question was apparently decided by the Court of Errors without

was forged, or whether officers have acted contrary to their constitutional obligations? It is no sufficient answer that we must rely on the integrity of the executive or other officers, and that the record of facts is conclusive evidence of the truth of such acts. Our notions of free institutions revolt at the thought of placing so much power in the hands

passing upon the point); 1841, *Hunt v. Van Alstyne*, 25 Kl. 605, 611 (same question, left undecided); 1841, *People v. Purdy*, 2 Hill 31 (same question; left undecided; *Int. Brouson, J.*, on the principle that the unconstitutional exercise of legislative power must be prevented, thought that at least the certified original could be examined); *a. c.* appealed, *a. v. Purdy v. People*, 4 id. 884, 390, 419 (Walworth, C., thought this certificate not conclusiv; the Court voted against his opinion, without expressing itself on the particular point); 1845, *De Bow v. People*, 1 Den. 9, 14 (same question; "it seems that the journals . . . may be consulted"); 1846, *Commercial Bank v. Sparrow*, 2 id. 97, 101 (the printed statute-book not conclusive; the other question not raised); 1853, *People v. Supervisors*, 8 N. Y. 317, 327 (whether the yeas and nays had been entered on the journal; *semble*, the journal not to be consulted, but it was); 1865, *People v. Devlin*, 83 id. 269, 279, 286 (whether a bill had been passed by a three-fifths vote; *semble*, that the journals could not be consulted); 1873, *People v. Com'rs*, 54 id. 276, 279 (whether a statute had been enacted by a two-thirds vote; "the original act is conclusive"); 1883, *People v. Petrea*, 92 id. 123, 137, 139 (whether a statute was based on a bill reported by commissioners to revise the statutes; the journals may be resorted to); 1891, *Rumsey v. R. Co.*, 130 id. 88, 92, 28 N. E. 763 (certificate of enrolment being defective, the journals were consulted to sustain the act; but whether a complete certificate would be conclusive is left undecided; the Court citing both *People v. Purdy* and *People v. Devlin*, and improperly leaving the matter unsettled); *Laws* 1892, c. 682, § 40 (presiding officer's certificate is to be "conclusive evidence" that a law was passed by the proper number of votes); *North Carolina*: 1870, *Brodnax v. Groom*, 64 N. C. 244, 248, *semble* (enrolled statute, conclusive); 1895, *Carr v. Coke*, 116 id. 223, 233, 22 S. E. 16 (whether a bill was duly read; enrolled copy held conclusive, in a careful opinion); 1896, *Union Bank v. Commissioners*, 119 id. 214, 221, 25 S. E. 966 (whether the yeas and nays were entered on the journals as required by the Constitution; journals consulted to overthrow the act; distinguishing *Carr v. Coke*); 1897, *Commissioners v. Snuggs*, 121 id. 394, 398, 28 S. E. 539 (same ruling); 1899, *Board v. Colar*, 37 C. C. A. 484, 96 Fed. 284 (journal considered, under a constitutional requirement in North Carolina that for certain legislation the yeas and nays must be entered on the journal); 1901, *Commissioners v. Dr-Rosset*, 129 N. C. 275, 40 S. E. 43 (*Carr v. Coke* approved; journals here consulted as to the several readings of a bill); 1903, *Wilson v. Markley*, — id. —, 45 S. E. 1023 (journals not to be consulted; except for ascertaining the due passage of certain private acts coming under the provisions of Const. Art. 2, § 14);

North Dakota: 1901, *Power v. Kitching*, 10 N. D. 254, 86 N. W. 737 (whether a bill was amended; journals not consulted); 1901, *Pickton v. Fargo*, lb. 469, 88 N. W. 90 (journals of a municipal council may be consulted); *Ohio*: 1854, *Miller v. State*, 3 Oh. St. 475, 479 (question raised but not decided); 1870, *Forlyce v. Godman*, 20 id. 1, 16 (whether a two-thirds vote had been given; journals consulted); 1886, *State v. Smith*, 44 id. 348, 363, 7 N. E. 447, 12 N. E. 829 (whether a bill was duly voted on; journals examined); 1887, *State v. Kiesewetter*, 45 id. 254, 256, 12 N. E. 807 (whether a bill was properly signed; journals consulted); *Oregon*: 1883, *Mumford v. Sewall*, . . . 67, 72, 4 Pac. 585 (whether a bill was properly read; journals and original bill consulted) 1887, *State v. Wright*, 14 id. 365, 372, 12 Pac. 708 (error in an amendment; journals consulted); 1892, *Currie v. Southern P. Co.*, 21 id. 566, 570, 28 Pac. 884 (whether a bill received a sufficient vote; journals consulted; *Bean, J.*, hesitating; *Lord, J.*, reserving his opinion); 1892, *State v. Rogers*, 22 id. 348, 364, 30 Pac. 74 (same ruling); 1897, *McKennon v. Cotner*, 30 id. 588, 49 Pac. 956 (journals may be consulted; an amendment appearing on the journal, it was presumed that it had been reconsidered and defeated, and thus the enrolment could be sustained); *Pennsylvania*: 1853, *Speer v. P. R. Co.*, 22 Pa. 376 (the certificate is "conclusive" as to enrolment; main question not considered); 1856, *Southwark Bank v. Com.*, 26 id. 446, 450 (the Legislature repealed a section of a pending bill; the journals consulted to identify the bill, and the section, though part of the bill as signed, treated as void); 1877, *Kilgore v. Magee*, 85 id. 401, 412 (whether a bill was properly entitled, read, etc.; enrolment conclusive); 1884, *Com. v. Martin*, 127 id. 185, 189, 204 (whether an act was properly entitled; enrolment conclusive); *South Carolina*: 1870, *State v. Platt*, 2 S. C. 150 (whether the statute required "Court to be held at Barnwell or at Blackville; the enrolled act read originally "Barnwell," which was altered to read "Blackville"; the journals consulted; the chief argument relied on is the necessity of preventing the violation of constitutional safeguards; *Moses, C. J.*, diss.); 1879, *Bond Debt Cases*, 12 id. 200, 226, 233, 289 (whether a two-thirds vote had been given; journals consulted); *State v. Hagood*, 13 id. 46, 54, 61, 70 (whether a bill was properly read; journals consulted; *McIver, J.*, diss. in part, in a forcible opinion); *South Dakota*: 1894, *Somers v. State*, 5 S. D. 321, 28 N. W. 804 (two statutes, approved the same day, having inconsistent provision; journal examined to see which was intended as repealing the other); 1901, *Narragang v. Brown Co.*, 14 id. 357, 85 N. W. 602 (journals not to be consulted to impeach the enrolled act); 1901, *State v. Bacon*, 14 id. 394, 85 N. W. 605 (same); *Tennessee*: 1879, *State v. Mc-*

of one man, with no guard upon it but his own integrity; and our Constitution has wisely so distributed the powers of government as to make one a check upon the other, thereby preventing one branch from strengthening itself at the expense of the co-ordinate branches and of the public. Such evidence should be of the most satisfactory character; and there is less to be apprehended from the subornation of witnesses, subject to the tests which the law imposes, than from the exercise of so great a power without restraint or accountability."

The answers to these arguments are represented in the following passages, dealing in various ways with one or more of the forms of argument against the conclusiveness of the enrolment:

Connell, 3 Lea 332, 341 (whether a bill was properly read; journals consulted, but the question not raised); 1880, *Gaines v. Morrigan*, 4 id. 608, 611 (whether an amendment was properly passed; journals consulted; but question reserved in part); *Williams v. State*, 6 id. 549, 553 (whether a proper majority voted; journals may be consulted); 1887, *Hayes v. State* (unreported oral opinion; cited in next two cases as in accord with them); 1888, *Brewer v. Huntington*, 86 Tenn. 733, 9 S. W. 166 (whether a bill was rejected; journals consulted); 1888, *State v. Algood*, 87 id. 163, 167, 10 S. W. 310 (whether a bill had passed after amendment; journals consulted); 1892, *Nelson v. Faywood Co.*, 91 id. 596, 599, 20 S. W. 1 (whether a bill was duly passed, signed, etc.; journals consulted); *Texas*: 1875, *Blessing v. Galveston*, 42 Tex. 641, 656 (question discussed, but not decided); 1880, *Houston & T. R. Co. v. Odum*, 53 id. 343, 351 (whether an act was certified after adjournment; journals consulted to determine date of passage); 1886, *Hunt v. State*, 22 Cr. App. 396, 400 (whether a bill was properly signed; journals consulted); 1890, *Ex parte Tipton*, 28 id. 438, 442 (error in enrolment; journals not to be consulted, where no constitutional provision requires a matter to appear therein); 1890, *Re Duncan*, 139 U. S. 449, *semble* (the validity of a Texas statute, under the rule of *Usener v. State*, *infra*, held not to be a Federal question); 1891, *Ewing v. Duncan*, 81 Tex. 230, 233, 16 S. W. 1000 (whether a two-thirds vote had been given; journals consulted; none of the above cases cited); 1892, *Williams v. Taylor*, 83 id. 667, 19 S. W. 156 (whether a bill had been duly reported; journals not consulted; good opinion by *Gaines, J.*; this case practically affirms *Usener v. State*, 8 Cr. App. 177, and expressly affirms *Ex parte Tipton*, 28 id. 438, and distinguishes *Ewing v. Duncan*, *supra*, on the ground that the date of taking effect was in issue and did not furnish the data for determining whether a sufficient majority for giving immediate effect had voted); *United States*: 1857, *Thompson's Case*, 9 Op. Attorney-General, 1, 3, per *Black* (in a forceful opinion denying to executive officers the right of such consultation; "we must take the acts of Congress as we find them, without addition or diminution"); 1867, *Gardner v. Barney*, 6 Wall. 499 (the date of the President's signature to a bill not being an essential part of the record,

the legislative journals may be looked to with other evidence; and whenever "the existence of a statute" is in question, the Court may look to "any source of information" that is helpful); 1891, *Field v. Clark*, 143 U. S. 649, 670, 12 Sup. 495 (whether a clause was omitted from the engrossed act; journals not to be consulted; whether the failure to observe the constitutional rule requiring entry of yeas and nays on the journal could be thus inquired into, not decided); for Federal rulings interpreting the law of individual States, see *supra*, under California, Illinois, Nebraska, and North Carolina; *Utah*: 1896, *Ritchie v. Richards*, 14 Utah, 345, 47 Pac. 670 (whether the yeas and nays were taken, the Constitution requiring the fact to be entered on the journals on demand of five members; held, that the enrolled bill, duly signed, approved, and deposited, was the final record of the statute, and the journals could not be consulted); *Batch and Miner, J.J., diss.*; *Vermont*: 1844, *Re Welman*, 20 Vt. 653, 656 (time when an act took effect; enrolment conclusive; though "in some instances" journals may be consulted); *St.* 1894, § 31 (the engrossed copy kept by Secretary of State "shall be taken to be" the act); *Virginia*: 1884, *Wise v. Bigger*, 79 Va. 269, 271, 281 (whether a two-thirds vote was given; journals consulted); *Washington*: 1893, *State v. Jones*, 6 Wash. 452, 34 Pac. 201 (whether the constitutional requirements had been fulfilled; journals not to be consulted; opinion by *Hoyt, J.*, perhaps the best on the subject); *West Virginia*: 1871, *Osburn v. Staley*, 5 W. Va. 85, 89 (whether the required number of votes was given; journals consulted); *Wisconsin*: 1866, *Watertown v. Cady*, 20 Wis. 501 (whether a vote was properly taken; question not decided); 1878, *Bound v. R. Co.*, 45 id. 543, 557 (whether an act was properly passed; journals consulted); 1885, *Meracle v. Down*, 64 id. 323, 327, 25 N. W. 412 (same); 1891, *McDonald v. State*, 80 id. 407, 411, 50 N. W. 185 (whether a bill was passed as constitutionally required; journals may be consulted); *Wyoming*: 1872, *Brown v. Nash*, 1 Wyo. T. 85, 93 (whether a proper vote was given; journals may be consulted); *Utah*: *Pacific R. Co. v. Carr*, ih. 96, 103 (same); 1892, *White v. Hinton*, 3 Wyo. 753, 756, 30 Pac. 953 (whether a bill was passed and approved after expiration of the session; journals not consulted).

1841, *Nelson, C. J., in Hunt v. Van Alstyne*, 25 Wend. 605, 610: "There are only two modes of contradicting it [the certified enrolment]: 1. By the journals of the two Houses, and 2. by parol testimony. The presiding officer had all the benefit of the first; the ayes and noes are taken, and the journal made up, under his supervision and control. His means of ascertaining and determining the fact, when he declares the law to be passed, exceed those of any other tribunal that might be called upon to inquire into it. Besides, the hurry and looseness with which the journals are copied, and the little importance attached to the printed copies, necessarily impairs confidence in their correctness. They are most uncertain data upon which to found a judicial determination of the rights of property, much more of great constitutional questions. As to the second mode of contradicting the certificate, the evidence would if possible be still more fallible and unsatisfactory. Indeed, we can scarcely imagine a case where from its nature the proof would be so subject to the doubtful and conflicting recollection of witnesses. Nothing short of absolute necessity could justify a resort to it. It would hardly deserve much weight in contradicting the journal itself, — much less the certificate of the presiding officer affixed to the law."

1866, *Beasley, C. J., in Pangborn v. Young*, 32 N. J. L. 29, 34: "[1] It is impossible for the mind not to incline to the opinion that the framers of the Constitution, in exacting the keeping of these journals, did not design to create records which were to be paramount to all other evidence with regard to the enactment and contents of laws. . . . If intended for any purpose whatever in any course of judicial investigation, can any one conceive that these registers would have been left in the condition in which by the Constitution we find them? In the nature of things they must be constructed out of loose and hasty memoranda, made in the pressure of business and amid the distractions of a numerous assembly. There is required not a single guarantee to their accuracy or to their truth; no one need vouch for them, and it is not enjoined that they should be either approved, copied, or recorded. . . . [2] These are the sanctions [the signatures of the two presiding officers and of the Governor] which the Legislature has provided for the authentication of its own acts, both to the public and to the judicial tribunals; and the question is therefore presented whether such authentication must not be deemed conclusive, or in other words, whether the Legislature does not possess the right of declaring what shall be the supreme evidence of the authenticity of its own statutes. This question, in my opinion, must be answered in the affirmative. How can it be otherwise? The body that passes a law must of necessity promulgate it in some form. . . . It is the power which passes the law which can best determine what the law is which itself has created. The Legislature in this case has certified to this Court, by the hands of its two principal officers, that the act now before us is the identical statute which it approved, and, in my opinion, it is not competent for this Court to institute an inquiry into the truth of the fact thus solemnly attested. . . . [3] I think the rule thus adopted accords with public policy. Indeed, in my estimation, few things would be more mischievous than the introduction of the opposite rule. . . . The rule contended for is that the Court should look at the journals of the Legislature to ascertain whether the copy of the act attested and filed with the Secretary of State conforms in its contents with the statements of such journals. This proposition means, if it has any legal value whatever, that, in the event of a material discrepancy between the journal and the enrolled copy, the former is to be taken as the standard of veracity and the act is to be rejected. This is the test which is to be applied not only to the statutes now before the Court, but to all statutes; not only to laws which have been recently passed, but to laws the most ancient. To my mind, nothing can be more certain than that the acceptance of this doctrine by the Court would unsettle the entire statute law of the State. We have before us some evidence of the little reliability of these legislative journals. . . . Can any one deny that if the laws of the State are to be tested by a comparison with these journals, so imperfect, so unauthenticated, the stability of all written law will be shaken to its very foundations? . . . We are to remember the danger, under the prevalence of such a doc-

trine, to be apprehended from the intentional corruption of evidences of this character. It is scarcely too much to say that the legal existence of almost every legislative act would be at the mercy of all persons having access to these journals. . . . [4] The principal argument in favor of this judicial appeal from the enrolled law to the legislative journal . . . was that the existence of this power was necessary to keep the Legislature from overstepping the bounds of the Constitution. The course of reasoning urged was that if the Court cannot look at the facts and examine the legislative action, that department of government can at will set at defiance in the enactment of statutes the restraints of the organic law. This argument, however specious, is not solid. The power thus claimed for the Judiciary would be entirely inefficacious as a controlling force over any intentional exorbitance of the law-making branch of the government. If we may be permitted, for the purpose of illustration, to suppose the Legislature to design the enactment of a law in violation of the principles of the Constitution, a judicial authority to inspect the journals of that body would interpose not the slightest barrier against such transgression; for it is obvious that there could not be the least difficulty in withholding from such journals every fact evincive of such transgression. A journal can be no check on the actions of those who keep it, when a violation of duty is intentional. . . . [5] Besides, if the journal is to be consulted, on the ground of the necessity of judicial intervention, how is it that the inquiry is to stop at that point? In law, upon ordinary rules, it is plain that a journal is not a record, and is therefore open to be either explained or contradicted by parol proof. And yet, is it not evident that the Court could not, upon the plainest grounds, enter upon such an investigation? In the case now in hand, if an offer should be made to prove by the testimony of every member of the Legislature that the journals are false, and that as a matter of fact the enrolled law did receive in its present form the sanction of both houses, no person versed in jurisprudence, it is presumed, would maintain that such evidence would be competent. The Court cannot try issues of fact; nor, with any propriety, could the existence of statutes be made dependent on the result of such investigations. With regard to matters of fact, no judicial unity of opinion could be expected; and the consequence would necessarily be that the conclusion of different Courts as to the legal existence of laws from the same proofs would often be variant, and the same tribunal which to-day declared a statute void might to-morrow be compelled, under the effect of additional evidence, to pronounce in its favor. The notion that Courts could listen upon this subject to parol proof is totally inadmissible; and it therefore unavoidably results that if the journal is to be taken into consideration at all, its effect is uncontrollable; neither its frauds can be exposed nor its errors corrected. And if this be so, and the journal is to limit the inquiry of the judicial power, how obvious the inadequacy, if not futility, of such inquiry! . . . [6] In the frame of our State government the recipients and organs of this threefold power are the Legislature, the Executive, and the Judiciary, and they are coördinate, in all things equal and independent. Each within its sphere is the trusted agent of the public. With what propriety, then, is it claimed that the judicial branch can erect itself into the custodian of the good faith of the legislative department? It is to be borne in mind that the point now touched does not relate to the capacity to pronounce a law, which is admitted to have been enacted, void by reason of its unconstitutionality. That is clearly a function of Judicature. But the proposition is, whether, when the Legislature has certified to a mere matter of fact, relating to its own conduct and within its own cognizance, the Courts of the State are at liberty to inquire into or dispute the veracity of that certificate. . . . In my opinion, the power to certify to the public the laws itself has enacted is one of the trusts of the Constitution to the Legislature of the State."

1869, *Frazer, J.*, in *Evans v. Browne*, 20 Ind. 514, 524: "It is important, certainly, that the question whether the enactment of a statute is valid shall be made capable of ready and correct solution, and that it shall not depend upon doubtful or conflicting evidence. When all are bound to know the law, they should have the means of knowledge, and not merely reasons for conjecture, uncertainty, and doubt. . . . It is argued

that there is an appeal to these [legislative journals], from the official attestation of the presiding officers and to the archives in the executive department. Would the journals be as satisfactory to the mind? Such journals, it is notorious, are and must be made in haste, in the confusion of business, and are often inaccurate. Their reading is frequently omitted, so that these errors go without correction. They do not show the nature of the bill as introduced, but merely the amendments which have been proposed to it. They are not required to contain anything by which it could be even identified and its passage traced. . . . By what reason or analogy can we sustain ourselves in holding that the journal should override the signatures upon the enrolled act? Surely not because it is in the nature of things more likely to speak the whole truth upon the question in hand. . . . But it is argued that if the authenticated roll is conclusive upon the Courts, then less than a quorum of each House may by the aid of corrupt presiding officers impose laws upon the State in defiance of the inhibition of the Constitution. It must be admitted that the consequence stated would be possible. Public authority and political power must of necessity be confided to officers, who being human may violate the trusts reposed in them. This perhaps cannot be avoided absolutely. But it applies also to all human agencies. It is not fit that the Judiciary should claim for itself a purity beyond all others; nor has it been able at all times with truth to say that its high places have not been disgraced. The framers of our government have not constituted it with faculties to supervise coordinate departments and correct or prevent abuses of their authority. It cannot authenticate a statute; that power does not belong to it; nor can it keep a legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. . . . If it may [look beyond the enrolled act], then for the same reason it may go beyond the journal, when that is impeached; and so the validity of legislation may be made to depend upon the memory of witnesses, and no man can in fact know the law which he is bound to obey. Such consequences would be a large price to pay for immunity from the possible abuse of authority by the high officers who are, as we think, charged with the duty of certifying to the public the fact that a statute has been enacted by competent Houses. Human governments must repose confidence in officers. It may be abused, and there may be no remedy. — Nor is there any great force in the argument which seems to be regarded as of weight by some American Courts, that some important provisions of the Constitution would be a dead letter if inquiry may not be made by the Courts beyond the rolls. This argument overlooks the fact that legislators are sworn to support the Constitution, or else it assumes that they will wilfully violate that oath. It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the Judiciary only will be faithful to its obligations."

1896, *Zane, C. J., in Ritchie v. Richards*, 14 Utah 345, 47 Pac. 670: "Objections may be urged to either means of proof. Minutes and memoranda may not always be correctly transcribed upon the journals. And the minutes and memoranda are sometimes made amid circumstances calculated to confuse and distract the attention, and to divert it from the business in hand. Bills may sometimes be enrolled, and signed by presiding officers, and approved by the governor, that have never been duly passed. Either source is subject to possible error. Courts and lawyers will differ as to which is the surest and best source of information. However, when statutes are published people shape their actions and conduct with respect to them; they incur obligations, acquire rights, and discharge duties in reliance upon them. If such a law, in any instance, should turn out to be void, because some requirement of the Constitution had not been observed in its passage, great injustice would be likely to follow. We must regard the enrolled bill, duly signed, approved, and deposited in the public archives, as a more accessible and convenient source of authentication, and, if referred to, less liable to overturn law, and quite as reliable as the journals of the two Houses. The people ought not to be required to ransack such journals to ascertain whether laws have been duly passed, and they cannot be expected to do so. Nor should lawyers, before advising clients, be required to

search such journals. Statutory enactments should not depend nor stand upon such a sandy and uncertain foundation, if a better one can be found. Laws evidenced by the signatures of the presiding officers, and the approval and signature of the governor, and the filing in the public archives, ought not to be overthrown by memoranda on the journals which the Constitution does not require to be made."

1898, *Irvine, C.*, in *Webster v. Hastings*, 56 Nebr. 609, 77 N. W. 127: "We are in this case for the first time confronted with its [*i. e.* the opposite rule's] mischievous results. If the fact of the due enactment of a statute is to be tried on any available evidence, certain results follow, of such character as to bid us pause and re-examine our premises. Being an issue of fact, it is to be tried by the triors of fact, — in many cases, a jury. Being an issue of fact, its determination in one court or in one case will be no bar to its retrial in other courts, or in the same court in an action where the parties are different. One jury or one judge may, on conflicting evidence, find that a statute was passed, and is therefore the law of the State. Another may find that it was not passed, and is therefore inoperative. The law will be one thing for one man, and another thing for another man, depending upon the diligence of his counsel, and the temper, or perhaps prejudice, of a jury. A city will be governed by one law when A sues it, and by a different law when B sues it. An issue of bonds will be valid after their maturity only when in a suit thereon a jury shall say that the Legislature passed the law authorizing the issue, and then they will be valid only as to the specific bonds in action. I need not amplify the illustrations. Such a state of affairs produces a confusion in our statute law suggesting anarchy."²

The arguments against conclusiveness seem to be reducible to three: first, the argument of legal theory, *i. e.* that the enrolment is not a record; second, that of practical policy, *i. e.* that there is danger of error and fraud; and third, that of constitutional necessity, *i. e.* the impossibility of securing in any other way the enforcement of constitutional restrictions on legislative action. — The first argument, on which stress is seldom laid, is met by the principle that there may be conclusive preferences for testimony, irrespective of records (*ante*, § 1348). — The second argument cannot for a moment stand (as the above passages make plain) against the considerations that there is equal or greater danger of error and fraud in the journals, and that the use of the latter plunges the community into the uncertainty of repeated litigation on a question never capable of final settlement; the first of the considerations already outlined (*ante*, § 1348 (2)) applies here in all its force. — The third argument, that of constitutional necessity, is the one most frequently pressed, and the one really responsible for almost all of the decisions against conclusiveness. But it seems, after all, to be but a spectral scruple, created by a false logic:

(1) In the first place, note that it is impossible of consistent application. If, as it is urged, the Judiciary are bound to enforce the constitutional requirements of these readings, a two-thirds vote, and the like, and if therefore an act must be declared no law which in fact was not read three times or

² The opinions by Hoyt, J., in *State v. Jones*, 6 Wash. 452, 34 Pac. 201, and Beasley, C. J., in *Paagborn v. Young*, 32 N. J. L. 29, are easily the best on the subject both for comprehensiveness and keenness of analysis and for clearness of exposition. The latter opinion is the one best known; but the former, though rarely cited,

would alone render superfluous all the other deliverances on the subject. It is not quoted here, because it does not lend itself to partial quotation; but it ought to be read in its entirety by every one desiring to make an argument on the subject.

voted upon by two thirds, this duty is a duty to determine according to the actual facts of the readings and the votes. Now the journals may not represent the actual facts. That duty cannot allow us to stop with the journals, if it can be shown beyond doubt that the facts were otherwise than therein represented. The duty to uphold a law which in fact was constitutionally voted upon is quite as strong as the duty to repudiate an act unconstitutionally voted upon. The Court will be going as far wrong in repudiating an act based on proper votes falsified in the journal as it will be in upholding an act based on improper votes falsified in the enrolment. This supposed duty, in short, is to see that the constitutional facts did exist; and it cannot stop short with the journals. Yet, singularly enough, it is unanimously conceded that an examination into the facts as provable by the testimony of members present is not allowable.⁷ If to support this it be said that such an inquiry would be too uncertain and impracticable, then it is answered that this concedes the supposed constitutional duty not to be inexorable, after all; for if the duty to get at the facts is a real and inevitable one, it must be a duty to get at them at any cost; and if it is merely a duty that is limited by policy and practical convenience, then the argument changes into the second one above, namely, how far it is feasible to push the inquiry with regard to policy and practical convenience; and from this point of view there can be but one answer. (2) In the second place, the fact that the scruple of constitutional duty is treated thus inconsistently and pushed only up to a certain point suggests that it perhaps is based on some fallacious assumption whose defect is exposed only by carrying it to its logical consequences. Such indeed seems to be the case. It rests on the fallacious notion that every constitutional provision is *per se* capable of being enforced through the Judiciary and must be safeguarded by the Judiciary because it can be in no other way. Yet there is certainly a large field of constitutional provision which does not come before the Judiciary for enforcement, and may remain unenforced without any possibility of judicial remedy. It is not necessary to invoke in illustration such provisions as a clause requiring the Governor to appoint a certain officer, or the Legislature to pass a law for a certain purpose; here the Constitution may remain unexecuted by the failure of Governor or Legislature to act, and yet the Judiciary cannot safeguard and enforce the constitutional duty.⁸ A clearer illustration may be had by imagining the Constitution to require the Executive to appoint an officer or to call out the militia whenever to the best of his belief a certain state of facts exists; suppose he appoints or calls out when in truth he has no such belief; can the Judiciary attempt to enforce the Constitution by inquiring into his belief?⁹ Or suppose the Constitution to enjoin on the legislators to pass a law upon a certain subject whenever in their belief certain conditions exist; can the Judiciary declare the law void

⁷ Cases cited *supra*, note 3.

⁸ These cases suggest the disputed question as to the Judiciary's use of the *mandamus*, and are therefore open to dispute.

⁹ *Post*, § 2569.

by inquiring and ascertaining that the Legislature, or its majority, did not have such a belief?¹⁰ Or suppose the Constitution commands the Judiciary to decide a case only after consulting a soothsayer, and in a given case the Judiciary do not consult one; what is to be done? These instances illustrate a general situation in which the judicial function of applying and enforcing the Constitution ceases to operate. That situation exists where the Constitution enjoins duties which affect the motives and judgment of a particular independent department of government, — Legislature, Executive, and Judiciary. Such duties are simply beyond enforcement by any other department if the one charged fails to perform them. The Constitution may provide that no legislator shall take a bribe, but an act would not be treated as void because the majority had been bribed.¹¹ So far as the Constitution attempts to lay injunctions in matters leading up to and motivating the action of a department, injunctions must be left to the conscience of that department to obey or disobey. Now the act of the Legislature as a whole is for this purpose of the same nature as the vote of a single legislator. The Constitution may expressly enjoin each legislator not to vote until he has carefully thought over the matter of legislation; so, too, it may expressly enjoin the whole Legislature not to act finally until it has three times heard the proposition read aloud. It is for the Legislature alone, in the latter case as well as in the former, to take notice of this injunction; and it is no more the function of the Judiciary in the one case than in the other to try to keep the Legislature to its duty:

1877, *Per Curiam*, in *Kilgore v. Magee*, 85 Pa. 401, 412: "So far as the duty and the consciences of the members of the Legislature are involved, the law [of the Constitution] is mandatory; they are bound by their oaths to obey the constitutional mode of proceeding; . . . [it is] a question of regularity in the conduct of those who have the power to enact a law and to declare it to be such. . . . But when a law has been passed and approved and certified in due form, it is no part of the judiciary to go behind the law as duly certified to inquire into the observance of form in its passage."

1886, *Campbell, J.*, in *Ex parte Wren*, 63 Miss. 512, 533: "It is the admitted province of the Courts to judge and declare if an act of the Legislature violates the Constitution. But this duty of the Courts begins with the completed act of the Legislature; it does not antedate it. . . . From necessity the judicial department must judge of the conformity of the legislative acts to the Constitution; but what are legislative acts must be determined by what are authenticated as such according to the Constitution. That instrument contains many provisions as to the passage of bills which are admitted to be addressed to

¹⁰ 1887, *Day Land & C. Co. v. State*, 68 Tex. 526, 4 S. W. 865 (a legislative preamble declaring an emergency to exist, justifying the suspension of the rule requiring three several readings, as permitted by the Constitution, is conclusive; "the Legislature . . . is made the sole judge whether facts exist to authorize the immediate passage of a bill").

¹¹ 1810, *Fletcher v. Peck*, 6 Cr. 87, 123, 130, 144; 1884, *Eakin, J.*, in *Webster v. Little Rock*, 44 Ark. 536, 548 ("the rule everywhere recognized"); 1849, *Jones v. Jones*, 12 Pa. 350, 357; 1859, *Lowrie, C. J.*, in *Sunbury & E. R. Co. v. Cooper*, 33 Pa. 278, 282 ("May the Judiciary sit

in judgment upon a charge that the Legislature have been faithless to their oaths, to the Constitution, and to the public interests! . . . We cannot hesitate a moment on this question"); 1891, *U. S. v. Des Moines, N. & R. Co.*, 142 U. S. 510, 544 ("The knowledge and good faith of a Legislature are not open to question; . . . the bill [here] alleges that its [the act's] passage was induced by the [defendant] Navigation Co., by false representations and threats of suits; but that amounts to nothing"); 1893, *U. S. v. Old Settlers*, 148 id. 427, 466. Compare Story, *Commentary on the Constitution*, § 1090 (whose arguments apply to the present problem).

legislators exclusively, and for the observance of which there is confessedly no remedy which Courts can apply. . . . [They are] to be enforced by the oath required of members, and not admitted to the Courts."

The truth is that many have been carried away with the righteous desire to check at any cost the misdoings of Legislatures. They have set such store by the Judiciary for this purpose that they have almost made them a second and higher Legislature. But they aim in the wrong direction. Instead of trusting a faithful Judiciary to check an evil Legislature, they should turn to reform the Legislature. That it is no better, in the average, is the fault of the people, by whom it is sent. The sensible solution is not to patch and mend casual errors by asking the Judiciary to violate legal principle and to do impossibilities with the Constitution; but to represent ourselves with competent, careful, and honest legislators, the work of whose hands on the statute-roll may come to reflect credit upon the name of popular government.

§ 1351. **Same: (3) Certificate of Election.** The mode of dealing with election returns is everywhere regulated by statutes more or less voluminous, and frequently subjected to amendment; and it would be impossible to state here the condition of the law of evidence in each jurisdiction without a consideration of all the provisions of the general election law. It will be enough to note broadly the considerations recognized as affecting the evidential doctrine of conclusive testimony.

(a) The certificate of the returning officer or commission that a *certain person has been elected* is generally held not to be conclusive; and the Court will therefore examine, with the aid of other sources (chiefly, the ballots themselves) into the fact in issue, of which the certificate is the provisionally preferred testimony, *i. e.* into the total number and tenor of votes by qualified electors:

1705, *Wilmot, J.*, in *R. v. Vice-Chancellor*, 3 Barr. 1647, 1649, 1661 (an order to compel the University proctors to declare who had the majority of votes): "I think it [their 'declaration'] immaterial; for the question depends not upon that, but upon the real majority of legal votes. Their declaration cannot alter or affect that. . . . Even if such their declaration had been contrary to the truth of the fair and legal right, the Court must have taken up the matter upon the true and real merits."

1835, *Rogers, J.*, in *Com. v. County Commissioners*, 5 Rawle 75, 79: "It is a startling doctrine that in case of a notorious fraud or a palpable violation of the law a constable could palm an officer on the public by the force of his return, — that, by merely omitting to state the place where the election was held, he could control the election, when it was admitted that it was not in fact held at the place appointed by the act. If this be the law, it is useless to go through the mockery of an election; the constable may return whom he pleases, always taking care that his return is correct upon its face. It would be better to give the appointment to the constable at once, without the useless ceremony of an election."

1855, *Whiton, C. J.*, in *Attorney-General v. Barstow*, 4 Wis. 567, 792: "The question is whether the canvass or the election establishes the right of a person to an office. It seems clear that it cannot be the former, because by our Constitution and laws it is expressly provided that the election by the qualified voters shall determine the question. . . . But it has been repeatedly contended in the course of this proceeding that, although the election by the electors determines the right to the office, yet the decision of the

persons appointed to canvass the votes cast at the election settles finally and completely the question as to the persons elected, and that therefore no Court can have jurisdiction to inquire into the matter. It will be seen that this view of the question, while it recognizes the principle that the election is the foundation of the right to the office, assumes that the canvassers have authority to decide the matter finally and conclusively. . . . [As to this, we say that] Courts which have the power to entertain proceedings by *quo warranto* have authority to determine who has this right, without being compelled to limit the proof of the right to the acts of those who by law are appointed to canvass the votes and make statements of them;” *Smith, J.* ¹ “It is said the Legislature has erected the board of State canvassers into a judicial tribunal,—supreme, final, and unquestionable. This is indeed strange doctrine. . . . Can this board of canvassers be considered a judicial tribunal when they have no power to issue a subpoena for nor to compel the attendance of witnesses, to summon parties before them, to grant a trial by jury? . . . If the decision of one board can oust the supreme judicial tribunal of the State of jurisdiction and paralyze its functions, so can another. The clerk of a board of supervisors and two justices of the peace of his own selection become the Court of first and last resort, in which the most sacred rights of freemen are adjudged and determined without appeal; and that, too, without a chance of being heard, without process, without a jury, without the privilege of appearing before the power which may pronounce upon their rights.” ²

1863, *Davies, J.*, in *People v. Pease*, 27 N. Y. 45, 55: “What is it that confers title to the office and the legal right to the reception of its emoluments? It surely is the fact that the greatest number of qualified voters have so declared their wishes at an election held pursuant to law. It is not the canvass or estimate or certificate which determines the right. These are only evidences of the right; but the truth may be inquired into and the very right ascertained.”

1865, *Welch, J.*, in *Howard v. Shields*, 16 Oh. St. 184, 191: “The question to be decided in an election contest is, Which party received the greatest number of legal votes? If the Court can, as it necessarily must, go behind the abstract, why should it not also go behind the poll-books and tally-sheets? . . . To hold that, when an election has been in fact held, and the majority of the legal voters have in fact and according to the prescribed forms of law cast their ballots for the candidates of their choice, the constitutional rights of the voters and of their candidates can be defeated by a mere misprision or omission of the judges or clerks, would be manifestly unjust and contrary to the plain intent and spirit of our election laws. Such a result should be permitted only in cases of necessity arising from the want of proper means to ascertain with reliable certainty the facts of the case.”

Nevertheless, when the chief source of evidence, the ballots themselves, cannot be trusted because they have been tampered with, or when by law they have been destroyed, the condition already pointed out (*ante*, § 1348 (2)) may exist, namely, the official certificate may become more trustworthy than any verdict that could be reached upon the scanty or suspicious evidence available. In such a situation the certificate, or some subordinate certificate such as the tally-list, may well be taken as conclusive. But this result has seldom been reached by the Courts except under express direction of a statute.³ Most Courts, however, while not treating the certifi-

¹ At pp. 781, 786.

² The most forceful exposition of the whole subject is to be found in the masterly arguments of Mr. (afterwards C. J.) Ryan, at pp. 674, 684, and Mr. Orton, at p. 703, in the above case.

³ See the following: 1897, *Weakley v. Wolf*,

148 Ind. 208, 47 N. E. 466 (tally-sheets and certificates to be conclusive as to unprotested ballots, which are not to be looked at or testified about; the law having provided expressly for their destruction, R. S. 1894, § 6248).

cate as conclusive, do lay down, upon the same considerations, a rule for measuring the relative value of the evidence, i. e. they refuse to decide according to the evidence of the ballots if the ballots have been so tampered with as to be untrustworthy; the chief difference of opinion here occurs merely on the question whether the ballots will be taken as reliable until the tampering is shown, or whether they will be taken as unreliable until the fact of tampering is negatived.⁴

(b) The certificate includes an assertion that the person named was voted for by the *required number of qualified electors*. Conceding that the certificate is not conclusive testimony to the net fact that the person named was elected, may it not at least be taken to be conclusive that the votes were cast by qualified electors? The argument to this effect has occasionally been rested on the idea that the election officers were given a quasi-judicial function in determining to accept the vote of given electors. But the stronger argument, advanced in the more weighty opinions, is that the case presented involves the conditions already noted (*ante*, § 1348(2)) namely, a dearth of evidence for the proper investigation of the facts at a judicial trial. These remarks are set forth in the following passages:

1863, *Denio, C. J., diss., in People v. Pease*, 27 N. Y. 45, 77: "The real question is who, according to the arrangements which the Constitution and laws have provided for determining that question, received the greatest number of votes, and was elected to the office. If the law has left it as an open question, to be determined like ordinary matters upon which private rights depend, or, which is much the same thing, if the certificate of the canvassers is made only *prima facie* evidence of the state of the poll, as is argued, the right can only be definitely settled by the verdict of a jury. But the nature of the subject would lead us to conclude, *a priori*, that such could not be the system organized by

⁴ The following are illustrations: *Ariz.*: 1898, *Onkes v. Finlay*, — *Ariz.* —, 53 Pac. 173 (ballots not controlling where not clearly shown to have been preserved unaltered); 1887, *Dixon v. Orr*, 49 Ark. 238, 241, 4 S. W. 774 (poll-books and tally-sheets are preferred evidence; if unavailable, other evidence by observers is receivable); 1887, *Wheat v. Smith*, 50 id. 266, 282, 7 S. W. 161 (original and duplicate returns being lost, the election officers' testimony of their contents was received); 1890, *Jones v. Gildeweli*, 53 id. 161, 176, 13 S. W. 723 (contents of stolen returns shown); 1891, *Merritt v. Hinton*, 55 id. 12, 16, 17 S. W. 270 (contents of lost or destroyed returns shown); *Cal.*: 1865, *People v. Holden*, 28 Cal. 123, 131 (the statute providing for ballot-preservation, the tally-list of the election-officers may be overturned by the results of an inspection of the ballots themselves; ballots presumed not to have been tampered with); 1884, *Coglan v. Beal*, 65 id. 58, 63, 2 Pac. 737 (the election officers' certificate may be overturned by the ballots, if they are in the same condition as when delivered by the election-judges); *Ill.*: 1872, *Knox Co. v. Davis*, 63 Ill. 405, 418 (poll-books and returns having been rejected for fraud, other evidence of the votes cast was received); 1880, *Kingery v. Berry*, 94 id. 515 (ballots to control if not tampered with); 1887,

Lawrence Co. v. Schmauhausen, 123 id. 321, 332, 14 N. E. 255; 1897, *Dooley v. Van Hohenstein*, 170 id. 620, 49 N. E. 193 (neither ballot-count in Court nor election judges' return is conclusive; but the former is to be preferred where not under suspicion of tampering); 1900, *Jeter v. Headley*, 186 id. 34, 57 N. E. 784 (ballots control, if not tampered with); *Kan.*: 1877, *Hudson v. Solomon*, 19 Kan. 177 (Brewer, J.: "The necessities of the case make it [the certificate] *prima facie* evidence, but, unless expressly so declared by statute, it is never conclusive"); *Ky.*: 1900, *Taylor v. Beckham*, 108 Ky. 278, 56 S. W. 177 (refusing to review the action of the Legislature, which was here the election board); 1902, *Edwards v. Logan*, — id. —, 70 S. W. 852 (ballots control, if preserved intact); *Mass.*: 1897, *Attorney-General v. Drohan*, 169 Mass. 534, 48 N. E. 279; *Nebr.*: 1892, *Albert v. Twohig*, 35 Nebr. 563, 568, 53 N. W. 582 (ballots control the officers' returns, if properly preserved); *N. Y.*: 1825, *People v. Van Slyck*, 4 Cow. 297, 323 (Woodworth, J.: "The trial is had upon the right of the party holding office; the certificate is not conclusive; the Court will decide upon an examination of all the facts"); *N. D.*: 1899, *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018; *Wis.*: 1898, *State v. Luy*, 103 Wis. 524, 79 N. W. 776.

the Legislature. . . . I am of opinion that the policy of the legal provisions which have been enacted upon this subject is to secure record evidence of the result of the election, which, save in a few exceptional cases to be presently mentioned, is conclusive upon the public and upon all individuals, and against the verity of which no allegation can be admitted. I do not proceed upon one of the grounds relied upon by the plaintiffs' counsel, namely, that the inspectors of elections are made judges of the qualifications of persons claiming to be elected and who may offer to vote. . . . But while I disclaim any reliance upon the alleged judicial character of the inspectors, I am still of opinion that, so far as the value of the vote is concerned, the voter is made a competent and effectual witness respecting his qualifications to vote. Should he swear falsely, he is liable to indictment and punishment for perjury; and the act directs the preservation of so much of the evidence of his having voted as shall be necessary to establish the fact upon the trial of an indictment. . . . The Legislature considered that if one claiming to be a voter came forward, openly and publicly, before the inspectors and the public, who would be likely to be his neighbors and acquaintances, and offered to vote and no one questioned his right, or swore positively to his qualifications if challenged, it would be quite safe to assume that he possessed the requisite qualifications; for the inspectors and the whole community would not be likely to conspire in the interest of illegal voting. The law, therefore, provided that in such a case the vote should be received without other evidence. As to those whose right should be challenged, the legislative will was that the voter should be questioned on oath by the inspectors; that if doubts as to his right should be entertained, these doubts should be stated to him and the law explained, and that then it should be left to his conscience whether to affirm upon his oath, under the peril of temporal punishment for perjury, and of such religious and moral responsibility as might affect his mind, or to abstain from voting. . . . No doubt the determination of the right is left to depend essentially upon the voter's oath, and that there is a possibility that a false or mistaken oath may sometimes be taken. But is the hazard of a perversion of the franchise, under these arrangements, so great as to require us to hold, against the plain language of the statute, that a right is implied to reëxamine the question before a jury, in case the right of the prevailing candidate shall afterwards be called in question? I think not."

1868, *Campbell, J.*, in *People v. Cicott*, 16 Mich. 283, 294: "The first inquiry, therefore, is whether an election can be defeated as to any candidate by showing him to have received illegal votes. . . . And where the illegality consists in the casting of votes by persons unqualified, unless it is shown for whom they voted, it cannot be allowed to change the result. The question of the power of Courts to inquire into the action of the authorities in receiving or rejecting votes is, therefore, very closely connected with the power of inquiring what persons were voted for by those whose qualifications are denied. . . . The reasons why such an inquiry should be prevented do not necessarily rest on any assumption that the inspectors act throughout judicially, although under our registration system that objection has a force which would not otherwise be so obvious. Neither do they rest in any degree upon the assumption that one rule or another is most likely to induce perjury, as very hastily intimated in *People v. Ferguson*, 8 Cow. 102 [quoted *post*]. But a very strong ground for them is found in the fact that our whole ballot system is based upon the idea that unless inviolable secrecy is preserved concerning every voter's action, there can be no safety against those personal or political influences which destroy individual freedom of choice. . . . Under our statutes there is no general provision which makes the canvass for local officers conclusive in all cases, and, therefore, the rule is recognized that the election usually depends upon the ballots, and not upon the returns. These being written and certain, the result of a recount involves no element of difficulty or ambiguity beyond the risk of mistakes in counting or footing up numbers, which may in some respects be more likely in examining the ballots of a whole county, than in telling off those of a town or ward, but which involves no great time or serious disadvantage. But the introduction of parol evidence concerning single voters in a con-

considerable district can rarely reach all cases of illegality effectually, and must so multiply the issues as to seriously complicate the inquiry. . . . No system can be devised which will prevent all illegal voting. But it cannot be said our legislation is not as likely to shut it out as any means open to judicial control would be. The registration law forbids the board from recording any name of which they have well-founded doubts, and it is practically impossible for any stranger to succeed in defrauding the law, with the publicity given to all the proceedings. Where a person applies for registration on election day, the inspectors act upon discretion, and are not compelled to admit a vote unless satisfied of its legality. The challengers on both sides, as we all know, canvass every district beforehand, and expect to challenge every one who is not known. While the inspectors cannot reject a registered voter who takes the proper oath, yet the means of previous inquiry, and the imminent risk of detection and punishment, have reduced the dangers of illegal voting within very narrow limits. . . . I am, therefore, of opinion that the election must be determined solely by the ballots received according to law; and that where the election proceedings are not irregular, and the law has been complied with in correcting the lists and preserving the ballots, the means of determining the result must be in the main arithmetical."

The arguments against the conclusiveness of the certificate as to the voter's qualifications are set forth in the following passages:

1827, *Savage, C. J.*, in *People v. Ferguson*, 8 Cow. 102 (repudiating the ruling of the trial judge that a voter's testimony to the tenor of an ambiguous ballot was inadmissible because "such a principle would be of the most dangerous tendency, as it would lead to subornation of perjury"); "The elector who put in the ballot is certainly higher evidence as [to] the person designated by it than the opinion of any other. Such elector is competent, unless he is to be excluded from principles of public policy. . . . It is true, if the voter should swear falsely, you probably cannot convict him of perjury. But are we to reject every witness who comes to swear under such circumstances that if he swears false, he cannot be convicted of perjury? I know of no such rule of evidence."

1863, *Selden, J.*, in *People v. Pease*, 27 N. Y. 45, 65: "The first ground upon which this position is attempted to be sustained is, that inspectors of elections are judicial officers, whose decisions in receiving the ballots are final and conclusive. . . . Inspectors are required to decide some questions, but they are such as ministerial officers are often required to decide. A county clerk, before recording a deed, must decide whether it is legally proved or acknowledged, but his decision is not conclusive; a sheriff must decide whether the person whom he arrests is the person described in his process, but his decision is not judicial, and he acts at his peril. . . . The inspectors may be required to decide important questions, and their decisions, for the purpose for which they are made, that of determining whether the votes shall be received or rejected, are final; but I do not think they are conclusive with regard to the legality of the votes when the question is presented in an action properly instituted to try the right of persons elected to office, or defeated by the result of the decisions. They cannot call witnesses — they can receive no oral testimony excepting the oath of the voter, and no documentary evidence, unless the challenge is based on an alleged conviction of crime. . . . Their decision leaves the question open for more deliberate adjudication whether the voter had or had not a right to vote. Great interests often depend upon these questions. They lie at the foundation of the government, and it is of the utmost importance that the means of detecting and exposing fraud and imposition, and correcting error, should be such as to secure the confidence of the people in the ultimate result of elections. . . . The greatest number of lawful votes alone gives the right to an elective office in this State; and as no adjudication can be had to determine the lawfulness of votes before they are received, that question must be open to examination by Courts afterwards, or there is no power anywhere in the government to discriminate between those which are lawful and those which are

unlawful. Indeed, if the rule contended for by the plaintiffs be adopted, the distinction between lawful and unlawful votes ceases to exist when they reach the ballot-box."

1868, *Christiency, J.*, in *People v. Cicott*, 16 Mich. 283, 311: "I cannot go to the extent of holding that no inquiry is admissible in any case into the qualification of voters, or the nature of the votes given. Such a rule, I admit, would be easy of application, and as a general rule might not be productive of a great amount of injustice, while the multitude of distinct questions of fact in reference to the great number of voters whose qualification may be contested, is liable to lead to some embarrassment, and sometimes to protracted trials, without a more satisfactory result than would have been attained under a rule which should exclude all such inquiries. Still I cannot avoid the conclusion that, in theory and spirit, our Constitution and our statutes recognize as valid those votes only which are given by electors who possess the constitutional qualifications; that they recognize as valid such elections only as are effected by the votes of a majority of such qualified electors. And though the election boards of inspectors and canvassers, acting only ministerially, are bound in their decisions by the number of votes deposited in accordance with the forms of law regulating their action, it is quite evident that illegal votes may have been admitted by the perjury or other fault of the voters; and that the majority to which the inspectors have been constrained to certify and the canvassers to allow, has been thus wrongfully and illegally secured. And I have not been able to satisfy myself that, in such a case, these boards acting thus ministerially, and often compelled to admit votes which they know to be illegal, were intended to constitute tribunals of last resort for the determination of the rights of parties claiming an election. If this were so, and there were no legal redress, I think there would be much reason to apprehend that elections would degenerate into mere contests of fraud. The person having the greatest number of the votes of legally qualified electors, it seems to me, has a constitutional right to the office, and if no inquiry can be had into the qualification of any voter, here is a constitutional right depending upon a mode of trial unknown to the Constitution, and, as I am strongly inclined to think, opposed to its provisions. I doubt the competency of the Legislature, should they attempt it, which I think they have not, to make the decision of inspectors or canvassers final under our Constitution. The extent of the inquiry into the qualification of voters, and how they have voted, may be limited or qualified by other provisions of the Constitution. . . . He may, if he sees fit, testify in court to the vote which he has given. . . . And whenever the person who has voted admits that he was not constitutionally qualified, or the fact clearly appears, so that it no longer remains a question for the jury, he can claim no protection from this privilege."⁶

§ 1352. **Sundry Official Certificates (Certificates of Jurat, of Acknowledgment of Deed, of Record of Deed, of Ship Registry, of Protest of Commercial Paper; Legislative Recitals in Statutes).** The suggestion has been made in many other instances that an official certificate should be taken as conclusive testimony to the fact certified; but this suggestion has been almost invariably repudiated by the Courts. Such cases, however, involve the necessity of distinguishing the rules of the substantive law bearing on the issue (as already noted in § 1346), and it would be impossible here to deal justly with the various questions. A few instances only may be noted, to illustrate the nature of the problem.

(1) A *recital* of fact in a *statute*, though it may in some conditions be admissible as an official statement (*post*, § 1662), is not conclusive testimony. The Legislature's recitals are commonly intended merely as explanations

⁶ See the authorities cited *supra*, note 4; the local statutes are so lengthy and so complicated with other rules of law that it is impracticable to collect the authorities here.

of motives and purposes, and not as determinations of controverted fact. They could not, without gross injustice, be made evidentially conclusive, and this is generally conceded.¹ As a contract or an estoppel, or otherwise, the recital may be binding;² but that would not be due to a rule of evidence.

(2) A *jurat* or *certificate of the taking of an oath* is ordinarily not conclusive testimony and may be shown erroneous.³ But in a given case the law may prescribe, as a condition precedent to certain legal consequences, that certain documentary forms of oath be observed; and then, if those forms are not observed, it is of no effect that the oath or other act was done without those forms; here all will depend on the significance of the statutory requirement.⁴

(3) For the same reason, the conclusiveness of a *deed's certificate of acknowledgment* will depend upon the view taken of the policy of the Legislature in requiring certain conditions for the validity of a transfer under the registration system, and also on the judicial or merely *ex parte* character (*ante*, § 1347) of the proceeding in which the acknowledgment is taken.⁵

(4) So also the theory of the substantive law (*ante*, §§ 1225, 1239) must disclose whether under the system of land-transfer registration the *recorder's registration of a deed* is conclusive as to its contents,⁶ or as to the execution

¹ Cal. C. C. P. 1872, § 1903 (recitals in a public statute are conclusive only "for the purpose of carrying it into effect"; in a *privata* statute, only "between parties who claim under its provisions"); 1849, *Birdsong v. Brooks*, 7 Ga. 88, 92 (statutory recital not conclusive; quoted *post*, § 1353); 1883, *Koehler v. Hill*, 60 Ia. 543, 564, 14 N. W. 733, 15 N. W. 609 (preamble of a statute by our Assembly reciting the terms of an act of a former one, not conclusive).

² 1902, *Fraser v. James*, 65 S. C. 73, 43 S. E. 292 (under a constitutional provision permitting the Legislature to establish new counties upon certain conditions, the existence of those conditions as recited in the statute establishing a new county cannot be disputed, apart from fraud or deceit by the Legislature). Consult *Endlich, Interpretation of Statutes* (1888), § 375.

³ 1700, *Thurston v. Slatford*, 1 Salk. 284 (a clerk's record as to an official not taking the oath; "if there be a mis-entry, it might be supplied and corrected by other evidence, for he should not be concluded by the mistake or negligence of the officer"); 1808, *R. v. Emden*, 9 East 437 (jurat of an affidavit, not conclusive as to the place of the swearing); 1903, *Nicholson v. Snyder*, — Md. —, 55 Atl. 484 (notary's certificate of oath to an answer in bankruptcy, not conclusive); 1899, *Baumer v. French*, 8 N. D. 319, 79 N. W. 340 (jurat of an affidavit, not conclusive).

⁴ 1898, *Ryder v. Alton*, 175 Ill. 94, 51 N. E. 821 (assessment commissioner's report sworn to before a notary; commissioner not allowed to deny having sworn); 1823, *Hale v. Cushing*, 2 Greenl. 218, 220 (oath of an assistant assessor; if not recorded, provably orally; the statutory requirement being directory only); 1831, *Tripp*

v. Garey, 7 id. 266, *semble* (certificate of a militia commander as to the clerk's appointment is by statute the exclusive evidence); 1860, *Hathaway v. Addison*, 48 Me. 440, 443 (oath of collector and assessor; same as *Hale v. Cushing*); 1876, *Farnsworth Co. v. Rand*, 65 id. 19, 21 (oath of a collector before a town clerk; if never recorded, provable orally); 1812, *Bassett v. Marshall*, 9 Mass. 312 (a justice of the peace made no record of an oath to a militia clerk; the parol fact was allowed; "since the magistrate made no record, . . . the evidence admitted was the best that could be required"); 1826, *Sherman v. Needham*, 4 Pick. 66 (certificate of oath of appointment of militia clerk prescribed by statute; "this is not like the case where the regular evidence has been lost and inferior evidence is admitted; the Legislature seem to have prescribed the mode of taking the oath"; and so the prescribed certificate alone would suffice); 1827, *Com. v. Sherman*, 5 id. 239 (same).

⁵ See the following cases: 1898, *Merrill v. Sypert*, 65 Ark. 51, 44 S. W. 462; 1867, *Hill v. Bacon*, 43 Ill. 477; 1899, *Tuschinski v. R. Co.*, 176 id. 420, 52 N. E. 920; 1902, *Parlin & Orendorff Co. v. Hutson*, 198 id. 389, 65 N. E. 93; 1899, *Ayer v. Ahlborn*, 174 Mass. 292, 54 N. E. 555. Compare § 1347, *ante*, and the cases there cited for a *married woman's* acknowledgment. Certificates of this kind may by statute be judicial acts. Compare *Jones on Mortgage*, § 538.

⁶ See the following illustrations: 1856, *Harvey v. Thorpe*, 28 Ala. 250, 263; 1885, *Gastou v. Merriam*, 33 Minn. 271, 276, 22 N. W. 614; 1829, *Hastings v. B. H. T. Co.*, 9 Pick. 80, 83; 1836, *Ames v. Phelps*, 18 id. 314.

of an entry of satisfaction of a mortgage,⁷ or as to the time of entry for registration,⁸ or as to other facts material to the recorded title.⁹

(5) So also a *notary's certificate of protest*, regarded from the point of view of evidence, is not conclusive.¹⁰ Yet it is possible for the law of negotiable paper to make a certificate in a certain form sufficient or indispensable for fixing liability, — just as it may make the mere mailing of a notice, irrespective of its receipt, sufficient for the same purpose.

These and numerous other instances illustrate that when an official certificate, entry, record, or the like is forbidden to be disputed, it is usually not a genuine instance of conclusive testimony, but rather a consequence of some rule of substantive law.¹¹ The only plain instances of a rule of conclusive testimony, recognized on common-law principles, seem to be those of the magistrate's report of testimony, the enrolment of a statute, and the return of an election officer (*ante*, §§ 1349–1351). It remains now to notice certain statutory rules that have been attempted.

§ 1353. **Constitutionality of Statutes making Testimony Conclusive; General Principles.** It has been suggested (*ante*, § 1348) that a Court takes an extreme step, amounting to a temporary and partial renunciation of its vital functions, when it foregoes its own investigation and accepts some person's testimony as conclusive of a fact to be judicially determined. That a Court

⁷ See the following illustrations: 1854, *Fleming v. Parry*, 24 Pa. 47, 51 (an entry of satisfaction of mortgage on the registry; that it was not intended as a satisfaction of the bond, allowed to be shown; the entry not being a record "to which that maxim applies, the proper application of which is to judicial records"); 1871, *Lancaster v. Smith*, 67 id. 427, 433 (deed-recorder's attestation of a discharge of mortgage, not conclusive; the act being that of the party and the recorder being merely the attester of the party's act).

⁸ See the following illustrations: 1817, *R. v. Reed*, 3 Price 495, 506, 511; 1834, *Tracy v. Jenks*, 15 Pick. 465, 468 (register's certificate of time of receiving and recording deed, conclusive as between creditors); 1841, *Musser v. Hyde*, 2 W. & S. 314 (conclusive as to time, in favor of a purchaser for value on the faith of the entry); 1803, *Taylor v. Holcomb*, 2 Tyl. Vt. 344 (town clerk's endorsement of time of record of deed, conclusive; but here allowed to be interpreted by his usage in recording); 1846, *Morton v. Edwin*, 19 Vt. 77, 80 (justice's certificate of time of record of execution, not conclusive); 1850, *Chandler v. Spear*, 22 id. 388, 401 (clerk's certificate of time of record of tax-sale bill, not conclusive); 1861, *Bartlett v. Boyd*, 34 id. 256, 261 (town-clerk's statutory certificate of date of mortgage-record and filing, not conclusive); 1863, *Johnson v. Burden*, 40 id. 567, 571 (town-clerk's certificate of date of filing for record, not conclusive); 1845, *Horsley v. Garth*, 2 Gratt. 471 (not conclusive as to date of filing and recording).

⁹ 1827, *Hubbard v. Dewey*, 2 Ark. 312, 315 (clerk's certificate of fact of record of deed or

execution, not conclusive); 1827, *Myers v. Brownell*, ib. 407, 409 (clerk's certificate of filing of deed with directions to delay recording, not conclusive); 1843, *Carpenter v. Sawyer*, 17 Vt. 121, 123 (clerk's certificate of source of record of notices, not conclusive). On the foregoing points, compare the cases cited *ante*, §§ 1225, 1239.

A *ship's register* is ordinarily not conclusive as to title; 1830, *Colson v. Bonzey*, 6 Greenl. 474 (action for supplies furnished). Compare the cases cited *ante*, § 1240, *post*, § 1647.

¹⁰ 1875, *Boit v. McKenzie*, 54 Ala. 112; 1883, *Martin v. Brown*, 75 id. 442, 447; 1871, *Rogers v. Stevenson*, 16 Minn. 68; 1843, *Wood v. Trust Co.*, 7 How. Miss. 609, 630; 1895, *Cook v. Bank*, 72 Miss. 982, 18 So. 461; 1821, *Stewart v. Allison*, 6 S. & R. 324.

¹¹ 1877, *People v. Hagar*, 52 Cal. 171, 187 (certified copy of petition on file; whether certificate of correctness of copy can be attacked, not decided); 1854, *Peterson v. Taylor*, 15 Ga. 483 (certificate by a clerk, as to papers filed; not conclusive); 1887, *Mussel v. Tama Co.*, 73 Ia. 101, 34 N. W. 762 (township trustees' certificate of proper supplies furnished, conclusive under statute, except for fraud); 1903, *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788 (magistrate's certificate of taking of deposition, not conclusive). Compare the additional instances cited and distinguished, *ante*, §§ 1346, 1347, *post*, § 2453.

Whether the officer himself is forbidden to impeach his own certificate, though it is otherwise not conclusive, is a different question (*ante*, § 530).

may do this, when it believes the result to be a more likely approach to truth than its own investigations could obtain, cannot be doubted. But in such a case the Court acts voluntarily, and exercises its choice. Being charged constitutionally with the exclusive function of determining facts in controversy, it believes this duty to be best carried out by accepting a certain person's statement as the most satisfactory source of reliance in reaching that determination. But can such a course be forced upon the Judiciary by another department of government? Can the Legislature prescribe a rule of conclusive evidence?

(1) On the one hand, so far as a so-called rule of conclusive evidence is not a rule of evidence at all, but a rule of *substantive law*, it is clear that the Legislature is not infringing upon the prerogative of the Judiciary. For example, a rule that an indorser's liability can be fixed by showing a notary's certificate of protest is not necessarily a rule making the certificate conclusive evidence of due demand and notice, but a rule of the law of negotiable instruments; because the law might be that no demand or notice at all was necessary for fixing an indorser's liability; to require a notary's certificate is merely to require a formal official instrument irrespective of its truth, *i. e.* something half-way between requiring actual notice and requiring no notice at all. Again, to make a rule that as between successive grantees the recorder's certificate of the time of filing deeds shall be conclusive, is not to make a rule of evidence, but merely to provide in the law of land-transfer that a deed found to be recorded as of a prior date shall take effect against a deed found to be recorded as of a subsequent date, irrespective of the actual time of entry and record. In such cases, and countless others, the use of the term "conclusive evidence" cannot conceal the true nature of the rule as a rule of substantive law making a certain right or obligation depend upon the existence of a certain official writing irrespective of its truth.¹ Such statutes do not in any way infringe the prerogative of the Judiciary, because they make no rule of evidence at all.

It is true that such statutes may in some other aspect be invalid because of *express constitutional limitations* of legislative power as to some substantive right. For example, in either of the above instances, if the statute was enacted to govern notes and deeds made prior to its passage, it might violate the constitutional prohibition against laws impairing the obligation of contracts or taking property without due process of law. Again, a law providing that an assessor's or collector's deed of land sold for taxes shall be conclusive evidence that all due proceedings have been taken in the forfeiture may be obnoxious to the prohibition against taking property without due process; for the law in effect provides that the property may be taken although in fact due proceedings have not been had, — in short, while purporting to make a rule of evidence, it really makes a rule of property-law by which certain acts are declared unnecessary which the Constitution has declared necessary.

¹ Compare § 1346, *ante*.

In such ways, various constitutional provisions may be violated; but the Legislative attempt is invalid, not because it deals with a rule of evidence, but because it deals with a constitutional rule of property.

(2) In order, then, to contrive a real test of the Legislature's power to make a rule of *conclusive evidence* in the genuine sense, there must be given a case in which fact A, said to be conclusively proved by fact B, is and remains the real and unchangeable fact in issue, to which fact B can never bear anything more than an evidential relation. Such a case, it will be seen, can hardly occur except when fact A is constitutionally preserved as the ultimate fact on which the right or obligation depends; because, were there no such constitutional sanction, all instances of such laws (except where the statute clearly showed the contrary legislative intention) would be supportable as virtually substituting fact B for fact A in the substantive law (as, where a notary's certificate is substituted for actual notice), and thus the case resolves itself into a change of a rule of substantive law, and not the making of a rule of conclusive evidence. Such instances, then, genuinely presenting a rule open only to interpretation as a rule of conclusive evidence, must be extremely rare. One instance, however, would seem to be a statute making an election certificate conclusive evidence of a candidate's election. Now constitutionally the votes actually cast are the effective facts of an election; the certificate of an official can never be anything more than evidence in relation to the fact of the votes cast. This and a few other cases present fairly the question whether the Legislature can constitutionally oblige the Judiciary to forego its own investigation and accept some person's testimony as determining the fact of election.

To this question the answer can hardly be doubtful. It is one thing for the Judiciary, while exercising in its own way its constitutional powers, to choose to accept the aid of an official certificate in reaching its determination; but it is quite a different thing for the Judiciary to be forbidden altogether to exercise its powers in a certain class of cases. The judicial function under the Constitution is to apply the law; to apply the law necessarily involves the determination of the facts; and to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. To make a rule of conclusive evidence, compulsory upon the Judiciary, is to attempt an infringement upon their exclusive province.²

§ 1354. **Same: Applications of the Principles (Liability in Tort, Contract, or Crime; Presumptions as to Tax-Collectors' Deeds, Railroad Commissioners' Rates, Immigration Officers' Certificates, Referees' Reports, Insolvency, Gaming, etc.).** It remains to distinguish these two principles as they have been judicially invoked for various legislative provisions.

² 1849, Nisbet, J., in *Birdsong v. Brooks*, 7 Ga. 88, 92 (holding a statutory recital not conclusive; "The Legislature has no power to legislate the truth of facts. Whether facts upon

which rights depend are true or false is an inquiry for the Courts to make, under legal forms. It belongs to the judicial department of the government").

(1) A statute which in reality deals with some rule of *substantive law* cannot be obnoxious to the present principle, although it may be obnoxious to some constitutional proviso which protects the rule of substantive law in question. Thus, a statute which makes more stringent the rule of *responsibility for a tort*, by substituting some other test than negligence, is constitutional.¹ So also a statute which enlarges the rules of contract by creating an *estoppel* is constitutional,—as when the terms of a bill of lading² or of a policy of insurance³ are declared to be “conclusive” in certain respects. On the other hand, a statute making a *tax-collector's deed of property* “conclusive evidence” of the validity of the tax-sale is ineffective, so far as it virtually sanctions the divestiture of property whose owner is not in default; as it is usually said, the essential facts which are constitutionally required for a “taking by due process of law” cannot be abolished by the Legislature, although the unessential details are entirely within the control of the Legislature to suspend or to abolish, conditionally or absolutely.⁴ So, too, any other statute dealing with *property rights* or

¹ 1899, *Baltimore & O. R. Co. v. Kreager*, 61 Oh. 312, 56 N. E. 203 (statute making a railroad company absolutely liable, regardless of negligence, for loss by “fire originating upon the land belonging to such railroad company, caused by operating such railroad,” held valid); 1896, *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 22, 17 Sup. 248 (statute making railroad companies liable absolutely, without regard to negligence, for fire communicated by its engines, held valid; an instruction declaring that the setting of the fire was only *prima facie* evidence of negligence, held properly refused); 1897, *Jones v. Brim*, 165 U. S. 180, 17 Sup. 282 (statute making one who drives a herd of cattle over a highway along a hillside liable *ipso facto* for damage by rocks rolled down or banks destroyed, held constitutional). *Contra*: 1878, *Little Rock & S. F. R. Co. v. Payne*, 33 Ark. 816 (*contra* to *R. Co. v. Mathews, supra*, on the ground that negligence is an essential of liability, and that the Legislature cannot “divest rights by prescribing to the Courts what should be conclusive evidence”; this is an ignoring of the history of the law of negligence).

² *Contra*: 1902, *Missouri K. & T. R. Co. v. Simonson*, 64 Kan. 802, 68 Pac. 653 (statute making a bill of lading “conclusive proof of the amount, etc. so received by such railway company,” held unconstitutional, on the ground that such statutes precluding judicial inquiry are an “invasion of the judicial province and a denial of due process of law”; *Doster, C. J.*, and *Smith and Ellis, JJ.*, diss., on the ground that, though statutes which “bind interested parties by the adversary action of others” may be invalid, the above statute merely applied the doctrine of estoppel to the party's own act).

³ 1896, *Daggs v. Ins. Co.*, 136 Mo. 382, 38 S. W. 85 (statute forbidding an insurer against fire “to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured thereon,”

held valid); 1898, *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 565, 19 Sup. 281 (Missouri, valued-policy statute, held valid). Legislators frequently seem to believe that something is gained by labelling such statutes as rules of evidence; *e. g.*, Fla. St. 1897, c. 4554 (in actions on fire insurance policies, “the insurer shall not be permitted to deny that the property insured” was of the value insured; this is entitled “an act prescribing a rule of evidence”).

⁴ 1872, *Stoudenmire v. Brown*, 48 Ala. 699, 709; 1876, *Doe v. Minge*, 50 id. 123; 1877, *Walker, J.*, in *Cairo & F. R. Co. v. Parks*, 32 Ark. 131, 145; 1864, *Dillon, J.*, in *Allen v. Armstrong*, 16 Ia. 508, 513 (an element “so indispensable that without its performance no tax can be raised,” cannot be abolished by statute); 1870, *Cole, C. J.*, in *McCready v. Sexton*, 29 id. 356, 388 (“This power of the Legislature extends only to those things over which it is supreme; as to the essential and jurisdictional facts, so to speak, which the Legislature cannot annul or change, it cannot excuse the non-performance of them, and of course cannot make the doing of any other thing a substitute for them or conclusive evidence of their being done. To restate the proposition succinctly: Whatever the Legislature is at liberty to authorize or not, it may waive or estop denial; but not so as to that which it must require”); 1887, *Re Lake*, 40 La. An. 142, 3 So. 479 (“The exercise of legislative power has never been sanctioned so as to make such deeds conclusive as to essential prerequisites”); 1876, *Callanan v. Hurley*, 93 U. S. 387, 392 (statute making tax-deed conclusive as to certain parts of the proceeding, held valid); 1863, *Smith v. Cleveland*, 17 Wis. 556, 566 (statute declaring certain irregularities in tax-sale proceedings not to invalidate the sale, held valid; “the Legislature might have fixed the time and provided for a sale without notice or advertisement; they may surely, by proper legislation in advance, guard against errors and

personal rights is to be tested by the question whether any legislative alteration of those rights is constitutionally forbidden, either by the general rule against *ex post facto* laws⁶ or by some particular provision.⁶ In its control over the substantive *criminal law*, the Legislature seems to be unlimited except by the provisions against *ex post facto* laws, against cruel punishments, and against deprivation of life and liberty without due process⁷; it may therefore, within those limits, create and define such crimes as it thinks best.⁸ The unwritten constitutional principle, therefore, which some judges have recognized,⁹ that the Legislature cannot declare to be a crime that which is in judicial opinion not so, is no more valid for criminal law than for other departments.

(2) Turning now to statutes which genuinely deal with a *rule of evidence*, it seems to be generally conceded, on the grounds already noticed (*ante*, § 1353, par. 2), that a legislative attempt to interfere with judicial powers by forbidding investigation of facts, through declaring certain testimony or other evidential data to be conclusive, is invalid.¹⁰ The genuine instances of this

cure mistakes when notice is required"). Compare the cases cited *infra*, note 16.

⁶ *Ante*, § 7.

⁷ 1880, *People v. Boggs*, 56 Cal. 648 (statute declaring official surveyor's county lines conclusive is constitutional, for the Legislature has merely sanctioned beforehand such lines as he runs); 1888, *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513 (statute giving a building lien, and making the landowner's failure to forbid by law conclusive evidence of consent, held invalid as "a destruction of vested rights without due process of law"); 1860, *Cooper's Case*, 22 N. Y. 87, 90 (statute making the grantees of the diploma of a certain law school entitled to admission to the bar, held valid, because the Legislature possessed the power of regulating the terms of admission); 1854, *Webb v. Den*, 17 How. 576, 582 (statute making a conclusive presumption, after 20 years' registration of a deed, that it was properly acknowledged, etc., held valid). The following case was therefore decided upon the wrong theory: 1862, *Goshen v. Richmond*, 4 Ali. 458 (statute declaring that the validity of a marriage shall not be questioned on certain grounds in a collateral proceeding, held valid as a mere change in the admissibility of evidence).

⁸ 1824, *Sandford, C.*, in *Barker v. People*, 3 Cow. 886, 705 ("Though no crime is defined in the Constitution, and no species of punishment is specially forbidden to the Legislature, yet there are numerous regulations of the Constitution which must operate as restrictions upon this general power"); 1856, *A. S. Johnson, J.*, in *Wynehamer v. People*, 13 N. Y. 378, 420 ("There may, in respect to offences attempted to be created by legislation, a question arise, capable of being considered by Courts of justice, whether the thing forbidden is an essential part of either of those secured private rights [of life, liberty, or property] so essential that without it the right cannot exist at all").

⁹ 1892, *State v. Kingsley*, 108 Mo. 135, 18

S. W. 994 (a statute declaring that "every person who shall obtain board or lodging . . . by means of any trick or deception . . . shall be held to have obtained the same with the intent to cheat . . . and shall be guilty of a misdemeanor," held valid, because "it is morally wrong to obtain board by means of a trick . . . and hence it is competent for the law-making power to declare it a crime").

¹⁰ 1897, *State v. Divine*, 98 N. C. 778, 4 S. E. 477 (statute making the president, etc., of a railroad criminally liable for the killing or injury of stock by the railroad, regardless of the person's actual share in the causing of the injury, held invalid; the opinion confuses this and the *prima facie* question); 1882, *State v. Kartz*, 13 R. I. 528 (statute making it a crime to "keep a place in which it is reputed that intoxicating liquors" are kept for illegal sale, held invalid; "to introduce into the law the principle that a person can be punished for what other people say about him is to render all the constitutional safeguards of life, liberty, and property unavailing for his protection," in particular, the protection of "due process of law"). In the following case the point was not decided: 1880, *State v. Thomas*, 47 Com. 546 (statute making it an offence to keep a place "where it is reputed that intoxicating liquors" are illegally sold, held constitutional; but the opinion evades the real issue by holding that the reputation only when "unexplained and uncontradicted" is to be "conclusive evidence"; the argument of Mr. Curtis for the defendant is ably met).

¹¹ Besides the foregoing rulings, which in effect assume this, are the following: 1854, *Pittsfield & F. P. R. Co. v. Harrison*, 18 Ill. 81 ("The Legislature may not, indeed, deprive the party of all means of establishing the facts upon which his rights depend"); 1899, *Vega S. S. Co. v. Consol. Elev. Co.*, 75 Minn. 309, 77 N. W. 973 (Gen. St. 1894, § 7675, declaring the certificate of weight of grain, etc., by the State

sort, indeed, are rare; most statutes purporting to do this are really attempts to change the substantive law under the guise of a rule of evidence, and therefore may or may not be valid, according to the considerations already noted (*supra*, par. 1). In the present class, however, would belong statutes which, while plainly recognizing one fact as still dominant in the substantive law, and not desiring to change it, should make another fact conclusive proof; such a case is almost inconceivable unless the conclusiveness is attributed to human testimony of the main fact; but it is theoretically possible, and this explains some of the judicial utterances.¹¹

Assuming, though, that conclusiveness cannot constitutionally be attributed by the Legislature to any testimonial evidence as such (*ante*, § 1353), there still remain two apparent exceptions, in which conclusiveness can lawfully be created under some circumstances; one is the finding of an *inferior court*, and the other is the finding of an *executive officer* within his province of action. (a) So far as constitutionally the organization of courts and the prohibition of appeals is within the legislative powers of regulation, it is obvious (*ante*, § 1347) that a statute which merely regulates the *right of appeal* from inferior judicial officers is valid.¹² (b) Furthermore, so far as the function of the Executive can constitutionally include the power of decision for itself upon facts which concern the performance of its duties, the decision of these facts is no part of the Judiciary's function; and therefore a legislative sanction for the conclusiveness of a certain executive officer's decision is no inter-

weighmaster, "shall be conclusive upon all parties," held unconstitutional, as "an arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights"; the plaintiff was here allowed to prove the actual amount of grain delivered, in opposition to the certificate's figures); 1876, *Howard v. Moot*, 64 N. Y. 262, 269 ("It may be conceded, for all the purposes of this appeal, that a law that should make evidence conclusive, which was not so necessarily in and of itself, and thus preclude the adverse party from showing the truth, would be void, as indirectly working a confiscation of property or a destruction of vested rights"); 1788, *Shippen, P.*, in *Pleasants v. Meag*, 1 Dall. 380, 383 ("The nature of evidence necessarily implies an adverse right to controvert and repel"). See an able and learned article by Mr. Blawett Lee, 13 *Harv. Law Rev.* 233, 252 ("Constitutional Power of the Courts over Admission to the Bar").

The following case, which invoked this principle, might have been decided on the theory of Federal powers (*ante*, § 6): 1862, *Wantlan v. White*, 19 Ind. 470 (Federal statute that "the oath of enlistment taken by a recruit shall be conclusive as to his age," held not to prevent a minor's guardian, demanding his release, from showing the fact).

¹¹ 1864, *Dillon, J.*, in *Allen v. Armstrong*, 16 Ia. 508, 513 ("If the Legislature should pass an act declaring that merely being found in the possession of property which had been stolen should be conclusive evidence of guilt, Courts

would be very apt to hold that this was an assumption and exercise of a power which it did not possess"); 1890, *Mitchell, J.*, in *Voght v. State*, 124 Ind. 358, 24 N. E. 680. The following case would raise the question: 1903, *Snyder v. Bonbright, C. C.*, 123 Fed. 817 (by a statute of 1885, making the owner of a building liable for injuries caused through lack of a satisfactory fire escape, the certificate of an inspector that the fire escape is satisfactory was conclusive; the question of constitutionality was not here raised).

¹² 1877, *Hunter v. Turnpike Co.*, 56 Ind. 213, 224 (the report of an inspector of a road as to the fact of completion was made conclusive by statute; held valid; but here a privilege of appeal from the report to the Court existed); 1854, *Van Alstyne v. Erwine*, 11 N. Y. 331, 341 (statute making the Court's appointment, on notice, of trustees for the property of an absconding debtor "conclusive evidence that the debtor therein named was a concealed, etc., debtor," applied); 1788, *Pleasants v. Meag*, 1 Dall. 380, Pa. (statute making a bankrupt's certificate of bankruptcy, etc., by the commissioners "sufficient evidence"; held here not to signify "conclusive evidence," i. e. without appeal to examine the proceedings of the commissioners); 1871, *Chase, C. J.*, in *U. S. v. Kleir*, 13 Wall. 128, 145 (here a statute making a pardon conclusive evidence of certain facts before the Court of Claims was held to be inconsistent with the right of appeal as otherwise guaranteed; *Miller and Bradley, JJ.*, diss.).

ference with the judicial power. Where the line should be drawn may be sometimes open to argument; but the principle cannot be doubted. It has been applied to statutes making final the schedules of rates by *railroad commissioners*,¹³ the decisions of *immigration officers*,¹⁴ and of other *treasury officers*.¹⁵ Here the moral is that if the Legislature is willing to create petty despots, the community must seek aid through a better Legislature, and not through a denial of necessary executive functions.

(3) There remains a question which has no concern with the question of conclusive evidence, but has often been assimilated to it, and has received an undeserved importance and a needless confusion by that association, namely the question of the constitutionality of statutes creating *rules of presumption* or *prima facie* evidence. A rule of presumption is simply a rule changing the burden of proof, *i. e.* declaring that the main fact will be inferred or assumed from some other fact until evidence to the contrary is introduced (*post*, § 2490). There is not the least doubt, on principle, that the Legislature has entire control over such rules, as it has over all other rules of procedure in general and evidence in particular (*ante*, § 7), — subject only to the limitations of evidence expressly enshrined in the Constitution. If the Legislature can abolish the rules of disqualification of witnesses and grant the rule of discovery from an opponent, it can shift the burden of producing evidence. Yet this elementary truth has been repeatedly questioned, and Courts have

¹³ 1858, *State v. Chicago, M. & S. P. R. Co.*, 38 Minn. 281, 37 N. W. 782 (statute making railroad commissioners' schedule of rates conclusive as to reasonableness, held valid, on the ground that a common carrier's charges were within legislative control and hence no judicial ascertainment was necessary); 1859, *Chicago M. & S. P. R. Co. v. Minnesota*, 134 U. S. 418, 452, 461, 464, 10 Sup. 462, 702 (statute making railroad commissioners' schedule of rates conclusive as to reasonableness, held invalid, because the question of reasonableness "is eminently a question for judicial investigation, requiring due process of law for its determination"; Bradley, J., and two others, diss., because the question, being a legislative one, could be delegated for investigation to the commission, "and such a body, though not a court, is a proper tribunal for the duties imposed upon it; . . . due process of law does not always require a court; it merely requires such tribunals and proceedings as are proper to the subject in hand"). Here again there is a current notion that the language of the law of evidence can be used to evade the issue: Ark. St. 1901, Feb. 27, No. 24 ("An act to define a rule of evidence in certain cases: In all actions between private parties and railroad companies brought under the law establishing a railroad commission . . . [the commission's rates prescribed] shall be held, deemed, and accepted to be reasonable, fair, and just, and in such respects shall not be controverted therein").

¹⁴ 1891, *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 660, 12 Sup. 336 (a Federal statute making conclusive the decision of an immigration inspector that an alien immigrant is within the classes

prohibited from entering, held valid; Brewer, J., diss.); 1892, *Fong Yue Ting v. U. S.*, 149 U. S. 698, 713, 732, 742, 754, 761, 13 Sup. 1016 (preceding case approved and applied to a deportation statute; "the power of Congress to expel, like the power to exclude aliens, . . . may be exercised entirely through executive officers"; the prior cases marking the boundary between executive and judicial matters are here collected; Brewer and Field, JJ., and Fuller, C. J., diss.); 1895, *Lem Moon Sing v. U. S.*, 158 id. 538, 15 Sup. 967 (preceding cases approved); 1901, *Fok Yung Yo v. U. S.*, 185 id. 296, 22 Sup. 686; 1901, *Lee Gon Yung v. U. S.*, ib. 306, 22 Sup. 690; 1901, *Chiu Bak Kan v. U. S.*, 186 id. 193, 22 Sup. 891; 1903, *Ksoru Yamataya v. Fisher*, 189 U. S. 86, 23 Sup. 611 (*Nishimura Ekiu's* case followed; but the statute implies at least "an opportunity to be heard" before the executive department "upon the questions involving his right to be and to remain in the U. S."). Compare the distinction taken in *Lavin v. Le Fevre*, 60 C. C. A. 425, 125 Fed. 693 (1903). One cannot help regretting that the Supreme Court sanctioned the Executive usurpation which the Legislature authorized in the preceding class of statutes.

¹⁵ 1855, *Murray v. Hoboken L. & I. Co.*, 18 How. 272, 284 (statute making a warrant of distress for debt due from a government collector to the United States conclusive evidence of the indebtedness, held valid as covering a matter not essentially one of determination by the judicial power).

repeatedly vouchsafed an unmerited attention to the question, chiefly through a hesitation in appreciating the true nature of a presumption and a tendency to associate in some indefinite manner the notion of conclusively shutting out all evidence and that of merely shifting the duty of producing it. Fortunately, sound principle has almost everywhere prevailed, though at an unnecessary expense of argument and hesitation.

Statutes giving presumptive or *prima facie* weight have therefore been held constitutional in application to *tax-collectors' deeds*, as raising a presumption of regularity of proceedings,¹⁶ to conduct indicating a *banker's knowledge of insolvency*;¹⁷ to conduct indicating illegal *gaming*¹⁸ or illegal *liquor-selling*¹⁹ (though here there is one line of singularly perverse decisions²⁰), to the findings of an *auditor* or *referee* in a trial,²¹ and to the schedules of rates of a *railroad commission*.²²

¹⁶ To the cases cited *supra*, note 4, which almost all concede this, add the following: 1893, *McDonald v. Conniff*, 99 Cal. 386, 390, 34 Pac. 71; 1894, *Clarka v. Mead*, 102 Id. 516, 519, 36 Pac. 862; 1888, *Gage v. Caraher*, 125 Ill. 451, 17 N. E. 777; 1855, *Hend v. Ballou*, 12 N. Y. 541; 1851, *Pillow v. Roberts*, 13 How. 472, 476; 1893, *Marx v. Hanthorn*, 148 U. S. 172, 181, 13 Sup. 508; 1856, *Delaplaine v. Cook*, 7 Wis. 44 (well-reasoned opinion by Whiton, C. J.).

¹⁷ 1894, *Robertson v. People*, 20 Colo. 279, 38 Pac. 328 (statute making a bank's failure within 30 days of a deposit *prima facie* evidence of knowledge of insolvency held constitutional); 1896, *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 991 (insolvent bankers' statute, held constitutional); 1896, *State v. Beach*, — Ind. —, 43 N. E. 949 (statute making failure of a bank within 30 days after receiving a deposit to be *prima facie* evidence of intent to defraud, held constitutional); 1894, *State v. Buck*, 120 Mo. 479, 25 S. W. 573 (insolvent bankers' statute, held valid). So also the following: 1903, *Crane v. Waldron*, — Mich. —, 94 N. W. 593 (fraudulent conveyances).

¹⁸ 1888, *Morgan v. State*, 117 Ind. 569, 17 N. E. 164 (statute declaring the fact of gaming, etc., to a lessor's knowledge to be sufficient evidence of renting for the purpose of gaming, held constitutional); 1890, *Voght v. State*, 124 Id. 358, 24 N. E. 680 (same statute held constitutional, and treated as merely defining a presumption); 1896, *Com. v. Smith*, 166 Mass. 370, 44 N. E. 563.

¹⁹ 1856, *Com. v. Williams*, 6 Gray 1 (statute declaring delivery of intoxicating liquor *prima facie* evidence of a sale, held valid: *Thomas, J.*, diss.); 1356, *Com. v. Wallace*, 7 Id. 222 (same; but *Thomas, J.*, not diss.); 1859, *Com. v. Rowe*, 14 Id. 47 (same); 1888, *Board v. Merchant*, 103 N. Y. 143, 149, 8 N. E. 484 (statute making the drinking of liquor on premises *prima facie* evidence of the occupant's sale with intent that the liquor should be there drunk, held valid); 1893, *People v. Cannon*, 139 Id. 32, 34 N. E. 759 (statute making the possession of marked bottles without the owner's consent *prima facie* evidence of unlawful purchase, held valid).

²⁰ 1881, *State v. Beawick*, 13 R. I. 211 (statute making the "notorious character" of premises or their frequenters *prima facie* evidence that said liquors are kept on such premises for the purposes of sale," held invalid, as depriving of liberty without "the law of the land," because "it virtually strips the accused of the protection of the common-law maxim that every person is presumed innocent until he is proved guilty"; yet the same ruling holds that another clause of the statute placing on the accused the burden of proof of a license is valid; the opinion discloses confused notions as to the nature of presumptions and burden of proof); 1881, *State v. Higgins*, Ib. 330 (statute making the sale of liquor in a place *prima facie* evidence that the sale is illegal," held valid, as in effect merely placing on the defendant the burden of proving a license; prior case distinguished); 1882, *State v. Meilor*, Ib. 666 (similar case to the preceding, but apparently inconsistent); 1885, *State v. Wilton*, 15 R. I. 180, 1 Atl. 415 (a statute making reputation merely evidence of the character of a place as a liquor nuisance, leaving the jury "free to find the accused guilty or not," held constitutional).

²¹ 1877, *Holmes v. Hunt*, 122 Mass. 505, 516 (statute making the report of an "auditor," or referee in civil cases, *prima facie* evidence, held valid). *Contra*: 1860, *Plimpton v. Somerset*, 33 Vt. 283 (statute making a referee's report *prima facie* evidence in common-law cases, held invalid, because the jury's verdict "becomes but the mere recording of a verdict made for them by others"; *Barrett, J.*, diss.). For the state of the doctrine in New Hampshire, which was rested largely on historical grounds, see the following cases: 1875, *Copp v. Henniker*, 55 N. H. 179; 1876, *Doyle v. Doyle*, 56 Id. 567; 1876, *Perkins v. Scott*, 57 Id. 55; 1876, *King v. Hopkins*, Ib. 334, 354, 359; in the last case, the opinion of *Foster, C. J.*, deals with the question of evidence, and, while apparently concealing the legislative power to make rules of *prima facie* evidence, it regards this statute as a virtual substitution of another tribunal for the jury; but his argument is laborious; the answer of *Cushing, C. J.*, is ample.

²² 1894, *Chicago B. & Q. R. Co. v. Jones*, 149

It has occasionally been suggested that these legislative rules of presumption, or any legislative rules of evidence, must be tested by the standard of rationality, and are invalid if they fall short of it.²³ But this cannot be conceded. If the Legislature can make a rule of evidence at all (*ante*, § 7), it cannot be controlled by a judicial standard of rationality, any more than its economic fallacies can be invalidated by the judicial conceptions of economic truth. Apart from the Constitution, the Legislature is not obliged to obey either the axioms of rational evidence or the axioms of economic science. All that the Legislature does in such an event is either to render admissible a fact which was before inadmissible, or to place the burden of producing evidence on the opposite party. When this has been done, the jury is free to decide; or, so far as it is not, this is because the party has voluntarily failed to adduce contrary evidence. There is here nothing conclusive, nothing prohibitive. So long as the party may exercise his freedom to introduce evidence, and the jurors may exercise their freedom to weigh it rationally, no amount of irrational legislation can change the result. If the Judiciary had long ago resented as unconstitutional that ill-advised species of legislative interference which forbade them to charge juries upon the weight of evidence, they need never have cared about the evidential effect of enactments of the present sort.

iii. 361, 37 N. E. 247 (statute making railroad commissioners' schedule of rates *prima facie* evidence of their reasonableness, held constitutional); 1891, Burlington C. R. & N. R. Co. v. Dey, 82 Ia. 312, 48 N. W. 98 (statute making railroad commissioners' schedule of rates *prima facie* evidence of reasonableness, held constitutional); and cases cited *supra*, note 13.

²³ 1896, Monks, J., in *State v. Beach*, — Ind. —, 43 N. E. 949 ("a statute which makes an act *prima facie* evidence of a crime, which has no relation to a criminal act and no tendency whatever to establish a criminal act," would be unconstitutional); 1856, Selden, J., in *Wynhamer v. People*, 13 N. Y. 378, 446 (statute making delivery *prima facie* evidence of sale of

liquor, declared invalid, on the ground that "all those fundamental rules of evidence . . . are placed by the Constitution beyond the reach of legislation . . . and are of course in their nature unchangeable"; this was *obiter*, the other judges not noticing the point); 1893, Beekham, J., in *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759 ("The limitations are that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must be not merely and purely arbitrary, or wholly unreasonable, unnatural, and extraordinary").

TITLE II: ANALYTIC RULES (THE HEARSAY RULE).

INTRODUCTORY.

THEORY AND HISTORY OF THE HEARSAY RULE.

CHAPTER XLIII.

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| <p>§ 1360. Nature of Analytic Rules.</p> <p>§ 1361. Nature of Hearsay, as an Extrajudicial Testimonial Assertion.</p> <p>§ 1362. Theory of the Hearsay Rule.</p> | <p>§ 1363. Spurious Theories of the Hearsay Rule.</p> <p>§ 1364. History of the Hearsay Rule.</p> <p>§ 1365. Cross-examination and Confrontation.</p> <p>§ 1366. Division of Topics.</p> |
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§ 1360. *Nature of the Analytic Rules.* Of the Auxiliary Rules (*ante*, § 1171) aiming at the amelioration of probative value, the second type is the Analytic Rule, *i. e.* a rule which accomplishes the desired aim by subjecting the offered evidence to a scrutiny or analysis calculated to discover and expose in detail its possible weaknesses, and thus to enable the tribunal to estimate it at no more than its actual value. Such a rule differs from a Preferential rule (*ante*, §§ 1171, 1286) in that it does not purport to require one kind of testimony before another can be resorted to. It differs from a Prophylactic rule (*post*, § 1813) in that the latter aims to prevent or eliminate beforehand the possible defects of the evidence, while the present type of rule aims at exposing those which have not otherwise been thus forestalled or eliminated. That it differs from the Synthetic or Quantitative rules (*post*, § 2030) is clear enough. Finally, it differs from the Simplificative rules (*post*, § 1863) in that it does not *a priori* strike out and exclude the evidence as undesirable, but merely insists on accompanying its admission by tests calculated to expose possible defects.

There is but one rule of the Analytic type, — the Hearsay rule; though this rule involves two branches or processes, Cross-examination and Confrontation. The details of these two branches can be later examined (*post*, §§ 1367-1418). At this point it is desirable first to examine the theory and the history of the Hearsay rule in general.

§ 1361. *Nature of Hearsay, as an Extrajudicial Testimonial Assertion.* When a witness A on the stand testifies, "B told me that event X occurred," his testimony may be regarded in two ways: (1) He may be regarded as asserting the event X upon his own credit, *i. e.* as a fact to be believed because he asserts that he knows it. But when it thus appears that his assertion is not based on personal observation of event X, his testimony to that event is rejected, because he is not qualified by proper sources of knowledge to speak to it. This involves a general principle of Testimonial Knowledge, already examined (*ante*, §§ 657, 665), and does not involve the Hearsay rule proper.

(2) But suppose, in order to obviate that objection, that we regard A as not making any assertion about event X (of which he has no personal knowledge), but as testifying to the utterance in his hearing of B's statement as to event X. To this, A is clearly qualified to testify, so that no objection can arise on that score. The only question, then, can be whether this assertion of B, reported by A, is admissible as evidence of the event X, asserted by B to have occurred. It is clear that what we are now attempting to do is to prove event X by B's assertion; the utterance of B's assertion being itself proved by A's testimony to it. In other words, merely the making of B's assertion is properly proved by A; but the occurrence of event X is also sought to be proved, by this assertion of B, which was uttered out of court, but is offered testimonially for the same purpose as if it were being made presently by B on the stand. This, the true significance of hearsay testimony, is brought out in the following passages:

1743, *Craig v. Earl of Anglesea*, 17 How. St. Tr. 1162: "If declarations of persons dead were to be admitted, they would in effect have the force of original testimony."

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. VI, c. IV: "It is of the essence of hearsay evidence to present to the notice of the judge two distinct persons in the character of witnesses: (1) a supposed percipient and extrajudicially narrating witness, stating at some antecedent point of time, in the hearing of any person not on that occasion invested with the authority of a judge, some matter of fact as having had place; and (2) a deposing, or say judicially narrating witness, who bears testimony not to the truth of that matter of fact, but to its having actually been asserted on the extrajudicial occasion in question by the extrajudicially stating or narrating witness."

1860, Chief Justice *Appleton*, *Evidence*, 174: "In all cases of hearsay the effective witness is the individual, whether party or not, whose supposed statements the narrating witness relates. The individual testifying is merely the conduit or pipe through whose agency the impressions of some one else are conveyed to the Court. The real proof is the hearsay statement."¹

It is these extrajudicial testimonial assertions which the Hearsay rule prohibits. The Hearsay rule points out that B's assertion, offered testimonially, is not made on the stand and presently, but out of court anteriorly, and challenges it upon that ground. The Hearsay rule tells us that B's assertion (even assuming B to have been qualified, by knowledge and otherwise, as witness) cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing such latent sources of error. The Hearsay rule predicates a contrast between assertions untested and assertions tested; it insists upon having the latter.

What is the nature of the test thus required by the Hearsay rule?

§ 1362. **Theory of the Hearsay Rule.** The fundamental test, shown by experience to be invaluable, is the test of *Cross-examination*. The rule, to be sure, calls for two elements, *Cross-Examination* proper, and *Confrontation*; but the former is the essential and indispensable feature, the latter is only

¹ So also Sir J. F. Stephen, in his Report *Ali and Woodroffe's* edition of the Act, 1898, on the Indian Evidence Act (quoted in *Syed* Appendix).

subordinate and dispensable (*post*, § 1395). The theory of the Hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness may be best brought to light and exposed by the test of Cross-examination. Of its workings and its value, more is to be seen in detail (*post*, §§ 1367-1394). It is here sufficient to note that the Hearsay rule, as accepted in our jurisprudence, signifies a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of Cross-examination:

1743, *Craig dem. Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1160: the legitimacy of the plaintiff as heir was in issue; the declarations of Mrs. Piggot, a deceased intimate friend of his alleged mother, were offered. "This was objected to by defendant's counsel, who insisted that hearsay was not evidence; . . . that Mrs. Piggot is dead, and where persons are dead, the law hath not provided for their testimony, nor will it substitute a mere declaration in the place of an oath; . . . that the admitting hearsay evidence in the present affair would introduce a dangerous precedent, in regard the other side could not have the benefit of cross-examining; in some cases, it is true, hearsay evidence is admitted from the necessity of the thing; . . . that in civil cases there is not the same necessity, because a bill in equity may be filed to perpetuate the testimony of ancient witnesses, and then the evidence may be cross-examined; but Mrs. Piggot being dead, no declaration of hers can be evidence, because the defendant has no opportunity to cross-examine her. . . . The Court would not admit the hearsay of Mrs. Piggot's declaration to deponent to be made use of as evidence, on the principal reason that hearsay evidence ought not to be admitted, because of the adverse party's having no opportunity of cross-examining."

1806, Mr. (later V. C.) *Plumer*, arguing in *Lord Melville's Trial*, 29 How. St. Tr. 747: "It is a universal principle of the law of evidence (subject to certain exceptions) that what one man says, does, or writes, behind the back of another, cannot be received in any criminal court to affect anybody but himself. . . . Every individual who stands upon his trial in a British court of justice has a clear right to have the witness brought in the front of the Court, to be submitted to his cross-examination, that he may have an opportunity of interrogating him respecting all the particulars of the fact."

1881, *Lord Blackburn in Dysart Peerage Case*, L. R. 6 App. Cas. 503: "In England, hearsay evidence, that is to say, the evidence of a man who is not produced in court and who therefore cannot be cross-examined, as a general rule is not admissible at all."

1812, *Kent, C. J.*, in *Coleman v. Southwick*, 9 John. 50: "Why not produce S. to testify what he told the defendant, instead of resorting to a bystander who heard what he said? . . . Hearsay testimony is from the very nature of it attended with all such doubts and difficulties, and it cannot clear them up. 'A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.' . . . The plaintiff by means of this species of evidence would be taken by surprise and be precluded from the benefit of a cross-examination of S. as to all those material points which have been suggested as necessary to throw full light on his information."

1827, *Duncan, J.*, in *Farmers' Bank v. Whitehill*, 16 S. & R. 89: "The general objection to the deposition of John Buck is that it is in the nature of hearsay evidence and that the defendant had no opportunity of cross-examination."

1851, *Drummond, J.*, in *U. S. v. Maccomb*, 5 McLean 286: "The ground upon which we proceed in each case is the presumption of the truth of the declarations, they being subjected to the tests which the law recognizes, — the presence of the accused and the right of cross-examination. . . . Of course it is clear that such testimony [as a mere sworn statement before a magistrate] could not be admitted in a court of law; for, first, the wit-

ness was living; and, secondly, the defendant had no opportunity of cross-examining him; and, however the authorities may differ as to the first, they all agree as to the second point, that being an indispensable prerequisite to the introduction of testimony."

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. VI, c. I, § 2: "In every instance that inferiority in respect of probative force, in consideration of which the term *Makeshift* [*i. e.* Hearsay] was found applicable with equal propriety to them all, will be seen to have for its cause the absence of one of the principal securities for correctness and completeness, viz. interrogation *ex adverso* at the hands of a party whose interest, in the event of its being incorrect or incomplete, may in proportion to that incorrectness or incompleteness be made to suffer by it."

In the foregoing passages, Cross-examination alone is mentioned as the test required by and involved in the Hearsay rule. In most instances, however, we find the Oath coupled with Cross-examination in the definition of the rule. That this coupling is merely accidental may easily be shown; but the following passages, naming oath and cross-examination, serve at least to exhibit the general notion that has commonly been conceded to characterize the Hearsay rule.

1716, *Serjeant Hawkins*, *Pleas of the Crown*, b. II, c. 46, § 44: "How far hearsay shall be admitted. It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination."

1773, Mr. *Peckham*, objecting, in *Fabrigas v. Mostyn*, 20 How. St. Tr. 135, to testimony about a statement of a native magistrate (or mustastaph) in *Minorca*: "Hearsay is no evidence. . . . Now can what he has said in *Minorca* to this witness be admitted as evidence here? The mustastaph is living, why don't they produce him? If they had brought him here, we could have his evidence on oath and could cross-examine him to the facts."

1837, *Wright v. Tatham*, 7 Ad. & E. 313, 5 Cl. & F. 689; letters were offered from absent persons, treating the testator as a competent person; Mr. *Cresswell*, objecting: "All the letters were inadmissible, because they presented statements which could not be verified by oath, and subjected to the test of cross-examination. . . . In a particular case the assertion, without oath, of a respectable man might influence a reasonable mind; but the rule established for the safe administration of justice in general is that evidence unconfirmed by oath and not subject to cross-examination shall not be received"; Mr. *Starkie*, on the same side: "The witness from whom it comes ought to be cross-examined as to the means he had of forming a judgment and the diligence and good faith with which they were applied. Here that test is wanting. . . . It may well be suggested [that the writers had other motives]. Suggestions of that kind are to be excluded only by submitting to those tests of knowledge and sincerity which the law requires. . . . The admission of evidence not on oath will be found in all cases to depend upon its being subject to tests which guarantee knowledge and sincerity"; the letters were excluded as hearsay, on the following grounds: *Coltman, J.*: "The administering of an oath furnishes some guarantee for the sincerity of the opinion, and the power of cross-examination gives an opportunity of testing the foundation and the value of it"; *Bosanquet, J.*: "If the writers of these letters were produced as witnesses and examined upon oath, their opinion would be receivable in evidence, because the grounds of their knowledge and the credibility of their testimony might be ascertained by cross-examination"; *Williams, J.*: "It is opinion presented in such a shape as makes it inadmissible for want of the sanction of an oath, under which evidence of opinion is always given; which sanction is required for this weighty reason, — that opinion, however imposing from the real or supposed respectability of the person expressing it, may, after diligent and patient inquiry and examination before those to whose judgment all evidence is addressed, be deemed by them to rest

upon a precarious foundation or upon none at all"; *Alderson, B.*: "The general rule is that facts are to be proved by testimony of persons on oath and subjected to cross-examination. . . . If, therefore, the letters are to be used as proofs of the opinion of the writers respecting Mr. Marsden's capacity, the objection to their admissibility is that this opinion is not upon oath, nor is it possible for the opposite party to test by cross-examination the foundation on which it rests."

1867, *O'Brien, J.*, in *Gresham Hotel Co. v. Manning*, Ir. R. 1 C. L. 125: "The statements and declarations of opinion received in evidence in this case were made by parties not examined upon oath or subject to cross-examination, and would not . . . be exempted from the general rule excluding hearsay evidence."

1817, *Swift, C. J.*, in *Chapman v. Chapman*, 2 Conn. 348: "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."

1843, *Shaw, C. J.*, in *Warren v. Nichols*, 6 Metc. 261: "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 hearing upon 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."

1868, *Breese, C. J.*, in *Marshall v. R. Co.*, 48 Ill. 476: "The general rule is that hearsay evidence . . . is not admissible, for the reason that such statements are not subjected to the ordinary tests required by law for ascertaining their truth,—the author of the statements not being exposed to cross-examination in the presence of a court of justice, and not speaking under the penal sanction of an oath, with no opportunity to investigate his character and motives, and his deportment not subject to observation."

1872, *Kingman, C. J.*, in *State v. Mellicott*, 9 Kan. 283, 287: "These rules [as to hearsay] have been adopted to guard against the manifest danger to human life that is so liable to arise from the admission as evidence of declarations not made under the sanction of an oath and not offering to the party to be affected by them an opportunity of cross-examination, or to call attention to omitted facts that if stated might modify or completely overturn the inference drawn from the declarations made. . . . These rules have been found so essential as safeguards in the investigation of truth that they have become fundamental in our system of jurisprudence, and some of them have been placed for greater security in our constitutions. No matter how convincing the testimony may be to the intelligent mind, unless it can be presented under fixed rules it cannot be received."

1892, *Field, C. J.*, in *Com. v. Trefethen*, 157 Mass. 185, 31 N. E. 961: "The argument, in short, is that such evidence is hearsay. It is argued that such declarations are not made under the sanction of an oath, and that there is no opportunity to examine and cross-examine the person making them, so as to test his sincerity and truthfulness or the accuracy and completeness with which the declarations describe his intention."¹

¹ *Accord: Eng.*: 1811, *Wood, B.*, in *Berkeley Peerage Case*, 4 Camp. 406; 1820, *Abbott, C. J.*, in *Doe v. Ridgway*, 4 B. & Ald. 54; 1832, *R. v. Davlin*, *Jebb Cr. C.* 127; 1867, *Lush, J.*, in *Smith v. Blakey*, L. R. 2 Q. B. 326; 1869, *Byles, J.*, in *R. v. Jenkins*, L. R. 1 C. C. R. 193; 1876, *Jessel, M. R.*, in *Sugden v. St. Leonards*, L. R. 1 P. D. 154; *Ala.*: 1830, *White, J.*, in *Drish v. Davenport*, 2 Stew. 270; 1875, *Manning, J.*, in *Walker v. State*, 52 Ala. 193; *Ark.*: 1852, *Johnson, C. J.*, in *Cornelius v. State*, 12 Ark. 804; *Conn.*: 1860, *Sanford, J.*, in *State v. Dart*, 29 Conn. 153, 155; *Ill.*: 1855, *Skinner,*

J., in *Starkey v. People*, 17 Ill. 20; 1862, *Wolker, J.*, in *Barnes v. Simmons*, 27 id. 513; 1885, *Craig, J.*, in *Digby v. People*, 113 id. 128; *Ind.*: 1869, *Ray, J.*, in *Morgan v. State*, 31 Ind. 199; *Ky.*: 1800, *Muter, C. J.*, in *Cherry v. Boyd*, *Litt. Sel. Cas.* 8; 1855, *Simpson, J.*, in *Walston v. Com.*, 16 B. Mour. 15, 35; 1872, *Hardin, J.*, in *Leiber v. Com.*, 9 Bush 13; *La.*: 1858, *Voorhies, J.*, in *State v. Brunetto*, 13 La. An. 45; *Me.*: 1858, *Rice, J.*, in *Hesld v. Thing*, 45 Me. 392; *Md.*: 1860, *Le Grand, C. J.*, in *Green v. Caulk*, 16 Md. 572; 1874, *Alvey, J.*, in *Maitland v. Bank*, 40 id. 559;

In the preceding passages, the testing required by the Hearsay rule is spoken of as cross-examination *under oath*. But it is clear beyond doubt that the oath, as thus referred to, is merely an incidental feature customarily accompanying cross-examination, and that cross-examination is the essential and real test required by the rule. That this is so is seen by the perfectly well-established rule that a statement made under oath (for example, in the shape of a deposition or an affidavit or testimony before a magistrate) is nevertheless inadmissible if it has not been subjected to cross-examination (*post*, §§ 1373-1377, 1708). In other words, a statement made under oath is, merely as such, equally obnoxious to the Hearsay rule.² Owing to the practice of requiring an oath (or its modern substitute, an affirmation) before proceeding to examination and cross-examination, the case does not happen to arise of testimony which has been tested by cross-examination and yet lacks the oath, so that the tenor of the rule as above stated cannot be demonstrated by that situation. But is sufficiently and clearly demonstrated (as above noted) by the fact that, even though an oath has been taken, the statements are still excluded if not subjected to cross-examination; as well as by the further fact that, whenever an exception to the Hearsay rule (*post*, § 1422) is found established, *i. e.* whenever statements not subjected to cross-examination are exceptionally received, it is not required that they shall have been made under oath. It is thus apparent that the essence of the Hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination, and that the judicial expressions (above quoted) coupling oath and cross-examination, had in mind the oath as merely the ordinary accompaniment of testimony given on the stand, subject to the essential test of cross-examination.

Mass.: 1851, Fletcher, J., in *Luud v. Tyngsborough*, 9 Cush. 40; 1852, Shaw, C. J., in *Com. v. Starkweather*, 10 id. 60; 1856, Thomas, J., in *Bartlett v. Emerson*, 7 Gray 176; *Miss.*: 1852, Yerger, J., in *Launpley v. Scott*, 24 Miss. 539; *Nebr.*: 1886, Reese, J., in *Ponca v. Crawford*, 18 Nebr. 557, 26 N. W. 365; *N. H.*: 1847, Parker, C. J., in *Patten v. Ferguson*, 18 N. H. 529; *N. J.*: 1826, Ewing, C. J., in *Westfield v. Warren*, 8 N. J. L. 250; 1869, Beasley, C. J., in *Estell v. State*, 51 id. 184, 17 Atl. 118; *N. Y.*: 1818, Thompson, C. J., in *Wilson v. Boerem*, 15 John. 286; 1884, Earl, J., in *Waldele v. R. Co.*, 95 N. Y. 274; *N. C.*: 1833, Daniel, J., in *State v. May*, 4 Dev. 334; 1842, Gaston, J., in *State v. Patterson*, 2 Ired. 353; 1855, Pearson, J., in *State v. Shelton*, 2 Jones L. 364; 1872, Rodman, J., in *State v. Williams*, 67 N. C. 14; 1887, Davis, J., in *State v. Hargrave*, 97 id. 458, 1 S. E. 774; 1894, Burwell, J., in *Propst v. Mathis*, 115 id. 526, 20 S. E. 710; *Oh.*: 1856, Bartley, C. J., in *Simmons v. State*, 5 Oh. St. 343; *Pa.*: 1813, Tilghman, C. J., in *Longenecker v. Hyde*, 6 Binn. 1; 1815, *id.*, in *Com. v. Stewart*, 1 S. & R. 344; 1823, *id.*, in *Buchanan v. Moore*, 10 id. 275; 1827, Gibson, C. J., in *Moritz v. Brough*, 16 id. 409; 1885, Green, J., in *Rall-*

ing v. Com., 110 Pa. 105, 1 Atl. 314; *S. C.*: 1819, Cheves, J., in *Drayton v. Wells*, 1 Notr & McC. 248; 1844, Richardson, J., in *State v. Campbell*, 1 Rich. L. 126; 1846, *id.*, in *Walker v. Meetze*, 2 id. 571; 1851, Evans, J., in *Robinson v. Blakely*, 4 id. 588; 1880, McGowan, J., in *State v. Belcher*, 13 S. C. 459, 462; *Tenn.*: 1848, Green, J., in *Phillips v. State*, 9 Humph. 249; *Tex.*: 1895, Brown, J., in *Byers v. State*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 761; *U. S.*: 1823, Story, J., in *Nicholls v. Webb*, 8 Wheat. 326, 333; 1869, Miller, J., in *Allen v. Killinger*, 8 Wall. 487; 1870, Peck, J., in *Medway v. U. S.*, 6 Ct. of Cl. 434; 1873, Field, J., in *Chaffee v. U. S.*, 18 Wall. 541; *Vt.*: 1831, Veazey, J., in *State v. Wood*, 53 Vt. 564; *Va.*: 1853, Allen, J., in *Broggy's Case*, 10 Gratt. 729; *Treatises*: 1801, Peake, Evidence, 10; 1802, McNally, Evidence, 360; 1806, Evans, Notes on Pothier, II, 250; 1810, Swift, Evidence, 121; 1843, Greenleaf, Evidence, § 124.

² 1899, Vann, J., in *Lent v. Shear*, 160 N. Y. 462, 55 N. E. 2 ("Declarations made under oath do not differ in principle from declarations made without that sanction, and both come within the rule which excludes all hearsay evidence").

§ 1363. **Spurious Theories of the Hearsay Rule.** Occasionally there have been advanced other reasons or definitions of the Hearsay rule, — though without much emphasis, and usually as supplementary only to the orthodox theory.

(1) It has been said, for example, that hearsay assertions are to be excluded because of the *risk of incorrect transmission* of the statements by the one reporting them :

1851, *Fletcher, J.*, in *Lund v. Tyngsborough*, 9 Cush. 40: "The danger that casual observations would be misunderstood, misremembered, and misreported, increases the number and force of the objections to the admission of hearsay."

1808, *Breese, C. J.*, in *Marshall v. R. Co.*, 48 Ill. 476 (after naming the real reason): "And the misconception to which such evidence is exposed from the ignorance or inattention of the hearers, or from criminal motives, are powerful additional objections."

To this supposed reason there are two conclusive answers: (a) This theory would exclude only *oral assertions*; yet the Hearsay rule excludes with equal strictness the best-authenticated written assertions of all sorts, — letters, sealed documents, affidavits, and the like, — and, of the numerous exceptions to the rule, only one or two show any special favor to written assertions. (b) *Other oral statements*, not offered as exceptions to the Hearsay rule, but as admissions (*ante*, § 1048), or as impeaching evidence (*ante*, § 1017), or as *res gestæ* utterances (*post*, § 1768), are never excluded because they are oral, and never admitted because they are written; and yet they are equally obnoxious to this supposed policy of excluding that which is liable to incorrect and garbled transmission.

(2) It has been said, by eminent names, that hearsay evidence possesses some *intrinsic weakness* :

1813, *Marshall, C. J.*, in *Mima Queen v. Hephurn*, 7 Cranch 295: "That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible."

1836, *Story, J.*, in *Ellicott v. Pearl*, 10 Pet. 436: "[Besides lacking oath and cross-examination, its fault is] . . . that it is peculiarly liable to be obtained by fraudulent contrivances, and above all that it is exceedingly infirm, unsatisfactory, and intrinsically weak in its very nature and character."

The charge of intrinsic weakness, so far as this vague expression is open to interpretation, seems to mean nothing more than that such statements lack the trustworthiness that the test of cross-examination might supply. The further suggestion of a peculiar liability to fraudulent manufacture seems to mean that oral utterances of the sort can by false witnesses be placed in the mouth of absent persons; and no doubt this is so. But, in the first place, this is not true of written statements offered and authenticated in court, and yet the Hearsay rule equally excludes these; and, in the second place, it is just as true of the other oral and receivable utterances above named, and yet these are equally admissible with written statements. There seems to be no soundness in either of the above suggestions.

(3) The Hearsay rule has sometimes been stated in part by describing the distinct principle above named (*ante*, § 1361, par. 1) requiring *personal knowledge* as one of a witness' qualifications:

1842, Professor Simon Greenleaf, *Evidence*, § 98: "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."

But here we are not regarding the reported statement of the absent person as a testimonial assertion; we are thinking of the witness on the stand as speaking directly to the ultimate fact, and we are denying the sufficiency of his knowledge of this fact. This is not a question of the Hearsay rule, but of the witness' Testimonial Qualifications (*ante*, §§ 657, 1361).¹

(4) We sometimes think of "hearsay" as a merely *anonymous utterance* or rumor; but such anonymity is not the source of the Hearsay rule's exclusion. An anonymous assertion would in any event be excluded, because the author is not shown to be qualified by knowledge and otherwise. The Hearsay rule assumes that the declarant is qualified as a witness (*post*, § 1424); but it still excludes the untested assertion, even though made by a qualified person.

§ 1364. **History of the Rule.** Under the name of the Hearsay rule, then, will here be understood that rule which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted, unless the asserter is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it. The history of the Hearsay rule, as a distinct and living idea, begins only in the 1500s, and it does not gain a complete development and final precision until the early 1700s. Before tracing its history, however, from the time of what may be considered its legal birth, it will be necessary to examine a few salient features of the preceding century, in order to understand the conditions amid which it took its origin.

One distinction, though, must be noticed even before this preliminary survey,—the distinction between requiring an extrajudicial speaker to be called to the stand to testify, and requiring one who *is already on the stand* to speak from personal knowledge (*ante*, § 1361, par. 1). The latter requirement had long ago been known in the early modes of trial preceding the jury. In the days when proof by compurgation of oath-helpers lived as a separate mode alongside of proof by deed-witnesses and other transaction-witnesses, "the witness was markedly discriminated from the oath-helper; the mark of the witness is knowledge, acquaintance with the fact in issue, and moreover, knowledge resting on his own observation."¹ Such a witness' distinctive function was to speak *de visu suo et auditu*.² The principle was not fully carried

¹ Judicial opinions illustrating this use of the term will be found *ante*, § 657.

² 1892, Brunner, *Deutsche Rechtsgeschichte*,

II, 397; 1902, Schröder, *Lehrbuch der deutschen Rechtsgeschichte*, 4th ed. 772.

³ 1898, Thayer, *Preliminary Treatise on Evidence*, 18, 499.

out; for a deed-witness need not have actually seen it executed, and might merely have promised by attestation to appear and vouch in court.³ But at any rate this principle, so far as it prevailed, concerned a different mode of trial, "trial by witnesses," which jury-trial supplanted.⁴ Afterwards, nearly three centuries later, when jury-trial itself had changed, and witnesses (now in the modern sense) became once more a chief source of proof, the old idea reappeared and was prescribed for them; the witness would speak to "what hath fallen under his senses,"⁵ and this became in the modern law a fundamental principle.⁶ But at the time now to be considered, when jury-trial was coming in (say the 1300s), that principle belonged in what was practically another mode of trial, and did not affect the development.

What we are here concerned with is a different notion, namely, that when a specific person, not as yet in court, is reported to have made assertions about a fact, that person *must be called to the stand*, or his assertion will not be taken as evidence. That is to say: suppose that A, who does not profess to know anything about a robbery, is offered to prove that B, who did profess to know, has asserted the circumstances of the robbery; here B's assertion is not to be credited or received as testimony, however much he may know, unless B is called and deposes on the stand. As to the history of this simple but fundamental notion, — the Hearsay rule proper, — it is necessary at the outset to notice briefly certain important conditions which prevailed at the beginning of the 1500s.

(a) And, first, it is clear that there was, up to about that time, no appreciation at all of the necessity of calling a person to the stand as a witness in order to utilize his knowledge for the jury. On the contrary, the leading conditions and influences of jury-trial permitted and condoned the practice of the jury's obtaining information by consulting informed persons not called into court:

1872, Professor *Heinrich Brunner*, *The Origin of Jury Courts*, 427, 452: "We may not interpret the verdict '*ex scientia*,' in the domain of English law as a verdict based on personal perception. The jurors of the assize were certainly entitled to give a verdict based on the communications of trustworthy neighbors. Glanvill makes it requisite, for the jurors' knowledge, 'that they should have knowledge from their own view and hearing of the matter or through the words of their fathers and through such words of persons whom they are bound to trust as worthy.' Thus they exhibit really in their verdict the prevailing conviction of the community upon the matter in question. For ascertaining this, ample opportunity is furnished by the 'view' and by the period of time elapsing between the view and the swearing in court. If their verdict agreed with the opinion throughout the community, they had nothing to fear from an attain. . . . Thus the juror of the English law who gives a verdict *ex scientia* (with reference to the view of lands had) is a

³ Thayer, *ubi supra*, 98; and cases cited *ante*, § 1292. A good additional illustration occurs in *Seld. Soc.*, *Select Civ. Pl.*, I, No. 76; and as late as 1543, in *Rolfe v. Hampden*, *Dyer* 53 b, a survival of this is seen in the case of two will-witnesses who "deposed upon the report of others." This was probably because such witnesses were originally transaction-witnesses, not document-witnesses, and in their latter character

the earlier trait survived, as the history of the parol-evidence rule indicates (*post*, § 2426).

⁴ Thayer, *ubi supra*, 17, 500; Brunner, *Entstehung der Schwurgerichte*, quoted *infra*.

⁵ 1670, *Vaughan, C. J.*, in *Bushel's Trial*, 6 *How. St. Tr.* 999, 1008; 1696, *Holt, C. J.*, in *Charnock's Trial*, 12 *id.* 1454.

⁶ Cases cited *ante*, § 657.

'knowledge-witness' simply, whether his knowledge rests on his own perceptions or on another's communication. . . . The English knowledge-witness [juror] is not an eye-witness, not a *testis de scientia* in the sense of the later Norman law."⁷

1803, Sir F. Pollock and Professor F. W. Maitland, *History of the English Law*, II, 622, 623: "Some of the verdicts that are given must be founded on hearsay and floating tradition. Indeed, it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony. . . . At the least a fortnight had been given to them in which to 'certify themselves' of the facts. We know of no rule of law which prevented them from listening during this interval to the tale of the litigants. . . . Separately or collectively, in court or out of court, they have listened to somebody's story and believed it."

The ordinary witness, as we to-day conceive him, coming into court and publicly informing the jury, was (it must be remembered) in the 1400s a rare figure, just beginning to be known.⁸ Of persons thus called, the chief kinds were the preappointed ones, — deed-witnesses and other transaction-witnesses; and even these, with the jury, "all went out and conferred privately as if composing one body; the witnesses did not regularly testify in open court."⁹ Even where facts were involved which, as we should think, needed other testimony, the counsel stated them by allegation, and a special witness might or might not be present to sustain the allegations.¹⁰ Well into the 1400s "it was regarded as the right of the parties to 'inform' the jury after they were impanelled and before the trial."¹¹ In 1450 it is said by Chief Justice Fortescue, "If the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable,"¹² *i. e.* it is not the offence of maintenance.¹³ Note that the only objection thought of is that of maintenance. In 1499 a juror, in a certain trial where a thunderstorm had caused a separation without leave, talked with a friend of one of the parties, and this, from the same point of view, was held not unlawful.¹⁴ Such practices of obtaining information from informed persons not called were a chief reliance for the early jury. In fact, the strict notions then prevailing as to the offence of maintenance tended to discourage

⁷ Professor Brunner goes on to point out (p. 453 ff.) that since in France the judicial use of "trial by witness" proper came early into prominence (in the 1300s and 1400s) through the civil or canonical system, and since the contrast between these two competing methods led the former to be called *testes de scientia*, and the jurors merely *testes de credentia*, the jury system became discredited as an inferior one and ultimately fell into disuse. In other words, the lack of any sharp discrimination in England as to the sources of the jury's "knowledge" was the marked feature which enabled it to survive, in contrast to the fate of its kindred institution in Normandy, where circumstances had led to the emphasizing of its inferior sources of knowledge. Compare also Glasson, *Histoire du droit et des institutions de la France*, VI, 544 (1895).

⁸ Note 20, *infra*.

⁹ Thayer, *ubi supra*, 97, 102; this continued probably into the 1500s.

¹⁰ Thayer, *ubi supra*, 121, 133.

¹¹ Thayer, *ubi supra*, 92; in Palgrave's "The Merchant and the Friar," there cited, an account of a trial for robbery in London in 1303 represents the sheriff as saying, when asked by the judge whether the jury is ready: "The least informed of them has taken great pains to go up and down in every hole and corner of Westminster — they and their wives — and to learn all they could concerning his past and present life and conversation."

¹² Y. B. 28 H. VI, 6, 1; *cit.* Thayer, 128; see also the petition quoted *ib.* 125.

¹³ Again, in 1504 (Y. B. 20 H. VII, 11, 21; *cit.* Thayer, 129), Rede, J., says: "If the jury come to my house to be informed of the truth, and I inform them, that is not maintenance."

¹⁴ Y. B. 14 H. VII, 29, 4; *cit.* Thayer, 132.

the coming of witnesses. In the 1400s "it was by no means freely done";¹⁵ and when, in 1562-63,¹⁶ compulsory process for ordinary witnesses was first provided, the measure came rather as a protection for the witness against the charge of maintenance than for any other reason.¹⁷ In short, as late as through the 1400s, there was not only no feeling of necessity for having every informant come to testify publicly in court, but there was still a discouragement of such a general process; and the jury might and did get a great deal of its knowledge by express inquiry from specific persons not called, or by the counsel's report of what had been or would be said by persons not called or not put on the stand.

(b) But in the meantime certain conditions were changing in a significant respect. Contrasting the end of the 1400s and the beginning of the 1600s, it appears, as the marked feature, that the proportion between the quantity of information obtained from ordinary witnesses produced in court and of information by the jury itself contributed or obtained was in effect reversed. The former element, in the 1400s, was "but little considered and of small importance";¹⁸ but by the early 1600s the jury's function as judges of fact, who depended largely on other persons' testimony presented to them in court, had become a prominent one, perhaps a chief one.¹⁹ It is necessary to appreciate that the ordinary witness (as we conceive him) did not come to be a common feature of jury trials till the very end of the 1400s.²⁰ Thus during the 1500s the community was for the first time dealing with a situation in which the jury depended largely, habitually, and increasingly, for their sources of information, upon testimonies offered to them in court at the trial.

(c) This, then, is the reason why another notion (a marked feature of the 1500s and early 1600s) should come into particular prominence at that epoch and not before. During that period much is found to be said, in the trials, about the number of witnesses, their sufficiency in quantity and quality. Juries were just beginning to depend for their verdict upon what was laid before them at the trial, and it was thus natural enough that they should begin to ask themselves, and to be urged by counsel to consider, whether they had been furnished with sufficient material for a right decision. Much begins to be thought and said, in statutes and otherwise, about having witnesses "good and lawful," "good and pregnant," "good and sufficient."²¹ There was, moreover, already in existence at that time, well known to a large proportion of the legal profession, and only waiting for a chance to be imported and

¹⁵ Thayer, *ubi supra*, 130.

¹⁶ St. 5 Eliz. c. 9, § 6.

¹⁷ The history of compulsory process is examined *post*, § 2190.

¹⁸ Thayer, *ubi supra*, 130.

¹⁹ For example, in 1499, Vavasour, J., says: "Suppose no evidence is given on either side, and the parties do not wish to give any, yet the jury shall give their verdict for one side or the other; and so the evidence is not material to help or harm the matter" (Y. B. 14 H. VII, 29, 4, *cit.* Thayer, 133); while in the early

1600s, Coke says (3 Inst. 163) that "most commonly juries are led by deposition of witnesses." Another indication is seen in the practical disuse of the attain by the end of the 1500s (Thayer, *ubi supra*, 138, 150, 153, 167), due largely to the fact that the jury now depended so much upon testimony in court.

²⁰ Thayer, *ubi supra*, 102, 121, 122, 126.

²¹ In other respects, also, this was a time significant of a desire to see to the sufficiency of the evidence placed before a jury; see Thayer, *ubi supra*, 179, 180, 430.

adopted, a mass of rules in the civil and canon law about the number of witnesses necessary in given cases, and the circumstances sufficient to complement and corroborate testimony deficient in number. Throughout the State trials of the 1500s and early 1600s, the accused is found insisting that one witness to each material fact is not enough.²³ In spite of these repeated appeals to the numerical system of the civil law, they produced no permanent impression in the shape of specific rules, except in treason and perjury.²³ But the general notion thoroughly permeated the times, and barely escaped being incorporated in the jury system. In a particular respect it left an impression material to the present inquiry. There had hitherto been no prejudice against the jury's utilizing information from persons not produced. But now that their verdict depended so much on what was laid before them at the trial, and now that the sufficiency of this evidence, in quantity and quality, began to be canvassed, it came to be asked whether a hearsay thus laid before them would suffice. It was asked, for example, whether, if there was one witness testifying in court from personal knowledge and another's hearsay statement offered, the two together would suffice.²⁴ Again, it was discussed in Queen Mary's reign (1553), whether, of the two accusers required in treason, one could testify by reporting a hearsay.²⁵ In Raleigh's trial (1603), Chief Justice Popham, refusing to produce Cobham to testify, explained that, "where no circumstances do concur to make a matter probable, then an accuser may be heard [in court, and not merely by extrajudicial statement]; but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced";²⁶ that is, a hearsay statement was sufficient if otherwise corroborated. So, too, the notion that persisted in the 1600s, that a hearsay statement, though not alone sufficient, was nevertheless usable in

²³ A single example must suffice; in Lord Strafford's Trial (1640), 3 How. St. Tr. 1427, 1445, 1450, he argues: "He is but one witness, and in law can prove nothing"; such "therefore could not make faith in matter of debt, much less in matter of life and death."

²⁴ The treason-statutes, coming in 1547-1554, will be noted later. The history of the numerical system, and of its failure to obtain a foothold in our law, is examined *post*, § 2032.

²⁵ 1541, Rolfe v. Hampden, Dyer 53 b (of three witnesses to a will, "two deposed upon the report of others, and the third deposed of his own knowledge," and there was no apparent objection, "though the jury paid little regard to the testimony aforesaid"); 1622, Adama v. Canon, Dyer 53 b, note (disbursement of money for P.; of two witnesses, one "deposed that he himself knew it to be true, and being examined why he would swear that, answered, 'because his father had said so'; and in this case much was said about the deposition of witnesses; first, that if one witness depose of his own knowledge of the very point in question, and the other in the circumstances, that shall be sufficient ground for the judge to pass sentence"; here the "circumstances" means the hearsay statement, as shown by Pyke v. Crouch, *infra*).

²⁶ 1553, R. v. Thomas, Dyer 99 b ("It was there holden for law, that of two accusers, if one be an accuser of his own knowledge, or of his own hearing, and he relate it to another, the other may well be an accuser"); 1558, Dyer, 134 a, note (under the treason statute requiring two accusers, "an accusation under the hands of the accusers or testified by others is sufficient"); 1628, Coke, 3d Inst. 25 ("The strange conceit in 2 Mar. [Thomas's Case], that one may be an accuser by hearsay, was utterly denied by the justices in Lord Lumley's Case [1572]," "reported by the lord Dier under his own hand, which we have seen, but [is] left out of the print"); approved by Hale, Pleas of the Crown (1680), I, 306, II, 287.

This notion of quantity, as associated with hearsay, is seen also in certain coeval rules on the Continent, declaring (for example) one witness upon personal knowledge to be equal to two or three going upon hearsay (Perille, Storia del diritto italiano, 2d ed., 1900, vol. VI, pt. 1, p. 388; Esmein, Histoire de la procédure criminelle en France, 1882, pp. 269, 369).

²⁷ As reported in Jardine's Criminal Trials, I, 427.

confirmation of other testimony,³⁷ was a direct survival of this treatment of hearsay from the standpoint of numerical sufficiency. During the 1500s nothing was settled in this direction; the matter was being debated and doubted. But the important feature is that the doubt about using hearsay statements — i. e. testimony from persons not called — was merely incidental to a general canvassing of the numerical and qualitative sufficiency of testimony, which in turn was a novelty arising from the jury-conditions of the 1500s.

It appears, then, that at the entrance to the 1500s (a) there had hitherto been no conception of a special necessity for calling to the stand persons to whose assertions credit was to be given; (b) that by the 1500s the increasing dependence of the jury on the evidence laid before them in court (as distinguished from their other sources of information) gave a new importance to such evidential material; and (c) that there was thus much debate as to the sufficiency of witnesses in number and kind, and that incidentally doubt began to be thrown on the propriety of depending on extrajudicial assertions, either alone or as confirming other testimony given in court.

With this preliminary survey, the process may now be traced of making more precise and comprehensive the general notion against hearsay which thus sprung into consciousness. It will be convenient to consider, first, hearsay statements in general, and, next, hearsay statements under oath; for the rule as it affected the latter had both an earlier origin and a slower development.

I. *Hearsay statements in general.* (1) In the first place, then, there is no exclusion of hearsay statements. Through the 1500s and down beyond the middle of the 1600s, hearsay statements are constantly received, even against opposition.³⁸ They are often objected to by accused persons, and are some-

³⁷ *Infra*, note 33.

³⁸ 1571, *Duke of Norfolk's Trial*, 1 How. St. Tr. 958, *Jardine's Crim. Trials*, 1, 157, 158, 159, 178, 201, 206, 210 (various letters and other hearsay statements are used against the accused); 1590, *Strauham v. Cullington*, Cro. Eliz. 228 (prohibition for suing for tithes; "they said that hearsay shall be allowed for a proof"); 1601, *Webb v. Petta*, Noy 44 ("the witnesses said that for a long time, as they had heard say, the occupiers . . . had used to pay annually to the parson 3s."); held that "a proof by hearsay was good enough to maintain the surmise within the statute 2 Ed. 6"; 1622, *Adams v. Canon*, Dyer 53 b, note (a hearsay admissible for one witness; see quotation *supra*); 1632, *Sherfield's Trial*, 3 How. St. Tr. 519, 536 (information in the Star Chamber against a vestryman of New Sarum for breaking a painted glass window; to show that the Bishop had warned him not to do it, one of the Court offered a letter from the Bishop, "but this being out of course, and a thing to which the defendant could make no answer, was not approved of"); 1640, *Earl of Strafford's Trial*, ib. 1381, 1427 ("they prove very little but what they took upon hearsay"); 1644, *Archbishop Laud's Trial*, 4 id. 315, 323 (argued for defendant:

"He adds what Sir Thomas Allisbury's man said. . . . But why doth he rest upon a hearsay of Sir Thomas Allisbury's man? Why was not this man examined to make out the proof?"), 391 (argued for defendant: "Of all which there is no proof but a bare relation what Mr. H., Mr. I., and Sir W. B. said; which is all hearsay and makes no evidence, unless they were present to witness what was said [by me to them]"); 395 (argued for defendant: "This is but Sir E. P.'s report, and so no proof, unless he were produced to justify it"), again at 399, 402, 432, 534, 538 (in all these instances the hearsay statements are received); 1663, *Moders' Trial*, 6 id. 273, 276 (bigamy; a witness testified that he once saw the first husband, not produced, "and the man did acknowledge himself to be so"; the Court: "Hearsays must condemn no man; what do you know of your own knowledge?" but the statement gets in); 1669, *Hawkins' Trial*, ib. 921, 935 (collateral charge that defendant picked N.'s pocket; N.'s statements to that effect were given by the witness, in spite of the defendant's demand that N. be called; Sir Matthew Hale was judge); 1670, *Style's Practical Register* 173 (citing a case of 1646).

times said by the judge to be of no value or to be insufficient of themselves, and are even occasionally excluded. In short, they are regarded as more or less questionable, and the doubt particularly increases in the 1600s; but, in spite of all, they are admissible and admitted. Nor is this result due to any abuse or irregularity peculiar to trials for treason or other State prosecutions; it is equally apparent in the rulings in the few civil cases that are reported. The practice is unmistakable.

(2) In the meantime, the appreciation of the impropriety of using hearsay statements by persons not called is growing steadily. By the second decade after the Restoration, this notion receives a fairly constant enforcement, both in civil and in criminal cases.²⁹ There are occasional lapses;³⁰ but it is clear that by general acceptance the rule of exclusion had now become a part of the law as well as of the practice. There even is found³¹ a counsel for the prosecution stopping "for example's sake" its violation by his own witness. No precise date or ruling stands out as decisive; but it seems to be between 1675 and 1690 that the fixing of the doctrine takes place.³²

²⁹ It is worth noting that the not uncommon belief which attributes most of the reforms in the rules of evidence in criminal trials to the Commonwealth of 1649 or the Revolution of 1688 is hardly well founded. In the present case, for example, the new idea comes in with the Restoration régime, 1660-1685; and this is generally true of the other matters of improvement (as noted *post*, §§ 2032, 2250). The Commonwealth went on with very much the same practices as the royal government which it overthrew; witness the argument (*infra*) of Mr. Pryune, who was one of the most vigorous opponents of Charles I. At the Restoration, much warning seems to have been taken, and it is clear that the decided amelioration is apparent; the trials of the Regicides, for instance, were (contrary to the general impression) almost models of fairness, considering the prior practice. What was left to be done was done under Anne, after 1700, rather than under William. Even Scroggs, in 1678, did not much violate existing rules; and the real abuses and irregularities occurred chiefly in the terrible times of unrest and mutual suspicion, just before and after the Duke of York's accession, and at the hands of the unscrupulous Jefferies, whose faults were chiefly his own and abnormal. Compare the similar opinion of Professor Willms-Bund, *State Trials for Treason*, 1882, vol. II, *Introd.* xx.

³⁰ *E. g.* in the cases *infra* of 1680, 1681, 1682, 1686.

³¹ *E. g.* in *Colledge's Trial*, *infra*.

³² 1673, *Pickering v. Barkley*, *Vin. Abr.* "Evidences," P, b, 1, vol. XII, 175 (to show the mercantile usage construing a policy, "a certificate of merchants" was read in court; but "the Court desired to have the master of the Trinity-house and other sufficient merchants to be brought into court to satisfy the Court viva voce"); 1676, *Rutter v. Hobden*, 1 *Keb.* 754 (objected that a contradictory statement of a witness could not be proved because not made on oath; but allowed); 1678, *Bishop Burnet on*

the Popish Plot, 6 *How. St. Tr.* 1106, 1122, 1427 (refers to a part of Dugdale's testimony as "only upon hearsay from Evers, and so was nothing in the law"); 1678, *Earl of Pembroke's Trial*, *ib.* 1309, 1325, 1333 (a deceased person's statements as to persons injuring him, received; one of the statements was offered as a death-bed declaration; and counsel adds, "there are little circumstances which are always allowed for evidence in such cases, — where men receive any wounds, to ask them questions while they are ill, about it, who hurt them"); 1678, *Ireland's Trial*, 7 *id.* 79, 105 (the defendant, to prove an alibi at St. Omer's college in France, offered to bring "an authentic writing" "under the seal of the college and testified by all in the college, that he was there all the while"; *Atkins, J.*: "Such evidences as you speak of we would not allow against you; therefore we would not allow it for you"; afterwards, members of the college were produced in person); 1679, *Samson v. Yarley*, 2 *Keb.* 223 (appeal of murder; what a witness, now dead, swore on the indictment was excluded; "what the witness dead had said generally, being but hearsay of a stranger, and not of a party [in] interest, they would not admit, which might be true or false"); 1680, *Anderson's Trial*, 7 *How. St. Tr.* 811, 865 (charge of being a priest and saying mass at the Venetian ambassador's; a letter of the ambassador, then out of the Kingdom, denying his saying of mass, not admitted for the defendant); 1680, *Gaseigne's Trial*, *ib.* 859, 1019 (one Barlow being offered as a witness, but being apparently afraid to speak, one Ravenscroft offered to tell what Barlow had told him the night before; *Pemberton, J.*: "You must not come to tell a story out of another man's mouth"; yet after some objection he was allowed to tell the whole story); 1681, *Plunket's Trial*, 8 *id.* 447, 458 (other persons' statements of defendant's acts, admitted without objection), 461 (Witness: "Mr. L. B. told me that he did hear of the French —"; *Pemberton, L. C. J.*: "Speak

(3) At the same time, and along with this general rule of exclusion, there is still a doctrine, clearly recognized, that a hearsay statement may be used as confirmatory or corroboratory of other testimony.²³ Here we have the survival of that notion about sufficiency and quantity, already referred to. A hearsay statement, by itself, is insufficient as the sole foundation for a conclusion; by itself it "can condemn no man," and so, by itself, it is excluded; but, when it merely supplements other good evidence already in, it is receivable. This limited doctrine as to using it in corroboration survived for a long time in a still more limited shape, i. e. in the rule that a witness's own prior consistent statements could be used in corroboration of his testimony on the stand;²⁴ and the latter was probably accepted as late as the end of the 1700s.²⁵

what you know yourself") ; 1681, Busby's Trial, ib. 525, 545 (witness offers an affidavit of a register of births; Street, B.: "You ought to have brought this man along with you to testify it"; Witness: "The sexton is an old man about 60 years of age and could not come"); Street, B.: "That does not signify anything at all"; 1681, Colledge's Trial, ib. 549, 603 (seditious publication; the Attorney-General himself stops a prosecution-witness who tells what the printer said as to the author), 623 (another counsel for the prosecution does the same; "we must not permit this for example's sake, to tell what others said"), 663 (counsel for prosecution: "You must not tell a tale of a tale of what you heard one say"); 1682, Lord Grey's Trial, 9 id. 127, 136 (hearsay statements plentifully received without objection); 1684, Hampden's Trial, ib. 1053, 1094 (hearsay statements excluded; Jefferies, L. C. J.: "You know the law; why should you offer any such thing?"); 1684, Bradlon's Trial, ib. 1127, 1181, 1189 (Mr. J. Withins: "We must not hear what another said that is no party to this cause"); 1686, Lord Delamere's Trial, 11 id. 509, 548 (hearsay statements put in without check); 1692, Stainer v. Droltwich, 1 Saik. 281 (an exception to the hearsay rule discussed as such); 1693, Thompson v. Trevanion, 1 Holt 286, Skinner 402 (a hearsay statement, received apparently as an exception); 1696, Charnock's Trial, 12 How. St. Tr. 1377, 1454 (Holt, L. C. J., alludes to the objection as well founded, and informs the jury when charging them: "Therefore I did omit repeating [to you] a great part of what D. said, because as to him it was for the most part hearsay"); 1697, Pyke v. Cronch, 1 Ld. Raym. 730 (if a testator sends a duplicate of his will to a stranger "and the stranger sends back a letter" mentioning its receipt, "after the death of the stranger such letter may be read as circumstantial evidence" to prove that such a duplicate was sent).

²³ 1679, Knox's Trial, 7 How. St. Tr. 763, 790 (the witness's former statement offered; L. C. J. Scroggs: "The use you make of this is no more but only to corroborate what he hath said, that he told it him while it was fresh and that it is no new matter of his invention now"); 1683, Lord Russell's Trial, 9 id. 577, 613

(L. C. J. Pemberton: "The giving evidence by hearsay will not be evidence"; Attorney-General: "It is not evidence to convict a man if there were not plain evidence before; but it plainly confirms what the other swears"); 1692, Cole's Trial, 12 id. 876 (Mrs. Milward: "My lord, my husband [now deceased] declared to me that he and Mr. Cole were in the coach with Dr. Clenche, and that they two killed Dr. Clenche"; Mr. J. Dolben: "That is no evidence at all, what your husband told you; that won't be good evidence, if you don't know somewhat of your own knowledge"; Mrs. Milward: "My lord, I have a great deal more that my husband told me to declare"; Mr. J. Dolben: "That won't do; what if your husband had told you that I killed Dr. Clenche, what then? This will stand for no evidence in law; we ought by the law to have no man called in question but upon very good grounds, and good evidence upon oath, and that upon the verdict of twelve good men." Nevertheless, he let her relate more of what her husband told her about the plot to kill Dr. Clenche; in charging the jury, he referred to it as "no evidence in law . . . especially when it is single, without any circumstance to confirm it"); 1725, Bradlon, Observations on the Earl of Essex' Murder, 9 How. St. Tr. 1229, 1272 ("It is true, no man ought to suffer barely upon hearsay evidence; but such testimony hath been used to corroborate what else may be sworn").

²⁴ 1682, Lutterell v. Reynell, 1 Mod. 282 (it was proved that one of the witnesses for the plaintiff had often "declared the same things" as now; and L. C. B. Bridgman "said, though a hearsay was not to be allowed as direct evidence, yet it might be made use of to this purpose, viz. to prove that W. M. was constant to himself, whereby his testimony was corroborated"); ante 1726, Gilbert, Evidence, 149 ("A mere hearsay is no evidence; . . . but though hearsay be not allowed as direct evidence, yet it may be in corroboration of a witness' testimony, to show that he affirmed the same thing before on other occasions; . . . for such evidence is only in support of the witness that gives in his testimony upon oath").

²⁵ 1767, Buller, Trials at Nisi Prius, 294; and cases cited ante, § 1123.

(4) In the meantime, the general rule excluding hearsay statements comes over into the 1700s as something established within living memory. It is clear that its firm fixing (as above observed) did not occur till about 1680; and so in the treatises of the early 1700s the rule is stated with a prefatory "It seems."⁸⁶ By the middle of the 1700s the rule is no longer to be struggled against;⁸⁷ and henceforth the only question can be how far there are to be specific exceptions to it.

What is further noticeable is that in these utterances of the early 1700s the reason is clearly put forward why there should be this distinction between statements made out of court and statements made on the stand; the reason is that "the other side hath no opportunity of a cross-examination." This reason receives peculiar emphasis in the final and comprehensive application of the rule to a peculiar class of statements made prior to the trial in hand, namely, statements made under oath. These come now to be considered.

II. *Hearsay statements under oath.* (1) As early as the middle of the 1500s a first step had been attempted towards requiring the personal production of those who had already made a statement upon oath. This requirement was limited to trials for treason; and the circumstances leading up to its introduction are described in the following passage:

1606, Bishop *Burnet*, arguing in the House of Lords, at *Fenwick's Trial*, 13 How. St. Tr. 537, 732: "There passed many attainders in that reign [of H. VIII], only upon depositions that were read in both houses of parliament. It is true, these were much blamed, and there was great cause for it. . . . In Edward VI's trial, the lord *Seymour* was attainted in the same manner [*sc.* without being heard], only with this difference, that the witnesses were brought to the bar and there examined, whereas formerly they proceeded upon some depositions that were read to them. At the duke of Somerset's trial [in 1551], which was both for high treason and for felony, in which he was acquitted of the treason but found guilty of the felony, depositions were only read against him, but the witnesses were not brought face to face, as he pressed they might be.⁸⁸ Upon which it was that the following parliament enacted that the accusers (that is, the witnesses) should be examined face to face, if they were alive."⁸⁹

The statute of 1553, thus referred to as first requiring the witness's pro-

⁸⁶ 1716, *Hawkins, Pleas of the Crown*, II, 596, h. II, c. 46, § 44 ("As to the Fifth Point, viz. of parol evidence, and how far hearsay shall be admitted. It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross-examination"); 1736, *Bacon, Abridgment, Evidence*, (K) ("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").

⁸⁷ 1701, *Captain Kidd's Trial*, 14 How. St. Tr. 147, 177 (Witness: "Here is a certificate [of my reputation] from the parish where I was born;"; L. C. B. Ward: "That will signify nothing; we cannot read certificates; they must

speak *via voce*"); 1716, *Earl of Wintoun's Trial*, 15 How. St. Tr. 804, 856; 1723, *Bishop Atterbury's Trial*, 16 id. 323, 455; 1725, L. C. *Maclefield's Trial*, ib. 767, 1187; 1743, *Craig dem. Annealey v. Anglesea*, 17 id. 1160 (a statement of Mrs. P., deceased, as to a material fact was offered; after some debate, the Court excluded it "on the principal reason that hearsay evidence ought not to be admitted, because of the adverse party's having no opportunity of cross-examining"); 1754, *Canning's Trial*, 19 id. 383, 406 (rule undisputed).

⁸⁸ This may be seen in the duke's trial, in 1 How. St. Tr. 520.

⁸⁹ Substantially the same account as Bishop *Burnet's* is given in *Rastal's Statutes* (?), I, 102, as quoted in a note to the Duke of Somerset's Trial, 1 How. St. Tr. 520; but no edition of any of *Rastal's* books seems to contain such a passage.

duction on the trial, was St. 5 Edw. VI, c. 12, § 22.⁴⁰ This was followed by a similar provision in 1554, St. 1 & 2 P. & M. c. 10, § 11.⁴¹ But this early step was premature; the innovation was too much in advance of the times; and it had only a short life. From the very year of the latter enactment, until the end of the succeeding century, it remained by judicial construction a dead letter. The means by which this result was reached was another section (§ 7) in the act of Philip and Mary, providing that trials for treason should be conducted "according to the common law," *i. e.* without any requirement of two witnesses or of producing witnesses; so that since the requirement of § 11 applied only to trials for the treasons defined by that very statute, the Crown, by bringing prosecutions on other definitions of treason (common law or statutory), was free from any such requirement.⁴²

This judicial construction was perhaps strained, and was abandoned after the Revolution and under William III's government. Nevertheless it was clear law for a century and a half; and, when Sir Walter Raleigh insisted so urgently on the production of Lord Cobham, he was truly answered by Chief Justice Popham that "he had no law for it."⁴³

Thus this limited attempt to require personal production, instead of *ex parte* depositions by absent persons, perished at its very birth. So far as this statutory attempt at the beginnings of a hearsay rule is concerned, it played no

⁴⁰ "Which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that which they have to say to prove him guilty," unless he confesses.

⁴¹ Upon arraignment for treason, the persons "or two of them at the least," who shall declare anything against the accused "shall, if they be then living and within the realm, be brought forth in person before the party arraigned if he require the same, and object and say openly in his hearing what they or any of them can against him."

⁴² 1554, Throckmorton's Trial, 1 How. St. Tr. 862, 873, 880, 883 (the defendant in vain invoked the treason-statute); 1571, Duke of Norfolk's Trial, lb. 958, 978, 992 (by the prosecuting Serjeant: "the law was so for a time, in some cases of treason, but since the law hath been found too hard and dangerous for the prince, and it hath been repealed"); 1586, Abington's Trial, ib. 1142, 1148 ("You stand indicted by the common law and the statute of 25 Edw. III . . . and in that statute is not contained any such proof"); 1603, Raleigh's Trial, 2 id. 16, 18; Jarline's Cr. Tr., I, 418, 420 (Popham, C. J. "Sir Walter Raleigh, for the statutes you have named, none of them help you. The statutes of the 5th and 6th of Edward VI and of the 1st Edward VI are general; but they were found to be inconvenient and are therefore repealed by the 1st and 2d of Philip and Mary, which you have mentioned, which statute goes only to the treasons therein comprised, and also appoints the trial of treasons to be as before it was at the common law");

1649, Lilburne's Trial, 4 How. St. Tr. 1269, 1401 (same rule). Compare the decisions by which the same result was reached for the requirement of two witnesses (*post*, § 2032). There was another similar statute about the same time, but it apparently was ineffective for the same reason: 1558, St. 1 Eliz. c. 1, § 27 (no person to be convicted of ecclesiastical offences or treason under this act — against heresy and foreign church authority — unless the two required witnesses, or such as are living and within the realm, "shall be brought forth in person face to face before the party so arraigned, and there shall testify and declare what they can say against the party so arraigned, if he require the same").

⁴³ The learned Mr. Jardine, in his Criminal Trials, I, 514, has vindicated this trial against the unjust criticisms of later times: "This doctrine and practice [of 1690 and later], however, though directly the reverse of those which preceded them, were not founded upon any legislative provision or any recorded decision of the Courts. But at the period of Raleigh's trial, there was, perhaps, no point of law more completely settled, than that the statute of the 1 & 2 Phillip and Mary, c. 10, had repealed the provisions of the statute of the 5th of Edward VI, respecting the production of two witnesses in cases of treason. . . . If, therefore, the Judges who presided on Raleigh's trial were to abide by the solemn and repeated decisions of their predecessors, and the uniform practice of the Courts of law for centuries, they could do no otherwise, consistently with their duty, than decide as they did."

further part at all; except perhaps as furnishing a moral support for the opinion which was already working towards a general hearsay rule.

(2) That at this time, then (say, until the early 1600s), the general absence of any hearsay rule (as already noted) allowed equally the use of this specific class, namely, extrajudicial statements taken under oath, is clear enough. It appears as well in ordinary felony trials⁴⁴ as in treason trials.⁴⁵

(3) It had, of course, always been usual (though, as just seen, not essential) to have the deponent present at the trial; but in such cases the general practice in State trials seems to have been, first to read aloud his sworn statement to the jury, and then to have him confirm it by declaring that it was "willingly and voluntarily confessed without menace or torture or offer of torture."⁴⁶ This went on till well into the 1600s. The sworn statement was still the main or the sufficient thing; but it was thought proper to have it openly adopted by the witness, so as to show that the prosecution did not fear a recantation. Thus the emphasis came gradually to be transferred from the sworn statement, as the sufficient testimony, to the statement on the trial as the essential thing.

(4) About this time, however, and markedly by the middle of the 1600s (coincidentally with the general movement already considered), the notion tends to prevail, and gradually becomes definitely fixed, that even an extrajudicial statement under oath should not be used if the deponent can be personally had in court. This much has now been gained; and it is seen in civil and in criminal trials equally.⁴⁷ His statement can still be used, though, if he

⁴⁴ 1615, *Weston's Trial*, 2 How. St. Tr. 911, 924; 1615, *Elwes' Trial*, ib. 935, 941.

⁴⁵ To the instances of this already cited above, construing the treason statute, may be added the following: 1571, *Duke of Norfolk's Trial*, 1 How. St. Tr. 958, *passim*; 1586, *Mary Queen of Scots' Trial*, ib. 1162, 1183; 1590, *Udall's Trial*, ib. 1271, 1302; Mr. Jardine, in his *Criminal Trials*, I, 514, says: "At the time of Raleigh's trial, most of the circumstances objected to by Sir John Hawles [under William III, about 1696] were strictly legal and justifiable; for instance, at that time, the depositions of absent persons were read as the usual course of evidence which had prevailed for centuries in State prosecutions; this mode of proof constituted the general rule, and the oral examination of witnesses was the exception, which was in practice sometimes allowed, but was as often refused, and never permitted but by the consent of the counsel for the prosecution." He also asserts (Introd., I, 25) that "the ordinary mode of trying persons indicted for murder, robbery, or theft" forbade the use of depositions; but his only authority for this statement is Sir Thomas Smith's description of a trial, which does not sustain him; and the citations in the note above seem to disprove his belief.

⁴⁶ The following list is only a selection: 1586, *Babington's Trial*, 1 How. St. Tr. 1127, 1131; 1589, *Earl of Arundel's Trial*, ib. 1250, 1252; 1600, *Earl of Essex' Trial*, ib. 1333, 1344; 1616, *Earl of Somerset's Trial*, 2 id. 965, 973.

Compare the cases cited *ante*, § 818, under Confessions. The following case indicates a growing inclination to insist on this *vide voce* confirmation where the original examination was technically defective: 1631, *Lord Audley's Trial*, 3 How. St. Tr. 401, 402 ("certain examinations having been taken by the lords without an oath, it was resolved [by all the judges] those could not be used until they were repeated upon oath").

⁴⁷ The first suggestion of this view seems to occur in the following cases: 1583, *Puckley v. Bridges*, *Choice Cases* in Ch. 163, quoted 1 *Swanst.* 171 (witnesses deceased and beyond seas; depositions in the Star Chamber, etc., used); 1590, *Udall's Trial*, 1 How. St. Tr. 1271, 1283 (examination on oath of one T. read, T. being beyond seas; but it does not appear that the latter circumstance was essential). In *Raleigh's Trial* (1603), 2 id. 16, 18, Raleigh is willing to concede that Lord Cobham's deposition could have been used, "where the accused is not to be had conveniently"; yet there it was used, though Cobham was "alive, and in the House." But thereafter the precedents indicate a general acceptance of the notion stated above: 1612, *Tomlinson v. Croke*, 2 *Rolle's Abr.* 687, pl. 3 (deposition receivable if the deponent is dead, not if he is living); 1613, *Fortescue & Cooke's Case*, *Godb.* 193 (depositions in chancery not to be read at law "unless affidavit be made that the witnesses who deposed were dead"); 1629, *Anon.*, ib. 326 ("if the party cannot find

cannot be had in person, — for example, because of his death (and there is much vacillation of opinion as to the sufficiency of other causes, such as absence beyond sea); and nothing is as yet said as to the further objection that the deposition was not taken subject to cross-examination. The significant feature of this stage is the thought that the hearsay statement is usable only in case of necessity, *i. e.* the deponent ought to be produced if he can be. But the thought that in any case there must indispensably have been an opportunity for cross-examination has not been reached.

(5) By the middle of the 1600s, the orthodox tradition in favor of allowing the use of extrajudicial sworn statements had thus become decidedly weakened and was on the point of giving way. Nevertheless, there was still a tradition of orthodoxy; and this tradition was in harmony with the practice of influential modes of trial other than trial by jury in the common-law courts.⁴⁹ A fixed rule to the contrary was consciously an innovation; and this innovation, though now on the point of prevailing, remained still to be established and to acquire orthodoxy. From the middle of the century we see the idea still progressing. The state of opinion is illustrated by one of the prosecutions conducted by the anti-Stuart party just before it obtained the upper hand and deposed Charles I:

1643, Col. *Fiennes' Trial*, 4 How. St. Tr. 185, 214; the defendant, tried by court-martial, argued that "no paper-deposition ought to be allowed by the law, in cases of life and death, but the witnesses ought to be all present and testify *viva voce*"; that he had not had notice of the commission "so that he might cross-examine the witnesses";

a witness," then his deposition "in an English court, in a cause betwixt the same parties," may be read); 1631, *Fitzpatrick's Trial*, 3 How. St. Tr. 419, 421 (a defendant in rape demanded that the lady be "produced face to face; which she was; who by her oath *viva voce* satisfied the audience"); 1638, *Dawby's Case*, Clayt. 62 (admitted, when dead); 1645, *Lord Maguire's Trial*, 4 How. St. Tr. 653, 872 (most of the witnesses spoke *viva voce*; a deposition was used of one who "was in town but he could not stay"); 1658, *Mordant's Trial*, 5 id. 907, 922 (all sworn except one, an escaped prisoner, whose deposition was used); 1666, *Lord Morley's Case*, Kel. 55, 6 How. St. Tr. 770 (depositions before a coroner might be read if the deponent were dead, or unable to travel, or detained by defendants; but not if unable to be found); 1673, *Blake v. Page*, 1 Keh. 36 (speaks of the affidavit of an absent person as allowable, but apparently by consent only); 1678, *Bronwich's Case*, 1 Lev. 180 (like *Lord Morley's Case*); 1678, *Earl of Pembroke's Trial*, 6 How. St. Tr. 1309, 1338 (a physician offers his prior deposition before the magistrate; the Court: "You must give it again *viva voce*; we must not read your examination before the Court"); 1685, *Oates' Trial*, 10 id. 1227, 1285 (deposition of a witness not found after search, excluded); 1692, *Harrison's Trial*, 12 id. 833, 851 (deposition taken by the coroner in the defendant's absence, read because the defendant had eluded the deponent).

When this necessity for the witness' absence could be foreseen (as when a deposition *de bene* was asked for before trial), there are some early indications that cross-examination would be a required condition: 1606, *Matthews v. Port*, Comb. 63 ("The witnesses may be examined [prior to trial] before a judge, by leave of the Court, as well in criminal causes as in civil, where a sufficient reason appears to the Court, as going to sea, etc., and then the other side may cross-examine them"); 1662, *St. 13 & 14 Car. II, c. 23, § 5* (in certain insurance claims, seamen being often the witnesses, an oath *de bene* may be administered, "timely notice being given to the adverse party, and set up in the office before such examination, the end such witness or witnesses may be cross-examined").

⁴⁹ *Ante* 1635, *Hudson, Treatise of the Star Chamber*, pt. III, § 21, in *Hargr. Collect. Jurid.* 200 ("It is a great imputation to our English courts that witnesses are privately produced," in chancery; pointing out that the ecclesiastical Court does otherwise, and reciting a recent reform of L. C. Egerton that witnesses should be produced before the opponent, "that the other side might examine him also if they please"); 1637, *Bishop of Lincoln's Trial*, 3 How. St. Tr. 769, 772 (Banks, Attorney-General, arguing in the Star Chamber, says: "The proceedings in this court, as in all other courts, is by examination of witnesses returned in parchment, not *viva voce*").

then Mr. Prynne, for the prosecution, answered, among other things, that in the civil law and courts-martial trials were as usual "by *testimoniis* [*i. e.* depositions] as by *testibus viva voce*; that in the Admiralty, a civil law court, as likewise in the Chancery, Star Chamber, and English courts formed after the civil law, they proceed usually by way of deposition; that even at the common law in some cases, depositions taken before the coroner, and examinations upon oath before the chief justice or other justices, are usually given in evidence even in capital cases; that the high Court of Parliament hath upon just occasions allowed of paper depositions in such cases"; and the depositions were "upon solemn debate" admitted.

This case, to be sure, was no precedent for a common-law trial, and it occurred amidst a bitter political controversy; but it sufficiently illustrates the unsettled state of opinion and the tendency of the time.⁴⁹ Yet no final settlement came under the Commonwealth, nor under the Restoration, nor directly upon the Revolution.⁵⁰

(6) By 1680-1690 (as already noted) had come the establishment of the general rule against unsworn hearsay statements. This must have helped to emphasize the anomaly of leaving extrajudicial sworn statements unaffected by the same strict rule. By 1696, or nearly a decade after the Revolution, that anomaly ceased substantially to exist. A few rulings under the Restoration had foreshadowed this result;⁵¹ but in that year it was definitely and decisively achieved in the trials of Paine and of Sir John Fenwick. The former was a ruling by the King's Bench after full argument, and came in

⁴⁹ A reflection of the English rule in this period is seen in the following colonial records: 1660, Mass. Revised Laws and Liberties, Whitmore's ed., "Witnesses," § 2 (a witness' testimony may be taken before the magistrate, but, if the witness lives within ten miles and is not disabled, it shall not be used "except the witness be also present to be further examined about it; provided also that in capital cases all witnesses shall be present, wheresoever they dwell"; repeated in the Revision of 1672); 1692, *Proprietor v. Keith*, Pa. Colon. Cas. 117, 124 (affidavits were offered to prove the truth of a libel; but the Court "were very unwilling to have them read, saying it was no evidence unless the persons were present in court"; yet they permitted some to be read, since the witnesses could not be present "by reason of the extremity of the weather"). See also Browne's *History of Maryland*, 84.

⁵⁰ Mr. Jardine, in his *Criminal Trials*, Introd., I, 25, 29, says: "The ancient mode of proof by examinations [under oath of absent persons] continued to be the usual and regular course [in cases of treason or other state offences] during the reigns of Elizabeth, James I, and Charles I. . . . During the Commonwealth the practice of reading the depositions of absent witnesses entirely disappeared, and has never been since revived. . . . It is believed that not a single instance can be produced of the reading of the deposition of an absent witness on the trial of a criminal (except in cases expressly provided for by statute), since the reign of Charles I." It would seem that the instances in note 47, *supra*,

show the practice to have been sanctioned until after the Revolution; Mordant's Trial, above cited, certainly shows that it did not cease during the Commonwealth. Mr. Jardine seems to have had a general but incorrect notion that the older methods ceased with the Commonwealth; for example, that torture did not cease, as he believes it did, has been noticed *ante*, § 818.

⁵¹ *Ante* 1668 (no date or name), Rolfe's Abr., II, 679, pl. 9 (depositions taken by bankruptcy commissioners, not admitted, "in a suit in which comes in question whether he was a bankrupt or not, or to prove anything depending on it, for the other party could not cross-examine the party sworn, that is the common course"); 1669, *R. v. Buckworth*, 2 Keb. 403 (perjury; testimony of a deceased witness sworn at the trial where the perjury was committed, received; by two judges to one); *ante* 1680, Hale, Pleas of the Crown, I, 306 ("The information upon oath taken before a justice of the peace" is admissible in *felony*, if the deponent is unable to travel, yet in *treason* this is "not allowable, for the statute requires that they be produced upon arraignment in the presence of the prisoner, to the end that he may cross-examine them"); 1688, *Thatcher v. Waler*, T. Jones 53 (deposition before the coroner of one beyond sea, admitted; but held that a deposition before a justice of the peace should not be received; the case of the coroner standing on the ground of a record); 1694, *R. v. Taylor*, Skinner 403 (affidavit not admissible); and the citations at the end of note 47, *supra*.

January.⁵³ The latter, coming in the next November,⁵⁴ involved a lengthy debate in Parliament; and, though the vote finally favored the admission of the deposition, the victory of reaction was in appearance only; for the weighty and earnest speeches in this debate must have burned into the general consciousness the vital importance of the rule securing the right of cross-examination, and made it impossible thereafter to dispute the domination of that rule as a permanent element in the law.⁵⁴ From this time on, the applicability of the Hearsay rule to sworn statements in general, as well as to unsworn statements, is not questioned.⁵⁵ From the beginning of the 1700s the writers upon the law assume it as a settled doctrine;⁵⁶ and the reason of the rule in this connection is stated in the same language already observed in the history of the rule in general, namely that statements used as testimony must be made where the maker can be subjected to cross-examination.⁵⁷

(7) There were, however, two sorts of sworn statements which, being already expressly authorized by statute, though not expressly made admis-

⁵³ 1696, *R. v. Paine*, 5 Mod. 163 (libel; a deposition of B., examined by the mayor of Bristol upon oath but not in P.'s presence, was offered; it was objected that "B. being dead, the defendant had lost all opportunity of cross-examining him," and the use of examinations before coroners and justices rested on the special statutory authority given them to take such depositions; the King's Bench consulted with the Common Pleas, and "it was the opinion of both Courts that these depositions should not be given in evidence, the defendant not being present when they were taken before the mayor and so had lost the benefit of a cross-examination"; the reports of this case in 1 Salk. 281, 1 Ld. Raym. 729, are brief and obscure).

⁵⁴ It is a little singular that *R. v. Paine* is not cited by any of the numerous debaters in Fenwick's Trial. The date of the former is given as Hilary Term, 7 Wm. III, which must have been January, 1696, or ten months before Fenwick's Trial. It is cited in Bishop Atterbury's Trial, in 1723, *infra*.

⁵⁵ 1696, Fenwick's Trial, 13 How. St. Tr. 537, 591-607, 618-750 (the sworn statement before a justice of the peace of one Goodvan, said to have absented himself by the accused's tampering, was offered on a trial in Parliament; a prolonged debate took place, and this deposition, termed hearsay, was opposed on the precise ground of "a fundamental rule in our law that no evidence shall be given against a man, when he is on trial for his life, but in the presence of the prisoner, because he may cross-examine him who gives such evidence," "by which much false swearing was often detected"; the deposition was finally admitted, Nov. 16, by 218 to 145 in the Commons, and the etalinder passed by 189 to 156 in the Commons and by 66 to 60 in the Lords; but it is clear from the debate that many of those voting to receive the deposition did so on the theory that Parliament was not bound to follow the rules of evidence ob-

taining in the inferior Courts; the speeches claiming that those rules would admit it were half-hearted and evasive; moreover, the prosecution only ventured (595) to offer it as "corroborating evidence"; see *supra*, note 33).

⁵⁶ The last remnant of hesitation is found in *Bredon v. Gill*, 1697, 2 Salk. 555, 1 Ld. Raym. 219, 5 Mod. 9' (question whether on statutory appeal from commissioners to appeal-commissioners depones below could be used or the witnesses should "be brought in again personally and examined *viva voce*"; ruled at first that "the law does not make *viva voce* evidence necessary, unless before a jury; in other cases depositions may be evidence"; but afterwards, *mutata opinione*, the Court required examination *de novo*). But the persistence with which the older notion lingered on is seen in Bishop Atterbury's Trial, 16 How. St. Tr. 323, 463, 471, 495, 503, 523, 536, 595, 607, 608, 616, 673; here an examination before the Council, not on oath, of one since dead, was on an impeachment voted by a majority of the Lords to be received; but the vote was clearly the result of hot partisanship, and the managers of the impeachment conceded that their evidence was not legal; in this trial the first citation of *R. v. Paine* occurs, at p. 536.

⁵⁷ 1730, Emlyn, Preface to State Trials, 1 How. St. Tr. xxv ("The excellency therefore of our laws above others I take to consist chiefly in that part of them which regards criminal prosecutions. . . . In other countries . . . the witnesses are examined in private and in the prisoner's absence; with us they are produced face to face and deliver their evidence in open court, the prisoner himself being present and at liberty to cross-examine them"); *ante* 1726, Gilbert, Evidence, 58 ff.; 1747, *Eade v. Lingood*, 1 Atk. 203 (deposition before bankruptcy commissioners, excluded).

⁵⁷ See the quotations in the preceding six notes.

sible, might be thought to call for special exemption, namely, the sworn examination of witnesses before justices of the peace in certain cases, and of witnesses before a coroner. That the rule excluding depositions taken without cross-examination should be applied to those of the former sort was not settled until the end of the 1700s.⁵⁸ That it should apply to those of the latter sort never came to be conceded at all in England,⁵⁹ — at least, independently of statutory regulation in the 1800s; and long tradition availed to preserve the use of these, though only as a distinct exception to a general rule. That general rule, from the beginning of the 1700s, was clearly understood to exclude alike sworn and unsworn statements made without opportunity to the opponent for cross-examination. From that period the rule could be broadly stated in the words of a judge writing just two centuries later: ⁶⁰ "Declarations under oath do not differ in principle from declarations made without that sanction, and both come within the rule which excludes all hearsay evidence."

One noteworthy consequence, having an important indirect influence on other parts of the law of evidence, was the addition of a new activity to the accepted functions of the counsel for an accused person. In 1695⁶¹ counsel had been allowed, in treason only, to make full defence for the accused; but until 1836⁶² no law allowed this in felony. Yet as soon as the right of cross-examination was established, it was indispensable that trained counsel should be permitted to conduct it, if it were to be effective.⁶³ And so in a short time this practice (without technical sanction) forced itself on the judges in criminal trials:

1883, Sir James Stephen, *History of the Criminal Law*, 1, 424: "The most remarkable change introduced into the practice of the courts [from the middle of the eighteenth century] was the process by which the old rule which deprived prisoners of the assistance of counsel in trials for felony was gradually relaxed. . . . In *Barnard's trial* [in 1758] his counsel seem to have cross-examined all the witnesses fully. . . . On the other hand, at the trial of Lord Ferrers two years later, the prisoner was obliged to cross-examine the witnesses without the aid of counsel. . . . The change [of law by the statute of 1836] was less important than it may at first sight seem to have been."

Indirectly, this resulted speedily in a new development, to a degree before unknown, of the art of interrogation and the various rules of evidence naturally most applicable on cross-examinations, — particularly, the impeachment of witnesses.⁶⁴ Furthermore, it resulted ultimately in the breakdown of the

⁵⁸ 1739, *R. v. Westbeer*, 1 Leach Cr. L., 4th ed., 12 (deceased accomplice's information upon oath, admitted, though it was objected that the defendant "would lose the benefit which might otherwise have arisen from cross-examination"); 1782, *Foster*, *Crown Law*, 328 (the eminent author regards a deceased deponent's examination before either coroner or justices as admissible, not discriminating as to the accuser's presence and cross-examination); 1789, *R. v. Woodcock*, 2 Leach Cr. L., 4th ed., 500 (justice of the peace's examination of the victim of an assault, excluded); 1790, *R. v. Eriawell*, 3 T. R. 707 (justice of the peace's examination of a

pauper as to his settlement; a divided Court); 1801, *R. v. Ferryfrystone*, 2 East 54 (the excluding opinion of the preceding case confirmed).

⁵⁹ *R. v. Eriawell*, *supra*; and cases cited *post*, § 1374.

⁶⁰ 1859, *Vann, J.*, in *Lent v. Shear*, 160 N. Y. 462, 55 N. E. 2.

⁶¹ St. 7 & 8 Wm. III, c. 3.

⁶² St. 6 & 7 Wm. IV, c. 114.

⁶³ By the prosecuting counsel it had of course already been employed, *e. g.* 1688, *Seven Bishops' Trial*, 12 How. St. Tr. 183.

⁶⁴ As noted *ante*, § 8.

old fixed tradition that a criminal trial must be finished in one sitting. The necessary sifting of testimony by cross-examination took double and treble the time used of yore. Under vast inconvenience, the old tradition was preserved, until at last it gave way, from very exhaustion, to the new necessities.⁶⁵

What we find, then, in the development of the Hearsay rule is: (1) A period up to the middle 1500s, during which no objection is seen to the use by the jury of testimonial statements by persons not in court; (2) then a period of less than two centuries, during which a sense arises of the impropriety of such sources of information, and the notion gradually but definitely shapes itself, in the course of hard experience, that the reason of this impropriety is that all statements to be used as testimony should be made only where the person to be affected by them has an opportunity of probing their trustworthiness by means of cross-examination; (3) Finally, by the beginning of the 1700s, a general and settled acceptance of this rule as a fundamental part of the law.⁶⁶ Such, in brief, seems to have been the course of development of that most characteristic rule of the Anglo-American law of evidence, — a rule which may be esteemed, next to jury-trial, the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure.

§ 1365. **Cross-Examination and Confrontation.** The essential requirement of the Hearsay rule, as just examined, is that statements offered testimonially must be subjected to the test of Cross-examination. But a process commonly spoken of as Confrontation is also often referred to as an additional and accompanying test or as the sole test. Now Confrontation is, in its main aspect, merely another term for the test of Cross-examination. It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential. The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, *i. e.* it may be dispensed with when it is not feasible. Cross-examination, however, the essential object of confrontation, remains indispensable. The details of this distinction are elsewhere to be examined (*post*, § 1395); it is enough to note here that, so far as confrontation is an indispensable element of the Hearsay rule, it is merely another name for the opportunity of cross-examination.

⁶⁵ "Mr. Erskine made his celebrated speech in Lord George Gordon's case, 1781, after midnight, and the verdict was given at 5.15 A. M., the Court having sat from 8 P. M. the previous day. In 1794, in Hardy's case, the Court sat from 8 till past midnight" (Sir H. B. Poland, *A Century of Law Reform*, 1901, p. 63); Until the trial of Hardy, in 1794, "there had not yet been an instance of a trial for high

treason that had not been finished in a single day" (Campbell, *Lives of the Chancellors*, 5th ed., VIII. 307). Compare the citations *post*, § 1864.

⁶⁶ It therefore does not date back so far as our judges have sometimes fondly predicated, — "to Magna Charta, if not beyond it," for instance (*Anderson v. State*, 89 Ala. 12, 7 So. 429; 1890).

§ 1366. *Division of Topics.* An exposition of the Hearsay rule embraces four general topics:

I. The Hearsay rule's requirements, and their satisfaction; *i. e.* the detailed rules for application of the tests of Cross-examination and Confrontation;

II. The kinds of assertions admitted as Exceptions to the Hearsay rule;

III. Utterances, not being testimonial assertions, to which the Hearsay rule is not Applicable;

IV. Sundry statements to which the Hearsay rule is Applicable.

SUB-TITLE I: THE HEARSAY RULE SATISFIED.

TOPIC I: BY CROSS-EXAMINATION.

CHAPTER XLIV.

IN GENERAL.

- § 1367. Cross-examination as a Distinctive and Vital Feature of our Law.
 § 1368. Theory and Art of Cross-examination.
 § 1369. Other Rules concerning Cross-examination, discriminated.
 § 1370. Cross-Examined Statements not an Exception to the Hearsay Rule.
 § 1371. Opportunity of Cross-examination, as equivalent to Actual Cross-examination.
 § 1372. Division of Topics.

1. Kind of Tribunal or Officer, as affecting Opportunity of Cross-examination.

- § 1373. General Principle; Sundry Tribunals (Commissioners of Land-Titles, Pilotage, Bankruptcy, etc.; Arbitrators).
 § 1374. Same: Testimony at a Coroner's Inquest.
 § 1375. Testimony before a Committing Magistrate or Justice of the Peace.
 § 1376. Depositions; Effect of Other Principles discriminated.
 § 1377. Same: General Principle; Opportunity of Cross-examination required.
 § 1378. Same: Notice and Sufficient Time; Attendance cures Defective Notice.
 § 1379. Same: Plural Depositions at the Same Time and Different Places.
 § 1380. Same: English and Canadian Statutes.

- § 1381. Same: U. S. Federal Statutes.
 § 1382. Same: U. S. State Statutes.
 § 1383. Same: Depositions in Perpetuum Memoriam.
 § 1384. Affidavits; Testimony of King or Ambassador.
 § 1385. *Ex parte* Expert Investigations; Preliminary Rulings on Voir Dire; Testimony by an Opponent.

2. Issues and Parties, as affecting Opportunity of Cross-examination.

- § 1386. General Principle; Issue and Parties must have been Substantially the Same.
 § 1387. Issue the Same.
 § 1388. Parties or Privies the Same.
 § 1389. Deposition used by Either Party; Opponent's Use of a Deposition taken but not read.

3. Conduct of the Cross-examination itself, as affecting Opportunity of Cross-examination.

- § 1390. Failure of Cross-examination through the Witness' Illness or Death.
 § 1391. Failure of Cross-examination through the Witness' Refusal to Answer or the Fault of the Party offering him.
 § 1392. Non-Responsive Answers; General or "Sweeping" Interrogatories.
 § 1393. Sundry Insufficiencies of Cross-examination.

§ 1367. Cross-examination as a Distinctive and Vital Feature of our Law. For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience. Not even the abuses and the puerilities which are so often found associated with cross-examination have availed to overbalance its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediæval system of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman or the foreign jurist to appreciate this its wonderful power, there has probably never been a moment's doubt upon this point in the mind of a

lawyer of experience. "You can do anything," said Wendell Phillips, "with a bayonet — except sit upon it." A lawyer can do anything with a cross-examination, — if he is skillful enough not to impale his own cause upon it. He may, it is true, do more than he ought to do; he may "make the worse appear the better reason, to perplex and dash maturest counsels," — may make the truth appear like falsehood. But this abuse of its power is able to be remedied by proper control. The fact of this unique and irresistible power remains, and is the reason for our faith in its merits. If we omit political considerations of broader range, cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial-procedure.¹ Striking illustrations of its power to expose inaccuracies and falsehoods are plentiful in our records;² and it is apparent enough, in some of the great failures of justice in Continental trials, that they could not have occurred under the practice of effective cross-examination.³ The praise of cross-examination and its efficacy as a fundamental test of truth have often been the subject of comment and exposition by our judges and jurists:

Ante 1680, Sir *Matthew Hale*, L. C. J., in his *History of the Common Law*, c. 12: "The excellency [in English law], of this open course of evidence to the jury in presence of the judge, jury, parties, and council, and even of the adverse witnesses, appears in these particulars: . . . 3dly, That by this course of personal and open examination, there is opportunity for all persons concerned, viz. the judge, or any of the jury, or parties, or their council or attorneys, to propound occasional questions, which beats and bouts out the truth much better than when the witness only delivers a formal series of his knowledge without being interrogated."

1806, Mr. *W. D. Evans*, *Notes to Pothier*, II, 198: "Whoever has had an opportunity of attending courts of judicature and also of seeing the private examinations which are taken upon many of the occasions above alluded to, must be convinced of the great danger of suffering any public or private interests to be affected by such examinations. Wherever the narration of a witness may be the subject of objection on account of his veracity, the failure which justice must experience from the want of an opportunity of trying the fact by a minute examination of circumstances open to contradiction, by fixing the witness to time and place and all other topics not comprised in a general sweeping account, will be manifest to the most cursory observers. . . . But even when all suspicion of veracity is supposed to be out of the question, how very unsatisfactory is the *ex parte* account of a witness taken under circumstances in which the adverse party had not a fair opportunity of cross-examination. . . . The decision of the event by the materiality of facts disclosed on cross-examination is a matter of perpetual occurrence. . . . The experience of every lawyer must furnish many instances of a set of cut-and-dried depositions being unable to stand the test of an open cross-examination."

1811, *Bayley*, J., in *Berkeley Peerage Case*, 4 Camp. 403: "Whoever has attended to

¹ Mr. Beutham affirms this in the quotation *post*. Such also was the pronouncement of an eminent member of the Tokyo Bar, Mr. Maanjima, who had entered the Bar at the Middle Temple, London, and had enjoyed an opportunity of comparing the methods there learned with those of his brethren who had been trained in France and Germany. In Continental practice, the examination of witnesses is in theory conducted by or through the judge, by repetition of questions, and in practice cross-examination

is so casual or so feeble as to be a negligible quantity.

² See *ante*, §§ 782, 990-996, 1005-1006, 1260, *post*, § 1368, for examples.

³ For example, in some of the trials set out in the Appendix to Stephen's *History of the Criminal Law*, vol. I.

Conversely, in the Dreyfus trial (1899), the exposure of the prosecution's particular frauds was due almost entirely to M. Labori's cross-examination.

the examination, the cross-examination, and the re-examination of witnesses, and has observed what a very different shape their story appears to take in each of these stages, will at once see how extremely dangerous it is to act on the *ex parte* statement of any witness and still more of a witness brought forward under the influence of a party interested. In this case A., whose legitimacy is supposed to be in issue, has put to J. S. every question he thought fit, and has therefore obtained from him probably not the whole that J. S. knows upon the subject, but all that will benefit A.; while B., against whom this disposition is to be read, has had no opportunity of proposing a single question to J. S., either to put his veracity to the test, or to bring out any other matter within the knowledge of J. S. which would make in his favor. . . . There may be various other considerations in point of interest to influence the father, which if exhibited by cross-examination might in a great degree impeach, if not completely destroy, the effect of the evidence he has given. So it might turn out on cross-examination that he had made other contrary declarations, perhaps equally solemn as those as to which he has been asked, and that his conduct . . . had been such as to throw an entire discredit on his present asseverations."

1824, Mr. *Thomas Starkie*, *Evidence* I, 96, 129: "The power given to the party against whom evidence is offered of cross-examining the witness upon whose authority the evidence depends constitutes a strong test of both the ability and the willingness of the witness to declare the truth. By this means the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are all severally scrutinized and examined. Under such circumstances it must be very difficult for a witness to interweave a false account so nicely with the truth as to make it consist and agree with all the other circumstances of the case. . . . However artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended; the fraud is therefore open to detection for want of consistency between that which has been fabricated and that which the witness must either represent according to the truth, for want of previous preparation, or misrepresent according to his own immediate invention. . . . The power and liberty to cross-examine is one of the principal tests which the law has devised for the ascertainment of truth, and is certainly a most efficacious test."

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. II, c. IX, and b. III, c. XX: "In the character of a security for the correctness and completeness of testimony, so obvious is the utility and importance of the faculty and practice of interrogation that the mention of it in this view might well be deemed superfluous. . . . By interrogations thus pointed, such a security for completeness is afforded as can never be afforded by any general engagement which can be included in the terms of an oath or other formula. . . . By interrogation, and not without, is the improbity of a deponent driven out of all its holds. . . . The best possible mode of extracting testimony—the mode which a considerate master of a family would employ when sitting in judgment on the conduct of a servant or a child—in a word, the mode by oral interrogation and counter-interrogation, is a production of English growth. Among those who in its native country are so cordial in their admiration of this mode of trial [by jury], there are not twenty perhaps who at this moment are aware that, in contradistinction to Roman jurisprudence, the mode of extracting evidence on this occasion is as peculiar to English procedure as the constitution of the court. The peculiarity of the practice called in England cross-examination, the complete absence of it in every system of procedure grounded upon the Roman (with the single exception of the partial and narrow use made of it in the case of confrontation), is a fact unnoticed till now in any book, but which will be as conclusively as concisely ascertained at any time by the impossibility of finding a word to render it by in any other language. . . . No political institution was ever kept more completely hidden from general observation. All mouths are open in praise of trial by jury; and this is the mode of extraction employed on a trial by jury. It has been observed that

somehow or other the ends of justice were more effectually accomplished in that sort of court of which the tribunal called a jury was one feature, and the use of this mode of extracting evidence another; but to which of them the effect was principally to be ascribed is a question that seems never to have presented itself. The feature which consists in the composition of the court seems to have engrossed all the praise of it. 'Trial by jury! Ever blessed and sacred trial by jury! Juries for ever!' is the cry; not 'Trial by oral and cross-examined evidence!' It is, however, to this comparatively neglected feature that that most popular of all judicial institutions would be found to be indebted for the least questionable and most extensively efficient, if not the most important of its real merits."⁴

1806, *Livingston, Sen.*, in *Jackson v. Kniffen*, 2 John. 85 (rejecting a testator's hearsay declarations): "Besides the danger of tampering with a person who may be known to have made a will, . . . the right of cross-examining is invaluable and not to be broken in upon. How often is testimony which, when first delivered, appears conclusive and irrefragable, entirely frittered away by this process,—so much so, that a witness well sifted not unfrequently proves more against than in favor of the party that produces him. If one eye-witness be worth more than ten hearsay witnesses, a still higher value must be set on proofs made in presence of both parties, compared with *ex parte* declarations. In one way, the whole truth comes out; in the other, no more than it may suit the witness or his friends to have disclosed. The not being under oath, although a serious objection, is not with me the greatest, because, admitting everything said to be true, so long as it is in the absence of one and at the solicitation of the other party, it should go for nothing. In what way the will was extorted, what menaces were used, why he was afraid of being murdered, . . . with many other inquiries which a public examination might have suggested, would have afforded the jury a much fairer means of arriving at the truth."

1844, *Richardson, J.*, in *State v. Campbell*, 1 Rich. L. 126: "The defendant's cross-examination expresses well the searching process and practical test furnished and intended by this rule of law. . . . Experience has proved that it is, of all others, the most effective, the most satisfactory, and the most indispensable test of the evidence narrated on the witness' stand. . . . I know of no disagreement, among the expounders of evidence, upon the importance of cross-examination."

1846, *Nisbet, J.*, in *McCloskey v. Leadbetter*, 1 Ga. 551, 555: "I have been thus particular in planting the power of cross-examination upon a foundation laid in authority, because of the sacred character of that right. The power of cross-examination is the most efficacious test which the law has devised for the discovery of truth. Without it, *in voce* examinations, and more particularly examinations by commission, would be very unsafe; the ingenious witness, or still more ingenious examiner-in-chief, might easily evade the truth and at the same time avoid the pains and penalties of perjury. The right to be confronted with the witness, and to sift the truth out of the mingled mass of ignorance, prejudice, passion, and interest, in which it is very often hid, is among the very strongest bulwarks of justice."

1881, *Ruffin, J.*, in *State v. Morris*, 84 N. C. 764: "All trials proceed upon the idea that some confidence is due to human testimony, and that this confidence grows and becomes more steadfast in proportion as the witness has been subjected to a close and searching cross-examination; and this because it is supposed that such an examination will expose any fallacy that may exist in the statement of the witness, or any bias that might operate to make him conceal the truth; and trials are appreciated in proportion as they furnish the opportunities for such critical examinations."⁵

⁴ The Common Law Practice Commissioners of 1853—a body including the eminent names of Jervis, Cockburn, Martin, Bramwell, Willes—declared "the circumstances which give to the system of English procedure its peculiar characteristic merits" to be "*in voce*

interrogation, cross-examination, publicity, examination in the presence of the tribunal."

⁵ On the other hand, the special weakness of chancery proceedings lay in its obstacles to an effective cross-examination: 1827, Benthams, *Rationale of Judicial Evidence*, b. III, c. 16

§ 1368. *Theory and Art of Cross-examination.* That the process of cross-examination is thus invaluable, the lawyer well knows. But *why* is it invaluable? Just what does it do, and how? What is the theory of its efficiency? Upon this we commonly reflect but little. Nevertheless, conscious of its power, we must also be conscious of the reasons for its power, if it is to be used intelligently and effectively. Those reasons can best be seen by contrasting cross-examination, as a stage or mode of presenting evidence, with the two other and alternative modes which co-exist with it. Cross-examination by an opponent is to be contrasted, on the one hand, with proof by *direct examination of the same witness by the proponent*, and on the other hand, with proof by *other witnesses called by the opponent*. What will cross-examination succeed in doing, which either of these modes might fail to do?

I. *The Theory of Cross-examination.* 1. *Proof by direct examination of the same witness, contrasted.* The fundamental feature is that a witness, on his direct examination, discloses but a part of the necessary facts. That which remains suppressed or undeveloped may be of two sorts, (a) the remaining and qualifying circumstances of the subject of testimony, as known to the witness, and (b) the facts which diminish and impeach the personal trustworthiness of the witness. (a) The *remaining and qualifying circumstances of the subject of testimony* will probably remain suppressed or undisclosed, not merely because the witness frequently is a partisan, but also and chiefly because his testimony is commonly given only by way of answers to specific interrogatories (*ante*, §§ 768, 785), and the counsel producing him will usually ask for nothing but the facts favorable to his party. If nothing more were done to unveil all the facts known to this witness, his testimony (for all that we could surmise) might present half-truths only. Some one must probe for the possible (and usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent.¹ Cross-examination, then, *i. e.* further examination by the opponent, has for its first utility the extraction of the remaining qualifying circumstances, if any, known to the witness, but hitherto undisclosed by him.² (b) The *facts which diminish and impeach the personal trustworthiness or credit of the witness* will also, in every likelihood, have remained undisclosed on the direct examination. These it is the further function of the opponent's examination to extract. Some of them, no doubt, could be as well or sometimes better proved by other witnesses.³ But many of them can be obtained only from the witness himself,—particularly those which concern his personal conduct

(Bowring's ed. vol. VI, p. 491); 1837, Story, J., in *Smith v. Barnham*, 2 Sumn. 612, 623; 1877, Langdell, *Equity Pleading*, § 56 ("It is not surprising therefore that the mode of taking testimony in equity fell into disrepute and finally broke down"); 1901, Mr. Augustine Birrell, *A Century of Law Reform*, p. 189; Mr. W. Blake Odgers, *ib.* 222 ("Cross-examination under such conditions became a farce"); and the citations *post*, § 1885.

¹ It is at this point that the Continental system breaks down, for the cross-interrogation is there chiefly by the judge, who has neither the strong interest nor the full knowledge that are required.

² Examples are given, *infra*, par. II.

³ At this point the contrast *infra*, par. 2, becomes important.

and his sources of knowledge for the case in hand. To this extent, again, cross-examination is vital, *i. e.* it does what must be done and what nothing else can do.⁴

2. *Proof by other witnesses called by the opponent, contrasted.* But so far as the rules of law and the circumstances of the case would permit the same facts, obtainable on cross-examination, to be equally proved by other witnesses cognizant of them, why not use the latter mode? The advantages secured by cross-examination are here mainly dramatic; but they are only less important (in the long run) than the foregoing, and they may be (in individual cases) even more emphatic. (a) The first is that the cross-examination *immediately succeeds* in time the direct examination. In this way the modification or the discredit produced by the facts extracted is more readily perceived by the tribunal. No interval of time elapses, to diminish or to conceal their force. Proving the same facts by new witnesses, after others of the proponent have intervened, might lose this benefit, and the counsel's argument at the close might not be able to replace it. (b) But, chiefly, the advantage is that the cross-examined witness *supplies his own refutation*. If qualifying or discrediting answers are extracted from him, they are the more readily believed. No other witness' credit intervenes to add a contingency of mistake. If we believed the answers on the direct examination, we must also believe the answers on cross-examination. Moreover, the dramatic contrast of the former and the latter may multiply and even exaggerate the abstract probative effect of the facts extracted. The difference between getting the same fact from other witnesses and from cross-examination is the difference between slow-burning sulphurous gunpowder and quick-flashing dynamite; each does its appointed work, but the one bursts along the weakest line only, the other rends in all directions.⁵—Cross-examination, then, will do things that cannot be done by questioning other witnesses.

What are the lessons to be drawn from this, the nature of cross-examination and its workings, to the technical use of it? The detailed rules and hints of experience for the art of successful cross-examination are without the present purview; for they involve also many considerations of human character rather than of rules of law.⁶ But at least the conclusions that depend upon the evidential theory of cross-examination may be noticed:

II. *The Art of Cross-examination.* Since the direct examination may not have disclosed all the remaining and qualifying circumstances of the

⁴ The foregoing two features have been analyzed and emphasized in the following work: 1885, Mr. J. C. Reed, *Conduct of a Lawsuit*, 2d ed., 280 ("There are at bottom but two kinds of cross-examination,—the one intended to elicit friendly evidence, . . . to make the witness give a complete narrative, if what has been kept back is favorable to your side, . . . and the other, to show the unreliability of the witness"; in the ensuing pages of the above work, this judicious and admirable author develops in detail these two aspects, from the point of view of the tactical art).

The underlying principle of this was eloquently stated by Mr. Evarts, in his epigram "Truth, if truth, will match all round, with material facts, with moral qualities," in the notable passage on the function of cross-examination, beginning "Truth comports with every fact" (*Tilton v. Beecher*, Official Report, III, 674).

⁵ The quotations from Pigott's cross-examination and Judge Daly's anecdote, *infra*, illustrate this principle.

⁶ For a collection of references to writers on the art of cross-examination, see *ante*, § 768.

again, nothing so far as the same advantages only be (in cross-examination. In this is more than enough or others' testimony, the continuation, we dramaticate the when getting is the washing weak-ness, then, examines and without human as that d: n may of the was elo-epigram and, with in the cross-ex-its with Report, examina-llustrate iters on 768.

issue, as known to the witness, and may also have left unrevealed the deficiencies of his knowledge, the suspicions of his motives, and other elements of discredit (*supra*, par. 1, *a* and *b*), it remains for the cross-examiner to evoke these. But what is he about to evoke? What will be the complexion of these facts when extracted? They *may* be what the cross-examiner hopes. And yet they may not be. In the long run, there will be a large proportion of such facts. But for a given witness it is often otherwise. The cross-examiner may already know what is there waiting for disclosure. But if he does not, he is faced by a contingency. He *may* extract the most confirming circumstances for the proponent's own case, which have somehow been left unmentioned. He *may* demonstrate that the credit of the witness is greater, not less, than was supposed. The great axiom, then, of the art of cross-examination, as dependent on the theory, is that *it is a contingency whether the facts that will actually be extracted will be favorable or unfavorable to the cross-examiner's purposes*. It is here that the art (that is, the technical skill) of cross-examination enters. On this hang all the lesser rules of the art. Hence it is that it must call to its aid so many other elements than mere knowledge of law. Experience of human nature, judgment of chances, knowledge of the case, tact of manner,—all these things, and more, have to do with the art. Yet the theory of the process underlies and influences at every point. To cross-examine, or not to cross-examine,—that is the fundamental question, which springs from the essential nature of the process and arises anew for every part of every witness' testimony. The greatest cross-examiners have always stated this as the ultimate problem.

III. *Illustrations of the theory and the art.* The theory and the art of cross-examination, as thus outlined, are amply illustrated in the annals of recorded trials. Of these, a few examples, of manageable compass, must here suffice. With reference to the foregoing analysis (par. 1, *a* and *b*, *supra*), the examples may be grouped under four heads:⁷

1, *a*. Examples of the *utility of a cross-examination*, in bringing out *desirable facts of the case, modifying the direct examination* or otherwise *adding to the cross-examiner's own case*:

1856, Mr. David Paul Brown, in "The Forum," II, 456 (this celebrated Pennsylvania advocate is describing a case of alleged infanticide by poison, administered by its mother, whose seducer had deserted her): "It was shown that a day or two before the death of her infant, the mother had sent for half-an-ounce of arsenic to a grocer's. That after the death the arsenic was taken to the grocer's, and was weighed, and had lost twenty-four grains in its weight. This circumstance, together with the opinion of the chemist, presented a strong case. Neither was sufficient in itself, but together they were dangerous. Of course, the cross-examination as to the weight was very rigid and severe. Upon this particular point it ran thus: 'When the arsenic was purchased, how did you weigh it?' 'I weighed it by shot.' 'How many shot?' 'Six.' 'Of what description?' 'No. 8.' 'When it was returned, did you weigh it in the same scales?' 'Yes.' 'Did you weigh it with the same shot?' 'I weighed it with shot of the same number—

⁷ Almost all of these, under 1, *a* and *b*, *infra*. Besides the ensuing examples, others will be found quoted elsewhere under other principles (*ante*, §§ 782, 990-996, 1005-1006, 1260). 2, *a* and *b*, *supra*, and no grouping is necessary.

for I had no other number.' 'How much less did it weigh?' 'Twenty-four grains less.' It was plain that this testimony bore hard upon the prisoner—but at this stage of the case the Court adjourned. Immediately my colleague (Mr. Boyd) and myself visited the stores of all the grocers, and took from various uncut hags of No. 8, the requisite number of shot, subjected them to weight in the most accurate scales, and found that the same number of these different parcels of shot varied more in weight than the difference referred to as detected in the arsenic at the time of its return. The shot—the grocers—the apothecary—the scales—were all brought before the Court. They clearly established the facts stated, and enabled us fairly to contend that there had been no portion of the arsenic used,—which argument, aided by the excellent character of the prisoner, proved entirely successful, and after a painful and prolonged trial, she was acquitted; so that her life may be said to have been saved by a shot."

1885, Mr. *John C. Reed*, *Conduct of a Lawsuit*, § 400: "When your evidence is but slight and that of the other side is very strong, you may be reckless in spurring his witnesses to make a complete statement. Your case is so had that any change in it may be for the better. We add an entertaining and apt illustration. Some time ago the writer while waiting in court watched the trial of a case where the plaintiff sought to recover damages for a breach of warranty. The defendant had sold him a horse with an express warranty that he was sound and kind and free from all 'outs.' The next day the plaintiff noticed that a shoe was loose, and he undertook to drive him to a blacksmith's shop to have him shod, when the horse exhibited such violent reluctance that he was obliged to abandon the attempt. Repeated efforts made it evident that he never would be shod willingly, and therefore he was obliged to sell him. The defendant called two witnesses. The first, an honest, clean-looking man, testified that he was a blacksmith, that he knew the horse in question perfectly well, and he had shod him about the time referred to in the plaintiff's testimony. 'Did you have any difficulty in shoeing him?' asked the defendant's counsel. 'Not the least. He stood perfectly quiet. Never had a horse stand quieter.' The other, a venerable-looking man, with a clear, blue eye, testified that he had owned the horse and that he was perfectly kind. 'Did you ever have any trouble about getting him into a blacksmith's shop?' 'Well, sir, I don't remember that I ever had occasion to carry him to a blacksmith's shop while I owned him.' The plaintiff's counsel evidently thought that cross-examination would only develop this unpleasant testimony more strongly, so he let the witnesses go. The jury found for the defendant. The next morning, as the writer was sitting in court waiting for a verdict, a man behind him, whom he recognized as the blacksmith, leaned forward and said, 'You heard that horse case tried yesterday, didn't you? Well, that fellow who tried the case for the plaintiff didn't know how to cross-examine worth a cent. I told him that the horse stood perfectly quiet while I shod him; and so he did. I didn't tell him that I had to hold him by the nose with a pair of pincers to make him stand. The old man said he never took him to a blacksmith's shop while he had him. No more he did. He had to take him out into an open lot and cast him before he could shoe him.' Of course the plaintiff's counsel should have been more searching in the examination, where he could not possibly have made his own case worse."

1888, *Parnell Commission's Proceedings*, 15th day, *Times' Rep.*, pt. 3, p. 125; the Irish Land League was charged with complicity in crime and agrarian outrage; its leaders did not deny the fact of outrages, boycotts, and the like, but did deny that the Land League had any share in them, and claimed that sundry local secret societies and individual miscreants were really responsible. James Burke testified; *Direct examination*: "I am a blacksmith. . . . There was a falling off in my customers. Previously to that, I had received a letter which threatened my life if I shod Birmingham's horses. I gave the letter to the police. I went before the League at Kinvarra." Q. "What for?" A. "I went to look for mercy; I was suffering from boycotting. . . . They told me it was not from there I was boycotted—it was not from the League. Afterwards I subscribed to the League, and paid 1s. Customers returned again and I have had no trouble since."

Cross-examination: "When they told me that it was not the League that was boycotting me, I believed them. The shilling I paid was the ordinary subscription." . . . Q. "It was not the League who boycotted you?" A. "No." Q. "Do you know who it was?" A. "Some blackguards, I think." Q. "There were no blackguards in the League, I hope?" A. "Not that I know of." Q. "All respectable people?" A. "Yes, I believe so."⁸

1888, *Parrell Commission's Proceedings*, 37th and 43d days, *Times' Rep.*, pt. 10, pp. 110, 113, 123, pt. 11, p. 158; a police-superintendent came to testify that at the meetings of the local Land Leagues speeches were habitually made denouncing certain persons, and that outrages upon them followed shortly, the League thus being charged with direct incitement of outrage; this witness had kept a record of the speeches and the ensuing outrages; "every meeting that occurs in the division is reported to me; . . . my record gives a summary of the language used;" and on cross-examination by Sir C. Russell, who asked him to go through the various instances "exhaustively," the witness was led through a number of cases of the sort he alleged; the connection between speech and outrage being sometimes made out by him; on a subsequent day, he was cross-examined by Mr. Davitt as follows, so as to show the slender basis for the witness' assertion of the criminal influence of the League's speeches; Q. "Your experiences of the League cover the counties of Wexford, Carlow, Kilkenny, Tipperary, Waterford—six counties altogether, I believe?" A. "No, eight counties." Q. "And this experience extends over a period of eight years?" A. "Not of all the counties; in some cases over a lesser period." Q. "About how many branches of the League are there in each of these counties?" A. "I have not the return with me. . . . I should say there are branches of the League in every parish." Q. "Then you would say there would be at least 50 branches in each county?" A. "At least that." Q. "Three hundred branches altogether in six counties?" A. "Yes." Q. "These branches meet weekly, I believe?" . . . A. "I should say practically they meet once a fortnight." Q. "That would represent a very large number of meetings of each branch every year; and for the total number of branches quite an extraordinary number of meetings—6,000 during the year; multiply that by eight years, we have 48,000 meetings. Now at each of these meetings, I understand, a chairman presides, and if there is a resolution to be proposed it is spoken to by two speakers. That would be three speeches for each meeting?" A. "I only know the procedure from what I see in the papers." Q. "I believe that is the rule. That would be 144,000 speeches in eight years, delivered in branches of the League in these counties of which you have experience of the League and its working. About how many outrages, roughly speaking, did you particularize to Sir C. Russell yesterday as resulting directly from speeches of the Land League?" A. "I gave instances of about two dozen." Q. "About 24. Dividing 24 into 144,000, that would give a very small number of outrages for eight years, would it not?" A. "Yes."⁹

⁸ So also the examination of David Freeley, *ib.* 23th day, pt. 8, p. 13.

⁹ Compare also these: 1843, *R. v. O'Connell*, 5 St. Tr. N. S. 1, 252 (cross-examination by Mr. Hatchell); 1875, *Tilton v. Beecher*, N. Y., "Official" Report, II, 116 (cross-examination of Mr. R. E. Holmes, as to the Winsted scandal, by Mr. Fullerton); II, 412 (cross-examination of Mr. J. L. Gay, by Mr. Morris). The following anecdote perhaps equals any instance ever chronicled: "A certain ex-Governor had on one occasion a client who was indicted for naming the specific charge being that the defendant had bitten off the ear of the prosecutor. The case came on for trial and the outcome of it was not very promising for the defendant. While the defence was still being adduced, the defendant leaned over and whis-

pered in the ear of his attorney, saying, 'Call Jack Deans; he was there; he saw the whole thing.' Thereupon in a short while Jack Deans was duly called and put upon the witness stand in behalf of the defendant. 'Now, Mr. Deans,' said the ex-Governor, after some preliminary questions, 'you say that you know the defendant and that you were present at the time of the alleged assault by him on the prosecutor. Tell us what you saw of that occurrence.' 'Well, I was coming 'long the road,' said the witness, 'and I seen 'em getting up out of the dirt; but I didn't see the defendant hit the prosecutor, and I didn't see him kick him, and I didn't see him bite his ear off.' 'You were in plain view of the parties and you say you did not see any of these things?' asked the ex-Governor, with an expanding

1, a'. Examples of the *inutility of a cross-examination*, in bringing out *undesirable facts of the case, strengthening the direct examination*:

1878, Mr. *W. V. N. Bay*, Bench and Bar of Missouri, 151: "In Parker's reminiscences of Rufus Choate is related a story of the cross-examination of a sailor who had turned State's evidence, and was relating the story of a theft of money from the ship while in a distant port. The witness declared that though he had taken the money, it was the defendant, the great advocate's client, that had instigated the theft. 'What did he say to you?' asked Choate. 'Why, he told us,' replied the witness, 'that there was a man in Boston, named Choate, who would get us off even if they caught us with the money in our boots!' This terrible thrust produced an uproar of laughter in the courtroom. Yet it is related that Choate's countenance remained absolutely immovable."¹⁰

1883, *Parnell Commission's Proceedings*, 72d day, *Times' Rep.*, pt. 20, pp. 145, 217; the Irish Land League was charged with collecting funds to be used for supporting crime and outrage and armed rebellion, and Mr. Parnell was under cross-examination as to the purpose for which he collected money during his tour in America; he admitted accepting money from all sources, including those "physical force" adherents, who favored dynamite-violence and the like, but claimed that he received it for the sole purpose of furthering the peaceable and lawful methods of the Land League; Sir Richard Webster, the attorney-general, in cross-examining, brought up the following significant incident, but by pressing it too far gave opportunity for the witness wholly to explain away and nullify its force; Q. "Do you remember the celebrated occasion at Troy, when a gentleman came forward and offered you 'five dollars for bread and twenty dollars for lead'?" A. "Yes." Q. "You did not think it necessary to refuse the twenty dollars for lead?" A. "I was very glad to get the money, but not for lead." Q. "In your presence, then, at Troy, a man offered five dollars for bread and twenty for lead?" A. "That was the expression used."¹¹ Q. "You understood that to mean that some one in the audience was ready to subscribe five dollars for charity and twenty dollars for fighting purposes?" A. "Not a bit of it. I understood that he was ready to subscribe five dollars to our charitable fund and twenty dollars in support of the Land League movement." Q. "Then did you think it a fair description of your agitation to call it 'lead'?" A. "No, I did not think it was." Q. "Why do you think the gentleman meant the Land League by 'lead'?" A. "Because if he had not he would not have given the money to me." Q. "Do you represent that a public offer of twenty dollars for lead in support of your agitation and an acceptance of the sum on your side would be understood as a repudiation of physical force opinions?" A. "At the beginning of my meetings in America I had declared that I would not receive one cent for arms or for any unconstitutional or illegal movement. . . . Having made that declaration at the outset of my tour, and having said subsequently nothing inconsistent with that declaration, I consider that no man in his senses would have offered me twenty dollars believing that the money would be used for the very purposes which I had repudiated." . . . Q. "Now, do you not know that that speech about lead was repeatedly quoted in Ireland, and that the construction put upon it was that the subscription was for physical force matters?" A. "By your side it was quoted, I know."

chest. 'Yes,' said the witness. Then the prosecuting attorney took a hand, and cross-examined. 'Now, Mr. Deans,' said he, 'you have told the Governor all that you *did not* see of this assault; please tell me what you *did* see of it.' 'Well,' said the witness, squirming in his chair and hesitating a long time before proceeding, 'it's so; I *didn't* see the defendant bite off the prosecutor's ear. But jest as I got abreast of him I seen him spit the ear out of his month!' That was enough for the prosecution and a great deal more than enough for the ex-Governor" (13 Green Bag 423). The

anecdote of the old gentleman's valet, quoted *post*, § 2094, is also an excellent illustration of the present principle.

¹⁰ This anecdote is related in Brown's *Life of Choate*, 3d ed. 451, but not so pointedly. Compare the following: 1875, *Tilton v. Beecher*, N. Y., "Official" Report, II, 236 (cross-examination of Mr. Oliver Johnson, by Mr. Fullerton); II, 706 (cross-examination of Mr. James Freeland, by Mr. Fullerton); II, 307 (cross-examination of Mr. Samuel Wilkeson, by Mr. Beach).

¹¹ Here the cross-examiner might well have stopped.

Q. "What do you mean by my side?" A. "The Tory party." . . . Q. "Did not Boyton, the Land League organizer, quote the speech as meaning what I have indicated?" A. "I do not know that he did." Q. "Do you not know that it has been proved already in this case?" A. "I do not. The only use made of the speech in that sense was when Mr. O'Hanlon tried to break up our meeting in the Rotunda. He wrote a letter to a newspaper next day wanting to know what I had done with these twenty dollars." Q. "And suggesting that the money ought to have gone to the physical force party for the purchase of land?" A. "Yes; he thought that I was misappropriating it."¹²

1, b. Examples of the utility of a cross-examination, in bringing out, from the witness himself, facts to lessen his credit.

1888, Parnell Commission's Proceedings, 78th day, Times' Rep., pt. 21, pp. 225, 230, 231; the Land League having been charged with terrorizing and intimidation of the people at large, a Catholic priest who was president of one of the branches was examined for the defence as to the methods of the League; *Direct examination*: Q. "Was any kind of pressure or intimidation exercised to your knowledge to make people join the League?" A. "No; things were done in a very regular way. A notice was posted up asking the people to come and join the League. Those who wished to do so then came and paid their subscriptions. There was no house-to-house-visit, there was no pressure whatever; it was perfectly free." . . . *Cross-examined* by Mr. Murphy. Q. "Nothing particular was done, I understand you to say, to induce people to join the Land League?" A. "Nothing, in my district." Q. "Are you quite certain?" A. "Quite certain." . . . Q. "I will call your attention to some of your own speeches. On the 12th of December, 1880, speaking at Craughwell, you say, 'I tell you that the wretch who has not joined the League, that that man deserves to go down to the cold, dead damnation of disgrace.' That is pretty strong?" A. "Yes." Q. "Did you use those words?" A. "It is possible." Q. "Did you use them?" A. "I may have." Q. "Have you any doubt about it?" A. "I never saw it in print." Q. "Did you use that language?" A. "Very likely I did." Q. "Do you regard that as an invitation to join the League voluntarily or involuntarily?" A. "Well, it does not involve any intimidation." . . . Q. "'To go down to the cold, dead damnation of disgrace?'" A. "Well, it is rather a strong expression, I admit." Q. "Did you believe that that was the proper fate for anyone who did not join the League?" A. "Well, I suppose I used it in order to induce them to join." Q. "Did you use the expression in order to frighten the people?" A. "I suppose it was in order to induce them to join the League."

1888, Parnell Commission's Proceedings, 55th day, Times' Rep., pt. 14, p. 252; certain letters, purporting to be Mr. Parnell's, and approving the Phoenix Park assassinations, had been sold to the London "Times" by one Richard Pigott, an Irish editor and informer; these letters had been in fact fabricated by Pigott himself, but until he came under Sir Charles Russell's cross-examination the case for the letters' genuineness was strong; the word "hesitancy" occurred in one of the letters and this with other words had been written down by Pigott at the opening of his cross-examination; Q. "Yesterday you were good enough to write down certain words on a piece of paper, and among them was the word 'hesitancy.' Is that a word you are accustomed to use?" A. "I have used it." Q. "Did you notice that you spelt it as it is not ordinarily spelt?" A. "Yes, I fancy I made a mistake in the spelling." Q. "What was it?" A. "I think it was an 'a' instead of an 'e,' or vice versa; I am not sure which." Q. "You cannot say what was the mistake, but you have a general consciousness that there was something wrong?" A. "Yes." Q. "I will tell you what was wrong according to the received spelling. You spelt it with an 'e' instead of an 'a.' You spelt it thus—'hesitancy.' That is not the received way of spelling it?" A. "I believe not." Q. "Have you noticed the fact that the writer of the body of the letter of the 9th of January, 1882—

¹² It is just to add that on the next day the cross-examiner returned to the subject with success.

the alleged forged letter — spells it in the same way?" A. "I heard that remark made long since, and my explanation of my misspelling is that having that in my mind I got into the habit of spelling it wrong." Sir C. Russell. "Did your Lordships catch that last answer?" The President. "Oh, yes." Q. "You say that your attention was called to the fact a long time ago that in the alleged forged letter 'hesitancy' was misspelt, and you fancy that, your attention having been called to the misspelling, you so got into the habit of spelling it in that way?" A. "I suppose so; I heard so much discussion about it. I never met anybody who spelt every word correctly, scarcely. (Laughter)." Q. "It had got into your brain?" A. "Yes, somehow or other." Q. "Who called your attention to it?" A. "Several people; it was a matter of general remark." Q. "Do you think that but for the fact of your attention being drawn to the way in which it had been spelt you would probably have spelt it rightly?" A. "Yes." Q. "You know that that [above] letter purports to be dated the 9th of January, 1882; you have already told me that this letter (handing [another] letter to witness) is yours?" A. "Yes, that is right; that is my letter." Q. "But you did not become possessed of this valuable [Parnell] letter, dated January 9, 1882, until the summer of 1886; and this letter [of yours] is prior to that. The wrong spelling had not got into your head then?" A. "No. I say that spelling is not my strong point." Q. "Did you notice that in this letter you spell 'hesitancy' in the same way?" A. "No, I did not." . . . Q. "How do you account for that? Your brain was not injuriously affected at that time?" A. "I cannot account for it." Q. "At all events you cannot account for it by that disturbance of your brain?" A. "No."¹³

1, b'. Examples of the *inutility of a cross-examination*, in bringing out *facts which strengthen the witness' credit*, or answers which otherwise give him a *personal victory*:

1840, *Law and Lawyers*, I, 180: "Jeffreys, the afterwards notorious chief justice and chancellor, was retained in a trial in the course of which he had to cross-examine a sturdy countryman clad in the habiliments of the laborer. Finding the evidence of this witness telling against his client, Jeffreys determined to disconcert him. So he exclaimed in his own bluff manner: 'You fellow in the leathern doublet, what have you been paid for swearing?' The man looked steadily at him, and replied: 'Truly, sir, if you have no more for lying than I have for swearing, you might wear a leathern doublet as well as I.'¹⁴

1869, *Saurin v. Starr*, as reported in O'Brien's *Life of Lord Russell*, 86 (a Sister of Mercy, being expelled for transgression of the rules of the convent, and suing for libel, her counsel was Mr., afterwards L. C. J., Coleridge): "Coleridge's case was that the breaches of discipline were trivial, contemptible. He pressed Mrs. Kennedy [the matron] on the point, asking what had Miss Saurin done. Mrs. Kennedy said, as an example, that she had eaten strawberries. 'Eaten strawberries!' exclaimed Coleridge, 'what harm was there in that?' 'It was forbidden, sir,' said Mrs. Kennedy, — a very proper answer. 'But, Mrs. Kennedy,' retorted Coleridge, 'what trouble was likely to come from eating strawberries?' 'Well, sir,' replied Mrs. Kennedy, 'you might ask what trouble was

¹³ The very effective cross-examination of the medical man, reported by Judge Daly, and the memorable cross-examination of Majocchi, in Queen Caroline's trial (quoted *ante*, § 995), belong here also.

¹⁴ In this same entertaining volume, other like anecdotes may be found at the same page. Of the same order is the following: "Ex-Governor Shaw, of Iowa, lately chosen to be Secretary Gage's successor at the head of the Treasury Department, tells how he once heard a small boy get the better of a lawyer who was

cross-examining him. Part of the questioning and the replies thereto were as follows: 'Have you any occupation?' 'No.' 'Don't you do any work of any kind?' 'No.' 'Just loaf around home?' 'That's about all.' 'What does your father do?' 'Nothin' much.' 'Doesn't he do anything to support the family?' 'He does odd jobs once in a while when he can get them.' 'As a matter of fact, isn't your father a worthless fellow and a loafer?' 'I don't know, sir; you'd better ask him. He's sittin' over there on the jury.' (Brooklyn Eagle, 1903.)

likely to come from eating apples; yet we know that trouble did come from it.' The answer flooded Coleridge."

1878, Mr. W. V. N. Bay, Bench and Bar of Missouri, 162: "The following story is told by Edwards: On a trial at Auburn, New York, the counsel for the People, after severely cross-examining a witness, suddenly put on a look of severity, and said: 'Mr. Witness, has not an effort been made to induce you to tell a different story?' 'A different story from what I have told?' 'That is what I mean.' 'Yes, sir; several persons have tried to get me to tell a different story from what I have told; but they could n't.' 'Now, sir, upon your oath, I wish to know who those persons are.' 'Well, I guess you've tried as hard as any of 'em.'"

§ 1369. **Other Rules concerning Cross-examination discriminated.** We are here concerned solely with the opponent's *right to have cross-examination*, and with the rule which excludes testimonial statements not subjected to cross-examination. Accordingly the inquiry is whether for a given statement it has satisfied this rule or not; and for this purpose we are to pass in review the various sorts of testimonial statements as to which such a question can be raised.

From this inquiry, then, four others must be distinguished, with which cross-examination in other aspects is concerned. (1) There is sometimes a special liberality as to the *kind of fact that may be asked for on cross-examination*. This involves the principles applicable to the admissibility of different sorts of evidence to impeach and discredit a witness. The real problem there involved concerns the mode of proving certain facts or the kind of facts admissible. Thus, certain facts are allowed to be proved by cross-examination only, not by other witnesses; moreover, even upon cross-examination certain kinds of facts are not allowed to be brought out. This subject is elsewhere dealt with (*ante*, §§ 875-1144, particularly §§ 878, 990-996).

(2) In the *order of presenting evidence*, certain stages are to be observed; the direct examination comes first, then cross-examination, and so on. Whether a certain fact may be asked about on cross-examination may involve these rules as to the order of presenting evidence (*post*, §§ 1866-1900, particularly § 1885). With these rules we are here not concerned.

(3) Cross-examination is chiefly used to discredit the witness thus examined, and there is a rule which forbids the discrediting of one's own witness. Accordingly, the inquiry often arises whether a witness is one's own or the opponent's, — for example, whether one may *cross-examine* (*i. e.* discredit) a *witness called by the opponent but not examined*, or called only to bring documents; in cases of that sort, the rule against impeaching one's own witness is involved (*ante*, §§ 909-918). With that rule we are here not concerned.

(4) Cross-examination, as well as direct examination, involves certain rules as to the *manner of interrogation*, — whether a question may be leading, whether it may be repeated, and the like. These principles are elsewhere dealt with, under Testimonial Narration (*ante*, §§ 763-788).

§ 1370. **Cross-examined Statements not an Exception to the Hearsay Rule.** The Hearsay rule excludes testimonial statements not subjected to cross-examination (*ante*, § 1362). When, therefore, a statement has already been

subjected to cross-examination and is therefore admitted — as in the case of a deposition or testimony at a former trial, — it comes in because the rule is satisfied, not because an exception to the rule is allowed. The statement may have been made before the present trial, but if it has been already subjected to proper cross-examination, it has satisfied the rule and needs no exception in its favor. This is worth clear appreciation, because it involves the whole theory of the rule:

1834, *Tindal, C. J.*, in *Wright v. Tatham*, 3 A. & E. 3, 22 (declaring that the testimony of a deceased subscribing witness at a former trial is equivalent to calling him now and thus obviates the necessity of calling another and living subscribing witness): “[The examination of B. at the former trial] is evidence as direct to the point in issue, and as precise in its nature and quality, as that of P. when called to the stand. . . . The evidence resulting from the written examination of the deceased witness, in the former suit between the same parties, is of as high a nature, and as direct and immediate, as the *viva voce* examination of one of the witnesses remaining alive and actually examined in the cause.”

1892, *Mitchell, J.*, in *Minneapolis Mill Co. v. R. Co.*, 51 Minn. 304, 315, 53 N. W. 639: “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.”

§ 1371. **Opportunity of Cross-examination, as equivalent to Actual Cross-examination.** The doctrine requiring a testing of testimonial statements by cross-examination has always been understood as requiring, not necessarily an actual cross-examination, but merely an opportunity to exercise the right to cross-examine if desired. The reason is that, wherever the opponent has declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that the testimony could not or need not be disputed at all or be shaken by cross-examination. In having the opportunity and still declining, he has had all the benefit that could be expected from the cross-examination of that witness. This doctrine is perfectly well settled:

1813, *Ellenborough, L. C. J.*, in *Cazenove v. Vaughan*, 1 M. & S. 6: “The rule of the common law is that no evidence shall be admitted but what is or might be under the examination of both parties. But if the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined. Here then the question is whether the defendant had an opportunity of cross-examining.”

1883, *Rapallo, J.*, in *Bradley v. Myrick*, 21 N. Y. 296: “The witness . . . was subject to cross-examination by the defendant’s attorney, if he chose to exercise that right, or in his absence by the Court. . . . On every trial the opposing party has the power to cross-examine. If he does not choose to appear and exercise this power, the consequences should fall on him and not on his adversary.”

1824, *Mr. Thomas Starkie, Evidence*, 97: “To satisfy this principle, it is not necessary that the party on whose authority the statement rests should be present at the time when his evidence is used, in order that he may then be cross-examined; it is sufficient if the party against whom it was offered has cross-examined or has had the opportunity of doing so, being legally called upon so to do when the statement was made. . . . If the party

might have had the benefit of a cross-examination in the course of a judicial proceeding, it is the same thing as if he had actually availed himself of the opportunity."¹

But, though this doctrine is a practically inevitable corollary of the general principle, it is worth while to note the possible consequences of its looseness, as warnings against an inconsistent strictness shown in other applications of the general principle. For, on the one hand, testimony already subjected to a cross-examination, however thorough, by a former party not in privity with the present opponent is excluded (*post*, § 1388); while, by the present doctrine, testimony never actually tested at all, in consequence of the carelessness, fraud, or incompetence of counsel, or of a privy in interest, is admitted, if merely the opportunity so to test it had existed. On the whole both err in attempting to create an inflexible rule. No doubt, usually, a mere opportunity to cross-examine can be trusted as a sufficient safeguard; and no doubt, usually, only a privy in interest would apply a sufficient cross-examination. But room should be allowed for the exceptional instances which will certainly occur. The trial Court should have a discretion.

§ 1372. *Division of Topics.* The subject of present inquiry is: What classes of testimonial statements satisfy the rule requiring an opportunity of cross-examination? The various sorts of statements may be grouped as follows, according to the circumstance in which the rule fails to be satisfied:

1. The *kind of tribunal* or officer, before whom the statement was made, as not furnishing a sufficient opportunity; 2. The *nature of the cause*, as to issues and parties, in which the statement was made, as not furnishing a sufficient opportunity; 3. The *course of the examination* itself, as furnishing only an incomplete opportunity.

1. Kind of Tribunal or Officer, as affecting Opportunity of Cross-examination.

§ 1373. *General Principles; Sundry Tribunals (Commissioners of Land-titles, Pilotage, Bankruptcy, etc.; Arbitrators).* In general the principle is clearly accepted that testimony taken before a *tribunal not employing cross-examination* as a part of its procedure is inadmissible; and, conversely, the kind of tribunal is immaterial and the testimony is admissible if in fact cross-examination was practised under its procedure:

1767, *Buller, J.*, *Trials at Nisi Prius*, 241: "From what has been said it is evident that (as there can be no Cross-examination), a voluntary Affidavit is no Evidence between

¹ 1693, *Howard v. Tremaine*, 1 Salk. 278 (depositions taken in *perpetuum*; the opponent to the bill had refused in contempt to answer; depositions admitted); 1900, *Small v. Reeves*, — Ky. —, 59 S. W. 515 (deposition voluntarily not cross-examined; motion to allow cross-examination on the trial, held properly refused in discretion); Mass. Pub. St. 1882, c. 169, § 34, Rev. L. 1902, c. 175, § 36 (the Court may exclude a deposition if the "adverse party failed without fault to attend the taking thereof").

The ruling in *U. S. v. French*, D. C., 117 Fed. 976 (1902), that notice to attend is not

sufficient is clearly erroneous. Compare § 1377, *post*.

The intimation in *Twohig v. Leamer*, 48 Nebr. 247, 67 N. W. 152 (1896) that it must affirmatively appear, in using testimony at a former trial, that a cross-examination was had, is also erroneous; for if cross-examination is an ordinary part of the proceedings before that kind of tribunal, it must be assumed that an opportunity for it was given, and an opportunity was sufficient.

Compare the rulings *post*, § 1378 (notice to attend).

Strangers. . . . So where there cannot be a Cross-examination, as Depositions taken before Commissioners of Bankrupts, they shall not be read in Evidence."

1825, *Graham, B.*, in *Attorney-General v. Davison*, McCl. & Y. 167: "The barrack commissioners were not required to summon the party for the purpose of examining the witnesses; and I have no doubt that they proceeded to examine the witnesses and to make their report without giving notice to the other side; and consequently, as the party had no opportunity of attending or cross-examining the witness, this cannot be legal evidence;" *Garrow, B.*: "in order to affect any party by oral or written testimony, an opportunity should be allowed to him of checking or correcting it by cross-examination."

1806, *Thompson, J.*, in *Jackson v. Bailey*, 2 Johns. 20: "It is said that this rule ought not to be extended to testimony taken before the Onondaga commissioners [to try land-titles]. . . . Opportunity was given for cross-examining witnesses; and it appears that the title now in question was actually litigated before the commissioners."

1858, *Eastman, J.*, in *Orr v. Hadley*, 36 N. H. 580: "Neither is it necessary that the former testimony should have been given on the trial of a cause in the exact technical shape of an action. It is sufficient if the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination."

Accordingly, testimony has been received or rejected on this account, *i. e.* because an opportunity for cross-examination was or was not a part of the procedure, when given before *bankruptcy-commissioners*,¹ *pilot-commissioners*,² *marine hull-inspectors*,³ *barrack-commissioners*,⁴ *land-commissioners*,⁵ county-boards,⁶ registers,⁷ and arbitrators.⁸

§ 1374. **Testimony at Coroner's Inquest.** In *England*, testimony at a coroner's inquest had been frequently admitted before the Hearsay rule was established.¹ During the 1700s, this continued as a traditional exception.² The dignity of the office was sometimes put forward as an explaining reason. But the determining circumstance was after all the tradition, as well as the early statutory provision authorizing the reporting of the testimony (though not expressly making it admissible).³ The anomaly was in effect removed in 1848 by Sir John Jervis' Act,⁴ which provided for a cross-examination and expressly made admissible in later proceedings the testimony thus obtained.

¹ *Ante* 1668, Anon., Rolle's Abr. II, 679, pl. 9; 1747, *Eade v. Liugood*, 1 Atk. 303; 1787, *Fitch v. Hyde*, K. rby 258; 1810, *Cox v. Pearce*, 7 John. 298.

² 1843, *Com. v. Ricketson*, 7 John. 298.

³ 1896, *Louisville Ins. Co. v. Monarch*, 99 Ky. 578, 36 S. W. 563.

⁴ 1825, *Att'y-Gen'l v. Davison*, McCl. & Y. 167, quoted *supra*; 1802, *Davis v. Batty*, 1 H. & J. 264, 282, *semble*.

⁵ 1806, *Jackson v. Bailey*, 2 John. 20, quoted *supra*; 1797, *Montgomery v. Snodgrass*, 2 Yeates 230 (deposition before a board of property, excluded; "the witness had been cross-examined," yet the board "are not vested with the powers essentially necessary to such a tribunal" as a court); 1798, *DeHaas v. Galbreath*, ib. 315 (deposition before the same board, excluded).

⁶ 1899, *Dunck v. Milwaukee Co.*, 103 Wis. 371, 79 N. W. 412.

⁷ 1899, *Payne v. Long*, 121 Ala. 385, 25 So. 780.

⁸ 1858, *Orr v. Hadley*, 36 N. H. 580 (see

quotation *supra*); 1845, *Bailey v. Woods*, 17 id. 372; 1794, *White v. Bisbiug*, 1 Yeates 400; 1824, *Forney v. Hallagher*, 11 S. & R. 203; 1850, *McAdams v. Stilwell*, 13 Pa. 90, 96.

It was excluded in *Jessup v. Cook* (1798), 1 Halst. 438; but here the witness was not shown unavailable, under § 1402, *post*.

¹ 1666, *Lord Morly's Case*, Kelyng 55; 1692, *Harrison's Trial*, 12 How. St. Tr. 852; cited *ante*, § 1364.

² 1754, *Robins v. Wolseley*, 2 Lee Eccl. 135, 421, 442 (referring to the common law); 1790, *R. v. Eriawell*, 3 T. R. 707.

³ 1554, St. 1 & 2 P. & M. c. 13; 1555, St. 2 & 3 P. & M. c. 10; 1826, St. 7 Geo. IV, c. 64. It is not certain whether St. 1 Wm. IV, c. 22 (1830) was to be regarded as applying to coroners; but testimony before the coroner continued to be admitted: 1840, *Sills v. Brown*, 9 C. & P. 601, 603.

⁴ St. 11 & 12 Vict. c. 42. It would seem that the English Courts would now exclude testimony not thus taken under cross-exami-

In the *United States*, the question has been re-considered upon principle and apart from the traditional English exception, and the proper conclusion has been reached that the lack of cross-examination as an element in coroner's procedure makes such testimony inadmissible:

1842, *Bronson, J.*, in *People v. Restell*, 2 Hill N. Y. 207: "It is said that depositions taken by the coroner on holding an inquest are evidence, although the defendant was not present when they were taken. This doctrine has been gravely questioned, and I am strongly inclined to the opinion that it cannot be maintained. The great principle that the accuser and the accused must be brought face to face and that the latter shall have the opportunity to cross-examine can never be departed from with safety."

1858, *Napton, J.*, in *State v. Houser*, 20 Mo. 436: "It is true that there may be a few cases in which depositions taken before coroners in England, without any opportunity of cross-examination, have been used against the accused, where the witness subsequently died; but the authority of such cases is questioned, even in that country, by their ablest writers on common law — Starkie, Roscoe, Russell —, and it is doubtful whether such testimony would be now received. At all events, such testimony has never been permitted in this country, and in England its admissibility has been altogether placed upon the peculiar dignity and importance attached to the office of coroner; and no such reasons exist here."⁵

§ 1375. **Testimony before Committing Magistrate or Justice of the Peace.**

Similar considerations apply to proceedings before a committing magistrate or a justice of the peace. If there was under the procedure of that official an opportunity of cross-examination, the testimony is admissible; otherwise not. There never has been any doubt on this point since the establishment of the general doctrine (*ante*, § 1364) in *R. v. Paine*, in 1696,¹ except in the special case of justices of the peace acting as committing magistrates under the statutes of Philip and Mary (*ante*, § 1374). The statutory provision for such examination, though not expressly making the testimony admissible, was thought by some during the 1700s² to imply a special exception, as in the case of coroners' examinations. But even this supposed excep-

tion: 1830, *R. v. Wall*, Russell on Crimes, b. IV, c. IV, § 3; 1866, *R. v. Rigg*, 4 F. & F. 1085.
⁵ *Accord*: 1881, *Sylvester v. State*, 71 Ala. 17, 24; 1891, *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. 331 (death of a passenger; testimony of a deceased witness before the coroner, under cross-examination and in the presence of "the respective counsel," excluded, because it did not appear "in whose behalf, in what capacity, nor for what purpose the respective counsel were present"; unsound); 1885, *Pittsburgh C. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 3 N. E. 439 (depositions excluded); 1852, *State v. Parker*, 7 La. An. 83, *semble*; 1893, *Insurance Co. v. Schmidt*, 40 Oh. St. 112 (testimony excluded); 1881, *McLain v. Com.*, 99 Pa. 97; 1844, *State v. Campbell*, 1 Rich. L. 125 (O'Neill, J., diss.); 1888, *State v. Jones*, 29 S. C. 225, 227, 7 S. E. 296. *Contra*: 1881, *State v. McNeil*, 33 La. An. 1333. Of course, if the coroner's practice does include a right of cross-examination, *e. g.* by an accused person present, the testimony is admissible: Ark. Stats. 1894, § 758 (testimony before a coroner, admissible "on

the trial of any person present at his examination"); Del. Rev. St. 1893, c. 33, § 4 (deposition before a coroner, usable "on the trial of any person present at the examination"); Tex. C. Cr. 1. 1895, § 514 (quoted *post*, § 1375); 1894, *Meyers v. State*, 33 Tex. Cr. 204, 216, 26 S. W. 196 (before a coroner, the defendant present and privileged to cross-examine; admitted).

¹ 5 Mod. 165; quoted *supra*, also *ante*, § 1364.

² *E. g.* in *R. v. Eriswell* (1790), 3 T. R. 707, per Buller, J. (the examination of a pauper, as to his place of settlement, before two justices of the peace was offered at the Quarter Sessions; the judges of the King's Bench were equally divided, but the opinion of Lord Kenyon subsequently prevailed in *R. v. Ferryfrystone*, 2 East 54, 1801; Kenyon, L. C. J.: "Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them and where each has an opportunity of cross-examining the witness").

tion was by the 1800s repudiated in England.⁹ On principle, as has often been pointed out, the question in all such cases depends simply upon whether there was an opportunity of cross-examination:

1696, *R. v. Paine*, 5 Mod. 165: "It was the opinion of both Courts [King's Bench and Common Pleas], that the depositions should not be given in evidence, the defendant not being present when they were taken before the mayor and so had lost the benefit of a cross-examination."

1817, *Richards, C. B.*, in *R. v. Smith*, 11olt N. P. 615, "observed that the statute did not mention the prisoner's presence at all. Undoubtedly, however, the decisions established the point that the prisoner ought to be present that he might cross-examine. But here he had the advantage offered him and omitted to use it."

1833, *Johnson, J.*, in *State v. Hill*, 2 Hill S. C. 609: "If the accused is present and has an opportunity of cross-examining the witness, the depositions, according to the rule, are admissible. . . . We know, too, how necessary a cross-examination is to elicit the whole truth from even a willing witness; and to admit such evidence, without the means of applying the ordinary tests, would put in jeopardy the dearest interests of the community."

§ 1376. *Depositions; Effect of other Principles Discriminated.* (1) A deposition is not receivable unless taken by an officer or other person authorized by

⁹ 1817, *R. v. Smith*, Holt N. P. 615, quoted *post*; affirmed in R. & R. 340 by all the judges; accord, 1817, *R. v. Forbes*, Holt N. P. 599; 1838, *R. v. Arnoid*, 8 C. & P. 621; 1838, *R. v. Errington*, 2 Lew Cr. C. 142, per Patteson, J. (answering the objection that St. 7 Geo. IV, c. 64, s. 2, did not require the accused's presence). The statutes in England now require an opportunity of cross-examination: 1848, St. 11 & 12 Vict. c. 42; 1867, St. 30 & 31 Vict. c. 35, § 61. In *R. v. Beeson* (1854), 6 Cox Cr. 430, Jervis, C. J., said: "[The statute of 11 & 12 Vict. c. 42] adds a rule which the judges had previously engrafted upon the old statutes of P. & M., that there must be full opportunity of cross-examination;" the statute was applied in (1886) *R. v. Griffiths*, 16 Cox Cr. 46.

So also in *Canada*: Ont. Rev. St. 1897, c. 90, § 10 (on a trial at the general sessions, a deposition taken before the magistrate at the original hearing may be used if the accused was present "and he, his counsel or solicitor, had a full opportunity of cross-examining the witness"); Can. Crim. Code 1892, § 687 (quoted *post*, § 1380, note 3); Quo.: 1854, *R. v. Peltier*, 4 Low. Can. 22.

¹⁰ Accord: Ariz. St. 1903, No. 25, amending Rev. St. 1901, P. C. § 763 (preliminary hearing before a magistrate); 1883, *Harris v. State*, 73 Ala. 497; 1895, *McNamara v. State*, 60 Ark. 400, 30 S. W. 762; Cal. (see the statutes and cases cited *post*, § 1413); Del. Rev. St. 1893, c. 97, § 18 (committing magistrate shall examine the witnesses in the accused's presence); 1882, *Robinson v. State*, 68 Ga. 833; 1883, *Smith v. State*, 72 id. 115; 1899, *Hardin v. State*, 107 id. 718, 33 S. E. 700; 1880, *State v. Wilson*, 24 Kans. 189, 194; 1869, *O'Brian v. Com.*, 6 Bnsh 563, 570; La. Rev. L. 1897, § 1439 (record by the recorder of New Orleans, or a justice of the peace, of testimony at fire inquest, taken on notice to the occupant, owner, agent, or custodian of property, admissible); 1895, *State v. George*, 60

Minn. 503, 68 N. W. 100; N. Y. C. Cr. P. 1881, § 8 (testimony before committing magistrate admissible only if there was cross-examination or the opportunity); 1842, *People v. Restell*, 2 Hill 300; N. C. Code 1868, § 1157 (examinations taken by a committing magistrate, usable only if the accused was present and had an opportunity to hear and cross-examine); 1847, *State v. Valentine*, 7 Ired. 225, 226; 1865, *Howser v. Com.*, 51 Pa. 338 ("notwithstanding the above-named statute [2 & 3 P. & M. c. 10] had been extended to Pennsylvania, it was displaced by our Constitution, and no *ex parte* testimony could be given against a prisoner in a capital case"); 1876, *Johnson v. State*, 1 Tex. App. 333, 338 (good opinion); Tex. C. Cr. P. 1895, § 814 (depositions before an "examining Court or jury of inquest," admissible if defendant was present and had the privilege of cross-examination); 1851, *U. S. v. Macomb*, 5 McLean 286 (justice of the peace); 1845, *State v. Hooker*, 17 Vt. 658, 669 (magistrate); 1897, *Pooler v. State*, 97 Wis. 627, 73 N. W. 336 (depositions of accomplices excluded, because the defendant was not present at their examination). In the United States the only instance in which to-day any statutory exception seems to have been made is that of the examination of the complainant in *bastardy*; but it is not clear that an examination taken in the defendant's absence and without some sort of notice given him (*post*, §§ 1378, 1382) would be admissible unless expressly so declared by the statute: Del. Rev. St. 1893, c. 77, § 16 (the mother's deposition in a *bastardy* charge may be taken in the defendant's absence if the constable returns "that he cannot be found"); N. J. Gen. St. 1896, *Bastards*, § 16 (examination of the mother in a *bastardy* charge may be in the defendant's absence, unless he demands the contrary); compare the statutes quoted *post*, § 1417.

law. It can be conceived that cross-questions put informally and recorded in writing might be as effective as a formal cross-examination. But cross-examination in its proper scope signifies a probing and testing under certain safeguards and opportunities for compelling answers, which can exist only in a formal proceeding governed by a settled procedure and enforced by vested authority; hence, that cross-examination which satisfies the rule must be a cross-examination, if not before a regular judge or magistrate, at least before an officer or other expressly authorized person proceeding according to prescribed forms. In what concerns the kind of officer or other person thus authorized, the question involved is one of the constitution of Court and their officers.¹ Statutes have provided a variety of ways, more or less formal, in which depositions may be taken. So far as the admissibility of a deposition depends upon its being taken by an authorized person, the question is one of judicial machinery, the organization of Courts, and is beyond the present purview.

(2) By Chancery practice, common-law practice, and statutes, a *preliminary order to authorize the taking of a deposition* is usually obtainable only upon certain conditions,—the illness or the impending departure of the deponent, and the like. But statutes have often removed these conditions in certain classes of cases. This process of securing in advance the evidential material for a trial is a part of the preliminary procedure of courts,—just as is the process of obtaining discovery from an opponent. These questions of preliminary procedure are without the present purview.² The admissibility of a deposition already taken is the limit of the scope of these investigations.

(3) When a deposition is offered, the principle of Confrontation requires that the witness' *personal attendance be shown impracticable* before the deposition may be used. The conditions thus required are dealt with under that principle (*post*, §§ 1401-1418).

(4) The document offered as a deposition is the testimony of the deponent *in writing*. Testimony by deposition can be only in writing, not oral, and the writing, moreover, must be made and transmitted according to a detailed mode prescribed by statute or by practice. So far as the manner of interrogation is involved, the principle is that of the Mode of Testimonial Narration, already dealt with (*ante*, §§ 799-805).³

§ 1377. **Same: General Principle: Opportunity of Cross-examination required.** The principle of the Hearsay rule, as applied to the use of a deposition, is precisely the same as for testimony obtained in other tribunals, in the instances already reviewed (*ante*, §§ 1373-1375). The mere speaking under oath is nothing; the essential condition is that the person against whom the sworn statement is offered should have had an opportunity to

¹ For the officers having power to compel answers, see *post*, § 2195.

² The statutes bearing on the subject may be found from the citations collected *post*, §§ 1380-1383. For the statutes granting discovery from an opponent, see *post*, §§ 1856, 1859.

³ For the conclusiveness of the magistrate's report of testimony, see *ante*, §§ 1326, 1349. For the use of the magistrate's report without calling the magistrate in person, see *post*, § 1667. For the authentication of a deposition or magistrate's report, see *post*, §§ 1676, 1681, 2164.

cross-examine the deponent (*ante*, § 371). This is universally conceded as a common-law principle:

1763, *Buller, J.*, Trials at Nisi Prius, 240: "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."

1777, *Mansfield, L. C. J.*, in *Goodright v. Moss*, Cowper 592: "[As to] offering a deposition or an answer in evidence against a person not a party to the original suit. That cannot be done for this reason, because such person has it not in his power to cross-examine."

1790, *Kenyon, L. C. J.*, in *R. v. Eriswell*, 3 T. R. 707: "Examinations upon oath, except in the excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them and where each has an opportunity of cross-examining the witness. . . . [In this case the deposition] was *ex parte*, obtained at the instance of those overseers whose parish was to benefit by it, and behind the backs of the parish against whom it has now been used, without having an opportunity of knowing what was going on or attending to have the benefit of a cross-examination. I regard the question as of the last importance and as putting in danger the law of evidence in which every man in the kingdom is deeply concerned."

1811, *Lawrence, J.*, in *Berkeley Peerage Case*, 4 Camp. 412: "A deposition is considered a partial representation of facts, as to all persons who have no opportunity of bringing out the whole truth by cross-examination."

1803, *Per Curiam*, in *Waterson v. Seat*, 10 Fla. 333 (after pointing out that no notice of a deposition had been given to the opponent, "so as to enable him to cross-interrogate"): "We can conceive of no circumstances under which the notice may be dispensed with. The plainest principles of natural justice, as well as our statute, require it. It is stated by one of the earliest writers (to enforce the rule on the subject) that even the Almighty would not proceed to pronounce sentence against our great ancestor without giving him notice, and therefore first called to him, 'Where art thou, Adam?'"¹

§ 1378. **Same: Notice and Sufficient Time; Attendance cures Defective Notice.** The opportunity of cross-examination involves two elements, (1) *notice* to the opponent that the deposition is to be taken at the time and place specified, and (2) a *sufficient interval of time* to prepare for examination and to reach the place.

(1) Where a deposition is taken for pending litigation, the *parties* to whom notice is to be given are definitely ascertainable, and the requirement of it, apart from statutory exceptions, is indispensable.¹ But where a deposition is taken with a view to use in litigation not yet begun — *in perpetuam memoriam* —, it may not be possible to ascertain the names of all the interested

¹ The learned judge's reference here is probably not, as might be imagined, to Genesis III, 9, but to Fortescue, *De Laudibus Legum Anglie* (1470), where the famous chief justice alludes to the above passage in Genesis.

² The rule in Chancery was not so strict, presumably because (*ante*, § 1367, note 5) cross-examination in Chancery was almost futile: 1767, *Buller, Nisi Prius*, 240; 1827, *Story, J.*, in *Gass v. Stinson*, 3 Sumner 98, 104 (examining the authorities); 1842, *St. 15 & 16 Vict. c. 86.*

But the principle existed: 1859, *Rebden v. Wesley*, 26 Beav. 434 (Romilly, M. R.: "This is clear that if you intend to use the answer of one defendant against another defendant, the latter must have the right of cross-examination").

³ See the statutes and cases *post*, §§ 1380-1382. Apart from statute, the notice may be oral: 1847, *Milton v. Rowland*, 11 Ala. 732, 736 ("the form or manner of notice is of no importance, when one in point of fact is proved").

parties, and the question may thus arise whether a deposition so taken may be used against a person who never received any notice and could not by diligence have been notified. This question does not seem to have been judicially decided;² but, so far as a statute has authorized a mode of notice by advertisement or the like, it would seem that this by implication sanctions the use of such a deposition, as a necessary deviation from the strict requirements of principle.

(2) The requirements as to the *interval of time* are now everywhere regulated by statute (*post*, §§ 1380-1383), and the rulings in regard to the sufficiency of time are thus so dependent on the interpretation of the detailed prescriptions of the local statutes that it would be impracticable to examine them here.³ But whether or not the time allowed was supposably insufficient or was precisely the time required by statute, the *actual attendance* of the party obviates any objection upon the ground of insufficiency, because then the party has actually had that opportunity of cross-examination (*ante*, § 1371) for the sole sake of which the notice was required.⁴ On the other hand, the failure of the opponent to attend, after sufficient notice, leaves it still true that there has been the necessary opportunity,⁵ which is sufficient on the same principle (*ante*, § 1371).

§ 1379. **Same: Plural Depositions at Same Time and Different Places.** The principle requiring an opportunity of cross-examination is clearly violated in the case of plural depositions appointed by one party for the same time at different places, so that it becomes impossible for the opponent to attend in person for cross-examination at both. Here he is deprived of the opportunity for cross-examination in one at least of the depositions:

1881, *Gray, C. J.*, in *Cole v. Hall*, 131 Mass. 90: "The manifest design of the Legislature is that the adverse party shall have opportunity to attend in person, or at least by his attorney duly instructed in the cause, to cross-examine the witnesses. . . . If depositions are taken at different places at or near the same time, it is within the power of the court, when the depositions are offered in evidence, to suppress the depositions of those witnesses whom the adverse party has thereby been deprived of reasonable opportunity to

² See the statutes and cases cited *post*, § 1383.

³ See some of them cited *post*, § 1381; see also *Wade on Notice*, §§ 1221-1252; *Foster, Federal Practice*, 3d ed., §§ 286-290.

⁴ 1862, *Alcard v. Strang*, 38 Ala. 326, 328 (applied to written interrogatories); 1849, *Caldwell v. McVicar*, 9 Ark. 418, 422 ("Where the party appears, by himself or attorney, and makes his appearance, cross-examines, objects to a question, to the competency of the witness, or does any substantive act connected with the taking of the depositions, and it so appears in the depositions regularly certified, the party will not at the hearing of the cause be allowed to object that no legal notice had been given"); 1858, *Jones v. Love*, 9 Cal. 68, 70 ("Having appeared and cross-examined, it was too late afterwards to make the objection" of short notice); 1895, *Ryan v. People*, 21 Colo. 119, 40 Pac. 777; 1850, *Greene Co. v. Bledsoe*, 12 Ill. 267, 271; 1844, *Connersville v. Wadleigh*, 7 Blackf. 102, 104; 1847, *Doe v. Brown*, 8 Id. 443, 444; 1859,

Nevan v. Roup, 8 Ia. 207, 210; 1859, *Mumma v. McKee*, 10 Id. 107, 110, *semble*; 1811, *Talbot v. Bradford*, 2 Bibb 316; 1888, Md. Pub. Gen. L. art. 35, § 28; 1868, *State v. Bassett*, 33 N. J. L. 26, 31; 1860, *McCormick v. Irwin*, 35 Pa. 111, 118; 1862, *Cameron v. Cameron*, 15 Wis. 1, 5. *Contra*: 1861, *Pinut v. Gaslight Co.*, 1 All. 343, 348 (on the fallacious ground that "it was impossible for them [the opponent] to say with certainty that the deposition would not be admitted"; this assumes that the law could not be known beforehand, — an assumption which would confuse all legal rules).

For the time of objections to competency and relevancy, see *ante*, §§ 18, 486, 586.

⁵ Cases cited *ante*, § 1371; and the following: 1895, *Moore v. Triplett*. — Va. —, 23 S. E. 69 (but in the special class of statutory proceedings here covered, *i. e.* sale of infant's lands, etc., under Code §§ 2435, 2619, actual presence was held necessary).

cross-examine. . . . In this, as in many other matters concerning the introduction of evidence, much must be left to the discretion of the judge presiding at the trial."

1893, *Allen, J.*, in *Evans v. Rothschild*, 54 Kan. 747, 39 Pac. 701: "Where testimony is taken by deposition, it is in one sense a part of the trial of the cause, and the only chance given to the opposing party to confront the witnesses whose depositions are taken under the notice is to attend before the officer who takes them. The only opportunity to apply the tests necessary to correct errors or detect falsehood in the statements drawn out on direct examination is that afforded by cross-examination at the same time. A party to an action has a right, if he deems it necessary, to be personally present when depositions are being taken affecting his interests. He is not required to employ a multitude of attorneys to protect his interests at different places on the same day, nor does the fact that he chooses to intrust his interests to the care of an attorney (other than the one who tries the case for him) at one place, require him or his principal counsel to attend on the same day at another place."

Under such circumstances, that deposition should be suppressed for which the opponent lost the opportunity of cross-examination, *i. e.* he is allowed to attend either, and the one not attended is excluded.¹ If in fact he succeeds in having representatives at both, then both become admissible, for there has been for both an actual opportunity of cross-examination.² But where he refrains from attending either, he practically waives the opportunity (*ante*, § 1371) as to both, and therefore both are admissible.³ The policy of excluding both, merely because the appointments are incompatible,⁴ cannot be supported.

§ 1380. **Same: English and Canadian Statutes.** The requirement of an opportunity for cross-examination has been almost invariably preserved in its integrity in the statutory regulation of the subject. The few deviations have occurred chiefly in provisions respecting notice to absent or unknown parties, and respecting the discretion that may properly be allowed a trial Court in making exceptions. This statutory regulation became necessary for the main purpose of vesting the common-law Courts with that power which, with singular ineptitude, they conceived themselves to lack or to be somehow prevented from exercising with due freedom, — the power of authorizing depositions to be taken before appointed officers.¹ The statutes conferring the power have thus usually also specified the requirements to be observed

¹ 1861, *Hankinson v. Lombard*, 25 Ill. 573; 1879, *Collins v. Richart*, 14 Bush 625; 1897, *Cross v. Cross*, — Ky. —, 41 S. W. 272 (notice to take on the same day that the opponent was taking another in the same suit on a previous notice, insufficient); 1867, *Fant v. Miller*, 17 Gratt. 187, 226; and cases quoted *supra*.

² 1878, *Latham v. Latham*, 30 Gratt. 340.

³ 1879, *Hay's Appeal*, 91 Pa. 268; see *Blair v. Bank* (1850), 11 Humph. 88.

⁴ *Id.* Code 1897, § 4688 ("if notices are given in the same case by the same party of the taking of depositions at different places on the same day, they shall be invalid"); 1815, *Waters' Heirs v. Harrison*, 4 Bibb 89; 1856, *Scammon v. Scammon*, 33 N. H. 60; *Me. Pub. St.* 1883, c. 107, § 14 (if notice of two depositions at the same time and place is given, or if deceptive

means are used to prevent attendance, the Court "may reject them"). The following ruling is sound: 1893, *Wytheville B. & I. Co. v. Teeger*, 90 Va. 277, 282, 18 S. E. 195 (notice on same day of deposition in another State in another suit in which proponent of present deposition was not a party though his counsel was engaged; admitted).

⁵ A deposition could be authorized by the cumbersome methods either of the personal attendance of a judge of the Court (1606, *Matthews v. Port*, Comb. 63), or of a postponement of trial till the opponent consented (1774, *Mansfield, L. C. J.*, in *Mostyn v. Fabrigas*, Cowp. 161, 174); but otherwise the party must sue out a commission in chancery (1827, *L. C. Eldon*, in *Macaulay v. Shackell*, 1 Bligh n. s. 96, 119, 131).

in giving notice to the opponent. In England this statutory reform came piecemeal. The chief enactments have been five: (1) in 1830-31, St. 1 Wm. IV, c. 22, giving to all superior Courts the power of authorizing depositions both abroad and at home;² (2) in 1867, St. 30 & 31 Vict. c. 35, § 61, extending the power to criminal proceedings for indictable offences: (3) under the Judicature Act of 1873, St. 36 & 37 Vict. c. 66, the Rules of Procedure, No. 36; (4) under the Judicature Act of 1875, St. 38 & 39 Vict. c. 77, § 17, the Rules of the Supreme Court (Order XXXVII), superseding the foregoing Rules and covering the same ground; and (5) in 1883, the Rules of the Supreme Court (Order XXXVII), made under authority of the same Act (c. 77, § 17), and superseding all prior civil regulations.³ Under the statute of 1830-31, the

² This was narrowly construed as applying to civil cases only: 1847, R. v. Upton St. Leouards, 10 C. B. 834.

³ The relevant English Rules of 1883 are as follows:

RULES OF THE SUPREME COURT, 1883 (under 38 & 39 Vict. c. 77, § 17), ORDER XXXVII: "I. *Evidence Generally*: 1. In the absence of any agreement between the solicitors of all parties, and subject to these Rules, the witnesses at the trial of any action or at any assessment of damages shall be examined *visu voce* and in open court, but the Court or a Judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with, be examined by interrogatories or otherwise before a commissioner or examiner; provided that where it appears to the Court or Judge that the other party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit." (This first appeared in the Rules of 1873.)

ORDER XXXVIII: "Affidavits and Depositions: 1. Upon any motion, petition, or summons evidence may be given by affidavit; but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit." (This was contained in substance in the Rules of 1873.)

ORDER XXXVII, Rule 20: "Any party or witness having made an affidavit to be used or which shall be used on any proceeding in the cause or matter shall be bound, on being served with such subpoena [from the opposite party], to attend before such officer or person [appointed by the Court] for cross-examination." (This first appears in the Rules of 1883.)

ORDER XXXVII: "II. Examination of Witnesses. . . 5. The Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the Court or Judge or any officer of the Court, or any

other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct." (This first appeared in the Rules of 1875.) "6. An order for a commission to examine witnesses shall be in the Form No. 36 in Appendix K." (The form provides fully for notice and cross-examination.) "6 a. If in any case the Court or a Judge shall so order, there shall be issued a request to examine witnesses in lieu of a commission." (This is the mode usually employed for foreign countries and sometimes for India and the Colonies; the form, No. 37, provides for notice and cross-examination.) "10, 11. Where any witness or person is ordered to be examined before any officer of the court, or before any person appointed for the purpose, . . . the examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses shall be subject to cross-examination and re-examination." (The provisions of 6, 6 a, 10, and 11 first appear in the Rules of 1883; though they may be considered as an adaptation of the provisions of the Chancery Practice Act of 1852, St. 15 & 16 Vict. c. 86.)

CANADA: Dom. Rev. St. 1866, c. 135, § 99 (Exchequer and Supreme Courts); **Crim. Code 1892, § 683** (commissions out of Canada; rules to conform to those of civil trials, "as nearly as practicable"); § 686 (depositions of sick persons; reasonable notice and a full opportunity of cross-examination is required); § 687 (deposition at a preliminary investigation, if it is proved that it was "taken in the presence of the accused, and that he, his counsel, or solicitor, had a full opportunity of cross-examining the witness"); **St. 1900, c. 46** (amends **Crim. Code 1892, § 687**, by omitting "he" before "his counsel"); **B. C. Rev. St. 1897, c. 52, § 134** (provisions for notice); **Man. Rev. St. 1902, c. 40, Rule 464** (depositions admissible on terms); **R. 469** (cross-examination of affiants); **R. 486, R. 492** (testimony taken on commission), c. 38, § 135 (judge may require cross-examination of affiants, in county Courts); **N. Br. Consol. St. 1877, c. 37, § 185** (provisions for notice); c. 53, § 30 (St. John City Court); c. 37, §§ 185, 188, (Supreme Court); c. 49, § 77 (Supreme Court in equity); **Newf. Consol. St. 1892, c. 50, Rules**

mode of taking depositions was left to the discretion of the Court; but it does not appear that any change of practice actually ensued. Under the final Rules of 1883, the essential requirement of an opportunity for cross-examination was safeguarded, while at the same time a certain just amount of flexibility was provided for; so that the English system now represents a thoroughly practical and successful regulation of the subject. In brief, it deals with the requirement of an opportunity of cross-examination as follows: (a) Depositions must be taken subject to cross-examination before the officer appointed; (b) within certain limits the Court has a discretion to accept *ex parte* sworn statements; but even in these cases the opponent is entitled to a subsequent cross-examination of the deponent before decision rendered. These Rules have been adopted in substance in several of the Canadian jurisdictions.

The practice of English Courts since the adoption of these rules indicates a disposition to preserve the principle of cross-examination so far as possible, and to use the discretionary powers of dispensation as little as possible.⁴

§ 1381. **Same: U. S. Federal Statutes.** In the two types of ordinary deposition dealt with in the Federal statutes (depositions *de bene esse*, *i. e.* on an order for conditional taking, and *dedimus potestatem*, *i. e.* a special commission), the principle is preserved that there must have been an opportunity of cross-examination.¹ By the original act of 1789 (c. 20, § 30), regulating the

of Court 33, par. 10 (provisions for notice); *N. Sc. Rev. St.* 1900, c. 159, § 41 (municipal Courts); *Rules of Court* 1900, Ord. 35, R. 3 B, R. 10 (provisions for notice); *N. W. Terr. Consol. Ord.* 1898, c. 21, Rule 263 (like *Ont. Rules*, § 483); *Rules* 271, 272 (opportunity of cross-examination provided); *Ont. Rev. St.* 1897, c. 60, § 143 (provisions for notice); *Rules of Court* 1897, § 483 (the Court may authorize testimony by affidavit or before an examiner; "but where the other party *bona fide* desires the production of a witness for cross-examination, and such witness can be produced," no affidavit shall be authorized); § 485 (depositions; rules assimilated to the practice for discovery from parties); §§ 501-504 (rules for commissions); *P. E. I. St.* 1887, c. 4, §§ 2-4 (rules for notice).

Compare the statutes admitting affidavits (*post*, § 1710).

⁴ On applications for the issuance of an order to take a deposition, the question whether it shall issue is entirely different from that of the admissibility of a deposition when taken, as pointed out *post*, § 1401. But sometimes a ruling on such an application may involve a ruling that such a deposition, even if taken, would be inadmissible; such a ruling was the following, in which the requirement of cross-examination is insisted upon as indispensable: 1882, *Crofton v. Crofton*, L. R. 20 Ch. D. 760 (Fry, J., refused to issue a commission to examine a witness in France, because the mode of examination there, which would control, left the putting of questions to the judge's discretion: "He is a witness who ought to be subjected to

the most drastic cross-examination, and . . . I decline to delegate my discretion to any other tribunal. If under the commission the witness would have been subject to cross-examination in the ordinary way, I should have thought it desirable to issue it").

¹ *U. S. Rev. St.* 1878, § 863 (for depositions *de bene esse*, "reasonable notice must first be given in writing"; and "whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct"); § 866 (for depositions by *dedimus potestatem* "to prevent a failure or delay of justice," the provisions of the above section "shall not apply").

Rules of the Federal Supreme Court, No. 13 (for new evidence in maritime cases before the Supreme Court, no commission shall issue except on notice and a copy of interrogatories); *Federal Equity Rules*, No. 67, as amended 1893 (rules prescribed for notice and cross-examination in taking testimony by commission); No. 68 (testimony by deposition under statute; "if no notice is given to the adverse party," he shall upon motion "be entitled to a cross-examination of the witness, either under a commission or by a new deposition under the Acts of Congress, if a Court or a judge thereof shall under all the circumstances deem it reasonable"); No. 70 (for commissions before issue reached, notice is required).

former class, the notice and opportunity to cross-examine was not necessary if the opponent or his attorney was not within one hundred miles of the place; but this defect is remedied (R. S. § 863) in the present statute. The statute authorizing the latter class of depositions (R. S. § 866) has also been construed to require notice and opportunity for cross-examination;² but the terms of the statute are so complicated with local State usage that it is not possible to say that all depositions offered in Federal Courts must be tested by that requirement.³

§ 1382. **Same: U. S. Statute.** The requirement of notice and opportunity to cross-examine has been generally preserved in all the various State statutes. Only a few deviations are found here and there.¹

¹ For the manner and time of the notice under these statutes, see the following: 1897, *American E. N. Bank v. First N. Bank*, 27 C. C. A. 274, 82 Fed. 961 (reasonableness depends on the circumstances of the case); 1900, *U. S. Life Ins. Co. v. Ross*, 42 C. C. A. 601, 102 Fed. 722 (notice to a corporate agent to accept service after the revocation of his authority but before appointment of another, held good); 1901, *Foster*, *Federal Practice*, 3d ed., §§ 286-290; *Gould and Tucker*, *Notes on Revised Statutes*, §§ 863, 866.

² The situation is as follows: The *dedimus potestatem* section (§ 866) prescribes that "common usage" shall control the mode. This "common usage" was for some time construed to permit the adoption of local statutory and common-law modes: *U. S. v. Cameron*, 15 Fed. 797 (McCrary, J., 1883); *Warren v. Younger*, 18 id. 859 (McCormick, J., 1884). *Contra*, *Randall v. Veuable*, 17 id. 162 (Turner, J., 1884). Then in *Ex parte Fisk*, 113 U. S. 725, 5 Sup. 724 (1884), the Supreme Court refused to recognize such a construction for the purpose of enforcing an order to take under a peculiar State law, and intimated, though expressly reserving the point, that the deposition, had it been already taken and were it offered in evidence, would be rejected on the same grounds. Finally, by St. 1892, c. 14, the Federal lower Courts were authorized to take (and presumably to admit in evidence) depositions according to the mode allowable in the State of the trial; thus apparently annulling the effect of *Ex parte Fisk*, *supra*. The doubt thus remained whether the new statute, going beyond the *dedimus potestatem* section (§ 866), operates also to relax the detailed requirements of § 863 concerning *de bene depositions*. Compare the statutes cited *post*, § 1410, and the rule as to the applicability of State law in Federal Courts (*ante*, § 6).

³ In the following list a few of the judicial rulings in regard to the requirement of notice have been placed after the respective statutes; where the requirement is not merely of "reasonable notice," but of notice in a specific way, the result depends almost entirely upon the wording of the local statute; where not otherwise stated, the statute requires notice and prescribes details; compare here the statutes cited *post*, § 1413 (former testimony) and § 1710 (affidavits); *Ala. Code* 1897, §§ 1834-1836; §§ 5290, 5293 (crim-

inal cases); 1895, *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13 (no notice necessary in proceedings under § 2803); *Alaska C. C. P.* 1900, §§ 646, 650, 652, 657 (like Or. Annot. C. 1892, §§ 817, 821, 823, 828); *Ariz. P. C.* 1887, §§ 2069, 2091 (depositions taken by accused); *Rev. St.* §§ 1834-1837 (civil cases); *Ark. Stats.* 1894, §§ 2987 ff. 2999; § 2117 (rule applied to depositions taken for accused in criminal case); § 7414 (no notice required of attesting witness' deposition for will-probate, unless contested); *Cal. P. C.* 1872, §§ 1338, 1339, 1353, as amended in 1880 (defendant's depositions in criminal case); § 882, as amended in 1878 (prosecution's depositions); *C. C. P.* 1872, §§ 2024, 2031, 2033 (civil cases); in 1901, § 2033 of the original code was omitted by Commissioners' amendment, and its substance was added to §§ 2021, 2030; for the validity of these amendments, see *ante*, § 488); *Colo. Const.* 1876, art. II, § 17, Annot. *Stats.* 1891, § 4833 ("reasonable notice" required in criminal cases); *C. C. P.* 1891, §§ 342, 349, 354 (in general); § 2300 (before irrigation-commissioners); §§ 2650, 2651 (before justices); *Conn. Gen. St.* 1887, § 1068 (in general); § 1074 (commission to take a deposition of one in military or naval service); *D. C. Comp. St.* 1894, c. 71, §§ 27-29 (deposition taken by defendant in a criminal case); c. 70, § 33 (depositions of will-witnesses); c. 20, § 2 (depositions in civil causes; reasonable notice required; when it is "impracticable," and there is "urgent necessity," such notice as judge shall think to be "reasonable and direct"); *Code* 1901, § 132 (notice of commission to take testimony of attesting witnesses to a will need not be given, unless the probate is opposed); §§ 1058, 1060 (in general); *Fla. Rev. St.* 1892, §§ 1124, 1134 (in general); §§ 2913 ff. (deposition for accused person); *St.* 1899, c. 4727, § 2 (in general); *Ga. Code* 1895, §§ 5299-5301 (commissions on interrogatories); § 5313 (depositions without commission); *How. Civil Laws* 1897, §§ 1379-1382 (domestic depositions); *Ida. Rev. St.* 1897, §§ 6061, 6067, 6069, 7588, 8163, 8182 (in general); *St.* 1899, Feb. 10, §§ 2, 31 (in general); *Ill. Rev. St.* 1874, c. 51, §§ 24-28, c. 148, § 4 (in general); *Ind. Rev. St.* 1897, §§ 428-430 (in general); *St.* 1899, c. 74 (probate proceedings); *Ia. Code* 1897, §§ 4687-4689, 4693-4699 (in general); § 5222 (accused's depositions); *Kan. Gen. St.* 1897, c. 95, §§ 363, 364, c. 102,

§ 1383. **Same: Depositions in Perpetuum Memoriam.** The principle requiring notice and opportunity of cross-examination applies equally to depositions taken in view of future litigation, *in perpetuum memoriam*; and it is preserved in the statutes as well as enforced in the judicial rulings.¹ Where a

§ 171 (in general); 1893, *Peterson v. Albach*, 51 Kan. 150, 32 Pac. 917 (time of notice); *Ky. Stats.* 1899, § 4855 (for depositions of attesting will-witnesses, notice required only to the party contestant); *C. Cr. P.* 1895, § 153 (defendant's depositions in criminal cases); *C. C. P.* 1895, §§ 566-569 (in general); *La. Rev. L.* 1897, §§ 615, 621, *C. P.* 1894, §§ 425-430, 438 (in general); *St.* 1896, No. 124, *Wolff's Rev. L.* 278 (criminal cases); 1903, *State v. Jackson*, 111 La. 343, 35 So. 596 (depositions taken for the prosecution under *St.* 1896, No. 124, admitted; the statute construed); *Me. Pub. St.* 1893, c. 107, §§ 5-9 (in general); *Md. Pub. G. L.* 1888, art. 35, §§ 15, 16, 19, 22, 28 (in general); art. 84, § 9 (depositions in shipping cases); 1800, *Gittings v. Hall*, 1 H. & J. 14, 18 (notice necessary for depositions under the act of 1723, c. 8, for land commissions); *Mass. Pub. St.* 1882, c. 169, §§ 25, 43, *Rev. L.* 1902, c. 175, §§ 27, 45 (notice required; unless notice was impossible under the circumstances); *St.* 1893, c. 188, *St.* 1899, c. 123, *Rev. L.* 1902, c. 175, § 43 (where the adverse party does not appear to defend, no notice is required); *Mich. Comp. L.* 1897, § 10136 (in general); 1897, *Drosowski v. Chosen Friends*, 114 Mich. 178, 72 N. W. 169 (reasonable notice; trial Court's discretion approved); *Minn. Gen. St.* 1894, §§ 5669-5675, 5685, 5688 (in general); *Miss. Annot. Code* 1892, §§ 1750-1764 (in general); *Mo. Rev. St.* 1899, §§ 2883-2891, 2902 (in general); 1894, *Glenn v. Hunt*, 120 Mo. 333, 346, 25 S. W. 181 (notice not necessary under *R. S.* 1889, § 4435, for an opponent out of the State); *Mont. C. C. P.* 1895, §§ 3354, 3363 (like *Cal. C. C. P.* § 2028, 2034); *P. C.* §§ 2483, 2504, 2506 (like *Cal. P. C.* §§ 1338, 1353, 1355); § 1692 (deposition before a magistrate of a witness not giving recognition); *Nebr. Comp. St.* 1899, §§ 3952-3954, 7187 (in general); *Nev. Gen. St.* 1885, §§ 3430, 3434, 4438 (in general); §§ 3910, 4056 (deposition of a witness for the people, admissible if it is taken in the defendant's presence, and the defendant has had "an opportunity to cross-examine"); *N. H. Pub. St.* 1891, c. 225, §§ 4, 5, 14 (in general); *N. J. Gen. St.* 1896, Evidence, § 25 (in general); § 30 (notice of eight days required for a commission out of the State, unless by consent or by judge's order); §§ 38, 66 (for depositions before a judge, commissioner, etc., out of the State, terms of notice prescribed); § 63 (same, deposition in foreign State); *St.* 1900, c. 150, §§ 31, 38, 45 (former provisions repeated); *St.* 1902, c. 135 (in a proceeding for divorce or annulment, where no appearance is entered, a deposition in another State or Territory may be taken and used "ex parte and without notice"); *N. M. Comp. L.* 1897, §§ 3037-3040 (in general); *N. Y. C. Cr. P.* 1891, § 219 (in depositions for the prosecution, two days' notice must be given); § 632 (in depositions for accused, notice as specified by the judge);

C. C. P. 1877, §§ 896, 899 (notice prescribed); *N. C. Code* 1893, § 1357 (in general); *St.* 1891, c. 522 (depositions taken by accused); 1896, *State v. Finley*, 118 N. C. 1161, 24 S. E. 495 (under c. 522, *St.* 1891, a co-defendant need not be notified); *N. D. Rev. C.* 1895, §§ 5677-5679 (civil cases); §§ 8378, 8388 (criminal cases); *Oh. Rev. St.* §§ 5273, 5274 (in general); § 7293 (in criminal cases, the judge's order may prescribe terms of notice); *Okl. Stats.* 1893, §§ 4242, 4243, 5287, 5351, 5362; *Or. C. C. P.* 1892, §§ 817, 821, 822, 823, 828 (in general); *Pa. St.* 1895, *Pub. Laws*, 279, § 1; *R. I. Gen. Laws*, 1896, c. 244, §§ 21, 24, 28; *St.* 1902, c. 998; 1851, *Hazard v. R. Co.*, 2 R. I. 62 (no notice required under statute, for an opponent more than 100 miles distant); *S. C. Rev. St.* 1893, §§ 2333, 2342, *Civ. C.* 1902, §§ 2869, 2878 (ten days' notice required for depositions on commission or before a court clerk); *ib.* §§ 2345 and *ib.* 2881 ("reasonable notice, not less than ten days," unless notice is impracticable, required for certain depositions); *ib.* §§ 891 and *ib.* 992 (justice Court rule); the statutes are applied in the following cases: 1900, *Henderson v. Williams*, 57 S. C. 1, 33 S. E. 261; 1901, *Wallingford v. Tel. Co.*, 60 Id. 201, 38 S. E. 443; *S. D. Stats.* 1899, §§ 6520-6521 (civil cases); §§ 8812, 8823 (criminal cases); *Tenn. Code* 1896, §§ 5627, 5640-5647 (notice to be as the Court may order, or according to detailed rules provided); § 5672 (if cross-examination is omitted, it may be had afterwards); § 7356 (rules for civil cases made applicable to defendant's depositions in criminal cases); *Tex. Rev. Civ. Stats.* 1895, §§ 2274-2276 (in general); *C. Cr. P.* 1895, §§ 797, 805, 808 (in general); *Utah Rev. St.* 1898, §§ 3450, 3456-3461, 5031, 5042 (in general); *Vt. St.* 1894, §§ 1264, 1265, 1924 (reasonable notice is to be given; for non-residents having no attorney in the State, no notice is necessary); §§ 153, 155 (notice required in election contests); 1868, *Kimpton v. Glover*, 41 Vt. 284 (time of notice); *Va. Code* 1887, §§ 3362, 3363 (in general); *Wash. C. & Stats.* 1897, §§ 6019, 6020, 6024, 6708 (in general); *W. Va. Code* 1891, c. 130, § 35 (in general); c. 50, § 106 (depositions before justices); c. 121, § 3 (specific rules for service of notice on non-residents); c. 77, § 27 (deposition of subscribing witness to will; notice necessary only to a party opposing probate); *Wis. Stats.* 1898, §§ 4086, 4096, 4102, 4114, 4115 (in general); *Wyo. Rev. St.* 1887, §§ 2621, 2622, *St.* 1895, c. 96, §§ 2, 4 (in general).

¹ ENGLAND: *Rules of Court* 1883, *Ord.* 37, r. 5 (quoted *ante*, § 1380; presumably suffices for this purpose); CANADA: Compare the statutes cited *ante*, § 1380, and *post*, § 1388; UNITED STATES: Notice is prescribed, except as otherwise stated; compare also the statutes cited *post*, § 1388, as to identity of parties and issues; *Ala. Code* 1897, §§ 1863, 1864, 1870, 1873; *Alaska C. C. P.* 1900, § 685; *Ariz. Rev. St.* 1887,

deposition is offered against one who has not been notified and could not have been, even by due diligence (as is likely to occur in cases where the parties to the future litigation are still unknown), it may be thought that a case of necessity exists, dispensing with the requirement; the statutes sometimes provide expressly that a deposition may be or shall not be used against such a party.³ In some jurisdictions, the statute requires that this kind of deposition shall be *publicly recorded*, the object being to secure as wide a notice of it as possible, so that counter-testimony may be availed of if desired; an object analogous to that of the requirement of notice for cross-examination.³ Under such a statute an unrecorded deposition would be inadmissible.⁴

§ 1384. Affidavits; Testimony of King or Ambassador. Upon the prin-

§ 1839; Ark. Stats. 1894, §§ 3017 ff. (notice required; if the adverse party is an infant, non-resident, unknown, or for four months absent from the State, the Court may appoint a cross-examiner); Cal. C. C. P. 1872, § 2084; Colo. C. C. P. 1891, § 366; Conn. Gen. St. 1887, § 1080; D. C. Comp. St. 1894, c. 20, §§ 6, 7, 11 (notice required); § 14 (any deposition *in perpetuam* may in Court's discretion be admitted); Del. Rev. St. 1893, c. 56, § 2 (boundary cases; notice to owners and tenants required); Fla. Rev. St. 1892, § 1138; Ga. Code 1893, § 3961 (the Court is to provide for "the most effectual notice"); Haw. Civil Laws 1897, § 1390; Ida. Rev. St. 1887, §§ 6117-6119; St. 1899, Feb. 10, § 24; Ill. Rev. St. 1874, c. 51, §§ 39-44 (notice required, and details prescribed; if the ordinary requirements seem to the Court insufficient, "the Court may order such reasonable notice to be given as it shall deem proper"); Ind. Rev. St. 1897, §§ 450-451 (in general); §§ 1272, 1290 (testimony to perpetuate a lost deed, record, etc., before the recorder, etc.; no notice apparently required); Ia. Code 1897, §§ 4718-4720 (notice required; if personal notice is impossible, the Court is to appoint a cross-examiner); Kan. Gen. St. 1897, c. 95, §§ 384, 385 (notice required; if personal notice is impossible, a cross-examiner is to be appointed by the Court); Ky. C. C. P. 1895, § 611 (notice to the "expected adverse party," required); La. C. Pr. 1894, § 440; Me. Pub. St. 1883, c. 107, §§ 22, 27; Md. Pub. G. L. 1888, art. 35, § 31 (land-boundaries; notice is to be posted in "the most public places in the county" 20 days before, and where all persons interested are known and any one lives out of the county, by newspaper advertisement 40 days before); Mass. Pub. St. 1882, c. 169, §§ 47, 54, 62; Rev. L. 1902, c. 175, §§ 48-62; Mich. Comp. L. 1897, § 10140; Minn. Gen. St. 1894, §§ 5694, 5701; Miss. Annot. Code 1892, §§ 1767-1771; Mo. Rev. St. 1899, §§ 4528-4531, 4531; 1866, Patterson v. Fagan, 38 Mo. 70, 80 (notice necessary); Mont. C. C. P. 1895, § 3421; Nebr. Comp. St. 1899, § 5996 (notice prescribed, as the judge directs; if personal notice is impossible, the judge is to appoint a cross-examiner); Nev. Gen. St. 1885, §§ 3439-3442; N. H. Pub. St. 1891, c. 226, §§ 3-5; N. J. Comp. L. 1897, §§ 3050-3055; N. D. Rev. C. 1893, § 3709; Ok. Rev. St. 1898,

§§ 5874-6 (in general); §§ 1169, 1188, 1193 (county surveyor may take and return testimony to marks, etc., on notice to the adverse party); Okl. Stats. 1893, §§ 4281, 4282 (notice required; the Court to prescribe details, and to appoint an attorney to cross-interrogate in case no personal notice can be given); Or. C. C. P. 1892, §§ 860, 865 (notice required, and details prescribed; the officer himself to cross-examine, if no opponent appears); R. I. Gen. L. 1896, c. 244, §§ 32, 33; S. D. Stats. 1899, § 6549 (the judge to prescribe terms of notice; and to appoint a cross-examining attorney where the parties cannot be notified); Tenn. Code 1896, §§ 5671, 5672; Tex. Rev. Civ. Stats. 1895, § 2277; U. S. Rev. St. 1878, § 867 (quoted *post*, § 1388); § 866 (provisions of § 863 as to depositions *de bene* do not here apply); 1897, Green v. Compagnia, 82 Fed. 490, 495 (excused, if taken without notice; here, a corporation in a foreign country, witnesses being sailors about to leave this country); Utah Rev. St. 1898, §§ 3467-3469; Vt. St. 1894, §§ 1274, 1275; Va. Code 1887, § 3369 (reasonable notice required to "the persons who may be so affected"); Wash. C. & Stats. 1897, § 6035; W. Va. Code 1891, c. 130, § 39 (reasonable notice to be given to "the persons who may be so affected"); Wis. Stats. 1898, §§ 4118, 4123, 4128, 4131; Wyo. Rev. St. 1887, § 3069 (notice required; the Court to appoint a cross-examiner, where personal notice cannot be given).

² See the statutes in § 1388, *post*.
³ Mass. Rev. L. 1902, c. 175, §§ 51, 63; 1840, Thacher, J., in *Com. v. Stone*, Thacher Cr. C. 604, 607 ("Why does the statute require that a deposition *in perpetuam* should be recorded? It is to preserve its purity and integrity, as well as the testimony itself. The record is a publication and serves to make it known as well as remembered. If it should contain errors or falsehoods, the parties in interest will have an opportunity to guard against them in season, either by taking the deposition *de novo*, or by putting on record the deposition of others to contradict or explain its contents").
⁴ 1814, Bradstreet v. Baldwin, 11 Mass. 229, 233; 1822, Braintree v. Hingham, 1 Pick. 245, 247; 1840, *Com. v. Stone*, Thacher Cr. C. 604, 607.

ciples already examined, it is perfectly clear that a mere affidavit — *i. e.* a statement sworn to before an officer — is inadmissible :

1767, *Buller, J.*, *Trials at Nial Prius*, 241 : "From what has been said, it is evident that, as there can be no cross-examination, a voluntary affidavit is no evidence between strangers."

1853, *Common-Law Practice Commissioners*, Second Report, p. 31 : "All applications to the Courts for their summary intervention in what may be termed incidental matters are founded on testimony contained in affidavits. If resisted, the evidence in opposition is brought before the Court in the same manner. Now it must be admitted that this species of evidence is of all others the most unsatisfactory. All the circumstances which give to the system of English procedure its peculiar and characteristic merits — *viz* *voce* interrogation, cross examination, publicity, examination in the presence of the tribunal, whereby an opportunity is afforded of observing the demeanor of the witness — are here wanting; and not only this, but the testimony is often not the spontaneous statement of the witness; the affidavit is prepared for and sworn to by the deponent, often without the sense of responsibility which would be felt by a witness when delivering a statement in his own words. Another very serious objection to affidavit-evidence is that there is no effectual mode of ascertaining the means of knowledge or the grounds on which general conclusions sworn to have been arrived at."

1851, *Grier, J.*, in *Walsh v. Rogers*, 13 How. 287 (referring to *ex parte* depositions): "Testimony thus taken is liable to great abuse. At best it is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood. The person who prepares the witness and examines him can generally have just so much or so little of the truth, or such a version of it, as will suit his case."

1870, *Thornton, J.*, in *Becker v. Quigg*, 54 Ill. 390, 394 (rejecting an affidavit to prove loss of a document): "One serious objection to the admission of *ex parte* affidavits is that the opposite party is denied the privilege of cross-examination. This is a most efficacious test for the discovery of truth, and should never be departed from, except from necessity. A witness subjected to this test cannot easily impose on the Court or fabricate falsehood."

This principle has been constantly recognized and enforced judicially.¹ There are, however, a number of instances (*post*, §§ 1709-1711), which form special exceptions to the Hearsay rule. They are briefly these: (1) a common-law exception for disqualified parties (when that form of incompetency prevailed), admitting the affidavit of the loss of a document proved by copy; this has been perpetuated in some statutes; (2) a common-law exception in Pennsylvania for an affidavit of a copy of a foreign register, in certain cases; (3) a statutory exception, widely in favor, for an affidavit of publication of a newspaper notice; (4) statutory exceptions in sundry unrelated cases. The use of affidavits in interlocutory and *ex parte* proceedings is not within the present

¹ 1691, *R. v. Taylor*, *Skluner* 403; 1808, *Pirkering v. Townsend*, 118 Ala. 351, 23 So. 703; 1883, *Smith v. Feltz*, 42 Ark. 355, 357; 1899, *People v. Plyer*, 126 Cal. 379, 58 Pac. 904 (affidavit not admissible to prove death of former witness in order to use his testimony); 1899, *Shreve v. Cicero*, 129 Ill. 226, 228, 21 N. E. 815 (affidavit of inspection of registry of deeds, excluded); 1871, *State v. Felter*, 32 Ia. 49, 51; 1893, *Hudson v. Appleton*, 87 id. 603, 607, 54 N. W. 462 (even where the affiant has become ill and mentally incompetent); 1894, *Democrat*

P. Co. v. Lewis, 90 id. 304, 57 N. W. 869 (affidavits usable before a certain board, here excluded); 1866, *Patterson v. Fagan*, 38 Mo. 70, 82; 1898, *Supreme Lodge v. Jagers*, 62 N. J. L. 96, 40 Atl. 783; 1845, *Harper v. Burrow*, 6 Ind. 33; 1893, *Allen v. U. S.*, 28 Ct. Cl. 141, 145

Distinguish the following: 1889, *Graham v. McReynolds*, 88 Tenn. 240, 247, 12 S. W. 547 (affidavit by plaintiff, offered as ratifying attorney's action in prosecuting suit; admitted).

Distinguish also the use of the opponent's affidavit as an admission (*ante*, § 1075).

purview, which is confined to adversary proceedings in the nature of common-law trials.

At common law, in England, the *king's* testimony as an individual seems to have been receivable without attendance for cross-examination, thus forming an exception to the Hearsay rule.² On the same principle it would seem that the testimony of an *ambassador* (privileged from attendance under the principle of § 2372, *post*) should be receivable; nevertheless, no exception is recognized, *i. e.* the ambassador's testimony must be taken, if at all, in the form of a deposition subjected to cross-examination, — in criminal cases at least.³

§ 1385. *Ex parte* Expert Investigations; Preliminary Rulings on the Voir Dire; Testimony by an Opponent. (1) Of late years, the fallacious suggestion has sometimes been made by unreflecting counsel that the rule requiring an opportunity of cross-examination applies to forbid the use of a diagram or model or map, or of a chemical analysis or other expert investigation, prepared or made out of court without notice to the other party. The suggestion is erroneous, for the reason that there is afforded in such cases the required opportunity of cross-examination, namely, when the witness who has made the model or the analysis takes the stand at the trial to testify to the results of his work. No more can be demanded. The map or model or analysis is not in itself testimony (*ante*, § 793); it is nothing until adopted by a competent witness as a part of his testimony and a mode of communication. One might as well demand that an opportunity of cross-examination be had at the time of the occurrence of an affray, or at the time that a witness is collecting his thoughts or doing any other act in preparation for testimony. The suggestion in question has been universally and properly repudiated by the Courts:

1886, *Henry, C. J.*, in *State v. Leabo*, 89 Mo. 247, 253, 1 S. W. 288 (examination of corpse by experts): "There is but a slight, if any, analogy between the examination by an expert or any one else of physical objects with a view of testifying to the result of his observations, and the deposition of a witness, as regards notice; the notice in the latter case is required in order that the opposite side may have an opportunity to cross-examine the deponent upon the facts testified to by him; the expert, when he comes to testify, is subject to that cross-examination."

1894, *Burg v. R. Co.*, 90 Ia. 106, 118, 57 N. W. 680: "It is not the law that in making such tests, measurements, etc., the opposite party is entitled to notice in order that he may be present. It is the right of each party, in the preparation for trial, to take all legal steps in the way of being able to meet the issues of fact by proofs; and in preparing for the presentation of his evidence, no notice to the adverse party is required."¹

¹ The cases are collected *post*, § 1674.

² The cases are collected *post*, § 1407.

³ *Accord*: 1891, *Augusta & S. R. Co. v. Dorsev*, 68 Ga. 234 (model prepared *ex parte*, admissible); 1894, *Burg v. R. Co.*, 90 Ia. 106, 118 (quoted *supra*); 1886, *State v. Leabo*, 89 Mo. 247, 253, 1 S. W. 288 (quoted *supra*); 1887, *State v. Brooks*, 92 id. 542, 579, 5 S. W. 257, 330 (similar); 1881, *State v. Morris*, 84 N. C. 756, 760 (notice to a defendant, not necessary; here, a witness who had examined boot-

tracks; to admit the opposite contention "is to put an end to all inquiry into the commission of offences depending upon the introduction of circumstantial evidence"); 1887, *State v. Whitacre*, 98 id. 753, 3 S. E. 488 (diagrams made *ex parte*, received); 1903, *State v. Nagle*, — R. 1. —, 54 Atl. 1063 (expert's experiments with a pistol); 1885, *Lipes v. State*, 15 Lea 125 (testimony from witnesses who examined the defendant's feet for the express purpose of seeing whether they fitted tracks, admissible); 1886,

No doubt a part of the notion leading to the making of such an objection is the distrust which must be felt for testimony coming from one who has been employed as a partisan and must therefore have been interested to reach results of a certain tenor. But this element in the objection is the truth directed, not against the absence of notice and cross-examination, but against the competency of a hired and partisan expert witness.³ Since a day no interest can disqualify, the objection fails in this aspect also.³

(2) In *preliminary rulings* by a judge on the admissibility of evidence, the ordinary rules of evidence do not apply. Hence there is no absolute right to cross-examination.⁴ Nevertheless, it is customary and proper to hear evidence on both sides before the ruling is made. Some Courts, however, are inclined erroneously to apply the specific right of cross-examination to the situation.⁵

(3) The interrogation of an *opponent*, by way of discovery (*post*, § 1855) is in itself in the nature of a cross-examination, and secures all the benefits of it. But the manner and subject of the interrogatories may be limited by the rule against impeaching one's own witness (*ante*, § 916), when the opponent is examined by deposition or on the stand like other witnesses. By the same rule, the interrogation of even an ordinary witness may be restricted (*ante*, §§ 910-915); and this question is sometimes loosely and improperly referred to as involving the general "right to cross-examine," as if that right were not recognized. So, also, the same improper phrase is sometimes applied to the rule forbidding to deal with the subject of one's own case on cross-examination (*post*, § 1885).⁶

Mississippi & T. R. Co. v. Ayres, 16 id. 725, 727 (expert examination *ex parte* of an injured person, made *pendente lite*, admissible; that "the evidence of an expert is rendered incompetent because based upon an *ex parte* examination," repudiated); 1894, Byers v. Railroad, 94 Tenn. 345, 352, 39 S. W. 128 (test made *ex parte* as to the time required for stopping a train, admitted; preceding cases approved); 1896, Moore v. State, 96 id. 209, 33 S. W. 1046 (examination of the deceased by two physicians called to him just after the affray; that this was done without notice to defendant, is no objection); 1898, Day v. U. S., 30 C. C. A. 572, 87 Fed. 125 (witnesses who had examined certain horses, though not for the express purpose of determining their satisfaction of a contract, admitted); 1902, Moran Bros. Co. v. Snoqualmie F. P. Co., 29 Wash. 292, 69 Pac. 759 (model of a regulator-box for a power-plant); 1901, Manch v. Hartford, 112 Wis. 40, 87 N. W. 816 (X-ray photograph); 1902, Hayes v. State, 113 id. 304, 67 N. W. 1076 (examination and post-mortem examination).

For the use of an *ex parte* surveyor's return, under statute, see *post*, § 1665.

³ It is this consideration which was had in mind by Messrs. Wharton & Stillé, Medical

Jurisprudence, § 1346, in a passage which was probably the original source of the objection in question.

⁴ 1898, Sanborn, J., in Day v. U. S., — U. S. App. —, 87 Fed. 125: "The measure of the competency of a witness is not the view or purpose with which he obtained his information, but the extent and character of the knowledge he obtained. The question is not why he obtained his knowledge, but what amount of knowledge he acquired."

For a consideration of the propriety of reform in the system of expert witnesses, see *ante*, § 562.

For the rule of notice to the opponent for evidence in general, see *post*, § 1845.

⁵ 1868, Com. v. Morrell, 99 Mass. 542, 543; 1895, Com. v. Hall, 164 id. 152, 41 N. E. 133.

⁶ Compare the citations *ante*, § 487 (qualifications of witnesses), § 861 (confessions), § 1258 (documentary originals), *post*, § 1451 (dying declarations), § 2550 (judge and jury).

⁷ Distinguish also the question whether there is a right of cross-examination on an affidavit denying common sources of title in ejectment; here the affidavit is really only a sworn pleading; 1884, Thatcher v. Olmstead, 110 Ill. 26 ("an oath of this character is not evidence").

2. Issues and Parties, as affecting Opportunity of Cross-examination.

§ 1386. **General Principle: Issue and Parties must have been Substantially the Same.** A testimonial statement may still not satisfy the Hearsay rule even where it has been made before a tribunal or officer at which there was cross-examination, or the opportunity, for the then opponent; because the cross-examination, for which there must have been an opportunity, must have been an adequate one. Unless the issues were then the same as they are when the former statement is offered, the cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposing inaccuracies and falsehoods. Unless, furthermore, the parties were the same in motive and interest, there is a similar inadequacy of opportunity, for the present opponent cannot be fairly required to abide by the possible omissions, negligence, or collusion, of a different party, whose proper utilization of the opportunity he has no means of ascertaining:

1726, Chief Baron *Gilbert*, *Evidence*, 68: "When you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross-examine."

1767, *Buller, J.*, *Trials at Nisi Prius*, 239: "A Deposition cannot be given in Evidence against any Person that was not a Party to the Suit; and the Reason is because he had not Liberty to cross-examine the Witness, and it is against natural Justice that a Man should be condemned by Proofs in a Cause to which he was not a Party."

1777, *Mansfield, L. C. J.*, in *Goodright v. Moss*, *Cowper*, 592: "[As to] offering a deposition or an answer in evidence against a person not a party to the original suit. That cannot be done, for this reason, because such person has it not in his power to cross-examine."

1815, *Gilchrist, J.*, in *Bailey v. Woods*, 17 N. H. 372: "We do not understand that the admissibility of such evidence depends so much upon the particular character of the tribunal as upon other matters. If the testimony be given under oath in a judicial proceeding, in which the adverse litigant was a party and where he had a right to cross-examine and was legally called upon to do so, the great and ordinary tests of truth being no longer wanting, the testimony so given is admitted in any subsequent suit between the parties. It seems to depend rather upon the right to cross-examine than upon the precise nominal identity of the parties."

1850, *Bartley, C. J.*, in *Summons v. State*, 5 Oh. St. 343: "The main reason for the exclusion of hearsay evidence is to be found in the want of the sanction of an oath, of legal authority requiring the statement, and an opportunity for cross-examination. Where these important tests of truth are not wanting, and the testimony of the statements of the deceased witness is offered on a subsequent trial between the same parties, touching the same subject-matter, and open to all the means of impeachment and objection to incompetency which might be taken if the deceased person could be present as a witness, there would not appear to be any sound and satisfactory ground for its exclusion."

1862, *Hinman, C. J.*, in *Lane v. Brainerd*, 30 Conn. 579: "As that was a trial between different parties, having different rights and with whom the plaintiff had no privity, and as he had no opportunity to examine or cross-examine the witnesses, it would be contrary to the first principles of justice to bind or in any way affect his interests by the evidence given on that occasion."¹

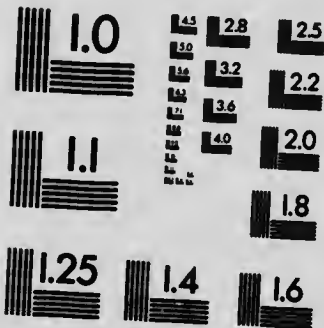
¹ For the mode of proving former testimony, by stenographers' notes, judges' reports, etc., see post, §§ 1666-1669.

For the rule that only the substance or a part need be proved, see post, §§ 2098, 2103, 2115.



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§ 1387. **Issue the Same.** The issue on the occasion when the former testimony or deposition was given must have been substantially the same, for otherwise it cannot be supposed that the former statement was sufficiently tested by cross-examination upon the point now in issue. Conversely, it is sufficient if the issue was the same, or substantially so with reference to the likelihood of adequate cross-examination, because the opponent has thus already had the full benefit of the security intended by the law.

The general rule in this shape is nowhere disputed. But there is naturally much variance shown in the strictness of its application in specific cases.¹ It

¹ In the following list, those rulings which rest on complicated facts peculiar to the special case, or which merely apply the general rule to facts not stated, are noted without any detailed statement of the ruling: *England*: 1817, *R. v. Smith, R. & R.* 339 (testimony on charge of assault and robbery, admitted on a subsequent charge of murder for same act); 1834, *Alderson, B.*, in *Doe v. Foster*, 1 A. & E. 791, note (ejectment for one piece of land, then for another, but the issue in both being the same, viz., who was A. B.'s heir; admissible); 1850, *R. v. Ledbetter*, 3 C. & K. 108 (testimony on a charge of assault, not received on a trial for felonious wounding, the act being the same; the ruling is in effect repudiated by later cases); 1852, *R. v. Dilmore*, 6 Cox Cr. 52 (testimony on a charge of felonious wounding, admitted on a charge of manslaughter for the same act); 1854, *R. v. Beeston*, ib. 425, *Dears. Cr. C.* 405 (deposition on a charge of felonious wounding with intent to do bodily harm, admitted on a trial for murder, the act being the same; *Jervis, C. J.*: "The presiding judge must determine in each case whether the prisoner has had full opportunity of cross-examination; and if the charges were entirely different, he would not decide that there had been that opportunity; but where it is the same case, and only some technical difference in the charge, the accused generally has had full opportunity of cross-examining;" *Alderson, B.*: "The question really is whether the deposition was taken under such circumstances that the accused had full opportunity of cross-examination"); 1864, *R. v. Lee*, 4 F. & F. 63 (testimony on a charge of robbery, admitted on a charge of murder, the assault being the same); 1874, *R. v. Castro* (*Tichborne Case*), *Charge of Cockburn, C. J.*, II, 305 (testimony in a civil case admitted at the trial of the then claimant for perjury at the former trial); 1876, *Brown v. White*, 24 W. Rep. 456, *Jessel, M. R.*; *Canada: Man.*: 1898, *R. v. Hamilton*, 12 Man. 354 (abortion; deposition taken "on another charge of the same purport and in connection with the same unlawful purpose," admitted); *N. Br.*: 1862, *Bennett v. Jones*, 5 All. 342 (the issue being substantially the same, for board of the plaintiff's wife, her former testimony was admitted); 1896, *Hovey v. Long*, 33 N. Br. 462, 467 (testimony at a former trial between the same parties on the same issues, admitted); *United States: Ala.*: 1850, *Davis v. State*, 17 Ala. 357 (testimony on a charge of larceny by stealing a mule, excluded on a charge

of stealing a buggy; the act of taking being the same); 1851, *Long v. Davis*, 18 id. 801, 802 (former issue, plea in abatement in an action on a note; present issue, a plea to merits; admitted); *Ark.*: 1895, *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102; *Cal.*: 1873, *Pico v. Cnyas*, 47 Cal. 174, 179; for the peculiar rule in this State as to testimony before the committing magistrate, see post, § 1393; *Colo.*: 1902, *Woodworth v. Gorsline*, 30 Colo. 186, 69 Pac. 705 (testimony in replevin suit against a sheriff, held admissible in a subsequent action of trover for the same goods against the creditor jointly liable); *Conn.*: 1864, *Spear v. Coon*, 32 Conn. 292 (deposition used on petition for new trial, admissible on the new trial; the two are "parts of the same proceedings"); 1902, *Mechanics' Bank v. Woodward*, 74 id. 689, 51 Atl. 1084 (action for money paid to the defendant's use on notes forged by his wife; testimony at the prior trial of an action, founded on the same transaction, after which an amended complaint had been substituted for the present suit, held admissible); *Del.*: 1838, *Rash v. Purnell*, 2 Harringt. 448, 456 (issue out of probate *divisavit vel non*; deposition taken on an application for review of a former issue on the same will, admitted); *Ga.*: 1849, *Crawford v. Word*, 7 Ga. 445, 456; 1872, *Gavan v. Ellsworth*, 45 id. 283, 288 (former trial a criminal complaint for the same assault as the present civil action; admitted); 1881, *Atlanta & W. P. R. Co. v. Venable*, ib. 697, 699 (former action, by a mother for personal injuries; present action, by a child for her death from those injuries; admitted); 1900, *Whitaker v. Arnold*, 110 id. 857, 36 S. E. 231; 1900, *Hooper v. R. Co.*, 112 id. 96, 37 S. E. 165 (testimony in a suit for personal injury by a minor through his father as next friend, not admitted in a suit by the father for loss of service caused by the same injury); 1901, *Radford v. R. Co.*, 113 id. 627, 39 S. E. 108 (answers to interrogatories in a former suit between the same parties for the same claim, but dismissed and now renewed, admitted); *Ill.*: 1854, *Doyle v. Wiley*, 15 Ill. 576, 578 (depositions taken before amendment and filing of new bill, admitted); *Kan.*: 1850, *State v. Wilson*, 24 Kans. 189, 194 (testimony on charge of assault with intent to kill B., admitted on trial for murder of B.); *Ky.*: 1829, *Brooks v. Cannon*, 2 A. K. Marsh. 525 (successive bills for the same cause; admitted); 1850, *Heth v. Young*, 11 B. Monr. 278, 280; *Md.*: 1808, *Hopkins v. Stump*, 2 H. & J. 301, 303

is enough to suggest that the situation is one that calls for common sense and liberality in the application of the rule, and not a narrow and pedantic illiberality. On the whole, the judicial rulings show a liberal inclination to receive testimony already adequately tested; but there is yet room for much improvement.

A statute sometimes attempts to provide for the admission, under the present rule, of testimony at a former trial,² as well as of ordinary deposi-

(depositions on a former dismissed bill for same cause and same parties, admitted); 1821, *Bowie v. O'Neale*, 5 id. 226, 231; 1900, *Baltimore Consol. R. Co. v. State*, 91 Md. 506, 46 Atl. 1000 (the deponent being present and testifying at the first trial, the deposition was not used; when offered at the second trial, the deponent being absent, it was excluded, because "his deposition should be retaken for use at that trial, so that the opposing party may have the opportunity, at the execution of the second commission, to avail of the witness' antecedent admissions and contradictions [at the first trial]"; this is unpractical and over-refined reasoning; the opponent in such case can obtain the same benefit by proving the witness' testimony given at the first trial, or if that would be forbidden by the rule of § 1032, *ante*, he could himself have taken a second deposition to put the question); *Mass.*: 1828, *Melvin v. Whiting*, 7 Pick. 81 (fishery controversy in both suits, but in the former a claim of free fishery, in the latter a claim of several fishery; excluded); 1871, *Weatherly v. Brown*, 106 Mass. 338 (deposition before amendment of declaration, admitted); *Minn.*: 1899, *Watson v. R. Co.*, 76 Minn. 358, 79 N. W. 308 (death by wrongful act; issues after amendment held substantially the same); *Miss.*: 1902, *Dukes v. State*, 80 Miss. 353, 31 So. 744 (murder; testimony of the deceased at a prior trial for the robbery which resulted in the death, excluded; this ruling is over-strict); *Mo.*: 1865, *Jaccard v. Anderson*, 37 Mo. 91, 95; *Nebr.*: 1897, *Ord v. Nash*, 50 Nebr. 335, 69 N. W. 964 (testimony at any one of two or more prior trials, admissible); *N. H.*: 1863, *Leviston v. French*, 45 N. H. 21; *N. Y.*: 1848, *Osborn v. Bell*, 5 Denio 370, 377 (implied assumpsit for goods tortiously seized and sold; testimony in a former action of trover by plaintiff's intestate for the same taking, admitted); *N. C.*: 1839, *M'Morine v. Storey*, 4 Dev. & B. 189 (testimony in D.'s action to recover slaves transferred to J., not admitted in an action by D.'s creditor against J.'s administrator as executor *de son tort*); 1898, *Mabe v. Mabe*, 122 N. C. 552, 29 S. E. 843 (ejectment; deposition in another State between the same parties in a suit on a note for the price of the same land, the matters being "connected" received); *Okl.*: 1897, *Watkins v. U. S.*, 5 Okl. 729, 50 Pac. 88 (perjury; testimony in the civil cause in which the perjury was charged, excluded); *Pa.*: 1851, *Jones v. Wood*, 16 Pa. 25, 43 (suits involving different land but the same boundaries; admitted); 1853, *Wertz v. May*, 21 id. 274, 279 (previous action terminated by a non-suit; admissible); 1860, *Haupt v. Henninger*, 37 id. 138, 140 (depositions taken for

application to a judge in chancery, admissible in a feigned issue before jury on same point); *S. C.*: 1850, *Bishop v. Tucker*, 4 Rich. L. 178, 182; 1902, *Oliver v. R. Co.*, 65 S. C. 1, 43 S. E. 307 (deposition at a first trial, admitted at the second; re-taking not required); *Tex.*: 1890, *Dunlap v. State*, 9 Tex. App. 179, 188 (testimony on charge of assault with intent to murder, admitted on trial for murder); 1901, *People's N. Bank v. Mulkey*, 94 Tex. 395, 60 S. W. 753 (depositions taken between the same parties, except one, in a prior suit on the same issue begun in a justice's court but dismissed for lack of jurisdiction, excluded, because the statute merely allowed their use "in any suit in which they are taken"; *un-sound*); *U. S.*: 1896, *Seeley v. K. C. Star Co.*, 71 Fed. 554 (a deposition taken in a suit in a State court, not admissible after voluntary withdrawal of the suit and re-institution for the same cause of action and against the same party in the Federal court; going upon R. S. § 861, limiting the taking of depositions to causes "pending in a district or circuit court"; the Federal Court here being bound to proceed under the Federal statute not sound; compare § 1381, *ante*); 1900, *Metropolitan St. R. Co. v. Gumby*, 39 C. C. A. 455, 99 Fed. 192 (loss of services of plaintiff's son; testimony of deceased witness for the son in his former action by a guardian for his own injury, not admitted for the plaintiff here, the parties and issues being different); 1900, *U. S. Life Ins. Co. v. Ross*, 42 id. 601, 102 Fed. 722 (admitting a deposition lawfully taken in Texas, before removal of the cause, of a witness residing out of the county, though not under the Federal statute more than 100 miles distant; in the Federal court the witness' death afterwards made it admissible); *Va.*: 1903, *Reed v. Gold*, — Va. —, 45 S. E. 868 (action by a receiver against delinquent stockholders of the corporation; testimony of a now deceased person in the prior chancery proceedings against the corporation, excluded, because the issues were not substantially the same); *Wis.*: 1864, *Charlesworth v. Tinker*, 18 Wis. 633, 635 (testimony on a criminal complaint for assault, admitted against plaintiff in a civil action for same cause).

² Compare also the statutes cited *post*, §§ 1413, 1416, 1417, particularly for testimony in issues of wills and bastardy: *CANADA: Dom. Crim. Code 1892*, § 688 (depositions are admissible in a prosecution "for any other offence" by the same person in all respects as they might be "according to law" on the trial of the charge for which they were taken); *N. Br. Consol. St. 1877*, c. 46, § 29 (former testimony, admissible "between the same parties or those

tions, taken in the same or other proceedings,³ and of depositions taken in

claiming under them"); *Newf. Consol. St. 1892*, c. 50, Rules of Court 33, par. 24 (former testimony may be used "in any subsequent proceedings in the same cause or matter"); *N. Sc. Rules of Court 1900*, Ord. 35, R. 24 (all testimony may be used "in any subsequent proceedings in the same cause or matter"); *UNITED STATES: Ariz. St. 1903*, No. 25, amending Rev. St. 1901, P. C. § 765 (testimony at the preliminary hearing before a magistrate is admissible "upon any subsequent trial of such defendant for the offence for which he is held"); *Cal. C. C. P. 1872*, § 1870 (8) (testimony in a "former action between the same parties relating to the same matter," admissible); § 1416 (testimony at a probate is admissible "in any subsequent contests concerning the validity of the will or the sufficiency of the proof thereof"); Commissioners' amendment of 1901 (re-enacts C. C. P. § 1316 as 1308, and substitutes a new section; quoted *ante*, § 1310, under the rule for attesting witnesses); *P. C. 1872*, § 686 ("In a criminal action the defendant is entitled . . . to be confronted with the witnesses against him in the presence of the Court, except that, where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, or where the testimony of a witness on the part of the people, who is unable to give security for his appearance, has been taken conditionally in like manner in the presence," etc. as above. "the deposition of such a witness may be read" if dead, etc.; see the qualifying decisions cited *post*, § 1398; they seem to hold that testimony at a former trial, as distinguished from an examination before a committing magistrate, is inadmissible); *Colo. Annot. Stats. 1891*, § 2426 (testimony taken "before any former referee," admissible on hearing before the referee for a decree of appropriation of water); *Conn. Gen. St. 1897*, § 1094 ("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"); *D. C. Code 1901*, § 1065, as amended by U. S. St. 1902, c. 1329 (on the death, etc. of a party, his testimony given at a trial may be used "in any trial or hearing in relation to the same subject-matter between the same parties or their legal representatives"); *Ga. Code 1895*, § 5186, Cr. C. § 1001 (former testimony, admissible if "upon substantially the same issue and between substantially the same parties"); *Ill. Rev. St. 1874*, c. 148, § 7 (testimony at a preliminary probate; see *post*, § 1413; for decisions construing it, see *post*, § 1417); *Ind. Rev. St. 1897*, § 1008 (written examination of complainant in bastardy before the justice may be used on the trial in Circuit Court); § 2831 (recorded testimony at probate of a will, admissible "upon any controversy concerning any lands devised by such will");

Ky. Stats. 1899, § 4643 (former testimony admissible, in trial Court's discretion, "in any subsequent trial of the same [civil] case between the same parties"); *Me. Pub. St. 1883*, c. 82, § 114 (former testimony as to execution or acknowledgment of a deed, admissible in another civil case, "involving the same question," if the parties are the same, or if one is the same and the present opponent was agent for the opponent in the former suit); *Mont. C. C. P. 1895*, § 3146 (8) (like *Cal. C. C. P. § 1870* (8)); *Nev. Gen. St. 1895*, § 3910 (where the defendant has had "an opportunity to cross-examine" a witness before a committing magistrate, and the testimony has been taken in writing and subscribed in defendant's presence, it is admissible on the witness' death, etc.); *N. J. Gen. St. 1896*, Evidence, § 12 (on new trial in action revived after party's death, his former testimony is admissible); *St. 1900*, c. 150, § 11 (in a new trial of a civil action, the official stenographic report of the testimony of a witness who has since died is admissible); *N. Y. C. C. P. 1877*, 2653 a (testimony of will-witnesses not probate, admissible on contest in Supreme Court; see also *id.* § 2651); § 830 (testimony of a party or witness, since deceased or insane or incompetent, "taken or read in evidence at the former trial or hearing may be given or read in evidence at the new trial or hearing"); *St. 1899*, c. 352 (amending C. C. P. § 830, by inserting after "new trial or hearing," the words "or upon any subsequent trial or hearing of the same subject-matter in an action or special proceeding between the same parties, who were parties to such former trial or hearing or their legal representatives, by either party to such new trial or hearing or to such subsequent action or special proceeding"); *Or. C. C. P. 1892*, § 706 (8) (like *Cal. C. C. P. § 1870* (8)); *Pa. St. 1887*, Pub. L. 158, § 3, P. & L. Dig. Witnesses, § 6 (testimony of deceased, etc. witness, taken when defendant was present and had opportunity to cross-examine, admissible on a subsequent trial "of the same criminal issue"); *Utah Rev. St. 1898*, §§ 3475, 5013 (official stenographer's report may be read "in any subsequent trial or proceeding had in the same cause").

³ Compare also the statutes cited *post*, §§ 1411, 1416, 1417; *Can. N. Br. Const. St. 1877*, c. 37, § 185 (depositions taken "when the title to land shall be in question" may be read "in all future causes between the same parties or persons holding under them for the same land"); *Alaska C. C. P. 1900*, § 658 (like *Or. Annot. C. 1892*, § 829); *Cal. P. C. 1872*, § 686 (quoted *supra*, note 1); *C. C. P. 1872*, § 2034 (deposition "in any other action between the same parties upon the same subject," admissible); amended in 1901 (by changing the number to § 2021, and by inserting after "same parties," the words "or their privies or successors in interest"); *Colo. C. C. P. 1891*, § 344 (a deposition may be read "in any stage of the same action or proceeding"); *Fla. Rev. St. 1892*, § 1146 (a deposition is usable, after discontinuance or non-suit, in another suit "for the same cause between the

taken in

perpetuam memoriam.⁴ But it is worth noting that usually the effect of the

same parties or their respective representatives," if it has remained on file; *Ill. Civil Laws 1897, § 1388* (deposition is admissible, after nonsuit or discontinuance, in another suit for the same cause between the same parties or their representatives"); *Penal Laws 1897, § 678* ("depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of the same or any other offence whatever, upon the like proof" as in the prosecution in which they were taken); *Ind. Rev. St. 1887, § 6670* (usable "in any stage of the same action or proceeding, or in any other action between the same parties, upon the same subject"), *St. 1899, Feb 10, § 22* (deposition duly filed may be used in another action, after dismissal, for the same cause, "between the parties or their assignees or representatives"); *Ill. Rev. St. 1874, c. 51, § 48* (all testimony taken by commissions of surveyors to establish corners "may be read in evidence in all suits in reference to said corners hereafter"); *Ind. Rev. St. 1897, § 449* (when another action is "commenced for the same cause" after dismissal of the first, a deposition is usable "in the second or any other action between the parties, or their assignees or representatives, for the same cause"); *Kan. Gen. St. 1897, c. 95, § 376* (usable "in any stage of the same action or proceeding, or in any other action or proceeding upon the same matter between the same parties"); *Me. Pub. St. 1883, c. 107, § 19* (after nonsuit or discontinuance, depositions are usable in an action for the same cause between the same parties or their representatives); *Mich. Comp. L. 1897, § 10142* (depositions are usable "on appeals and re-trials of the same cause of action"); *Minn. Gen. St. 1894, § 5681* (a filed deposition is usable "when the plaintiff in any action discontinues it, or it is dismissed for any cause, and another action is afterward commenced for the same cause between the same parties, or their respective representatives"); *Mont. C. C. P. 1895, § 3363* (like *Cal. C. C. P. § 2034*); *Nebr. Comp. St. 1899, § 5957* (a deposition is usable "in any stage of the same action or proceeding, or in any other action or proceeding, upon the same matter between the same parties"); *Nec. Gen. St. 1885, § 3432* (usable "in any stage of the same action or proceeding"); *N. Y. C. C. P. 1877, § 881* (deposition may be used in any subsequent action "between the same parties or between any parties claiming under them or either of them"); *N. D. Rev. C. 1895, § 5682* (like *Okl. Stats. § 4247*); *Oh. Rev. St. 1898, § 5278* (a deposition is usable "in any stage" of the action, "or in any other action or proceeding upon the same matter between the same parties"); *Okl. Stats. 1893, § 4247* (admissible "in any stage of the same action or proceeding, or in any other action or proceeding upon the same matter between the same parties"); *Pa. St. 1814, P. & L. Dig. Evidence, § 1* (a deposition is usable in "any subsequent cause in which the same matter shall be in dispute between the same parties, their heirs," etc.); *S. D. Stats. 1899, § 6524* (like *N. D. Rev.*

C. § 5682); *Utah Rev. St. 1898, § 3459* (like *Cal. C. C. P. § 2034*); *St. 1899, c. 57* (a deposition of a witness, taken *de bene* in a criminal case, may be used "upon any subsequent trial of the case in the district court on appeal"); *Vt. Stats. 1894, § 1273* (on discontinuance by reason of death, depositions, not of parties, may be used in a subsequent suit between the same parties or their representatives involving the same subject-matter); *Va. Code 1887, § 3362* (for actions pending in the same court between the same parties "depending upon the same facts, or involving the same matter of controversy, in whole or in part," a deposition taken in one may be read in all); *Wash. C. & Stats. 1897, § 6029* (depositions are usable, after discontinuance or dismissal, in another action "for the same cause between the same parties, or their respective representatives"); § 6030 (depositions are usable on new trial on appeal and on change of venue); *Wis. Stats. 1898, § 4093* (a deposition is usable "in any trial, inquiry, or assessment" in the action, and "in any other action between the same parties, including their respective legal representatives, involving the same controversy," if filed, etc.); *Wyo. Rev. St. 1887, § 2626* (like *Oh. Rev. St. § 5278*).

⁴ Compare also the statutes cited *post*, § 1412; *Can. N. Sc. Rules of Court 1900, Ord. 35, R. 35* (in proceedings in which the Attorney General is made a party for the Crown, depositions in *perpetuum* are admissible though the Crown was not a party to the action in which it was taken); *Ont. Rev. St. 1897, c. 324, § 15* (similar); *Ala. Code 1897, § 1867* (admissible on trial "between the persons described in the affidavit as parties, actual or expectant, or their successors in interest"); *Alaska C. C. P. 1900, § 690* (like *Or. Annot. C. 1892, § 863*); *Ariz. Rev. St. 1887, § 1839* (usable "in any suit which may be hereafter instituted by or between any of the parties to the statement [affidavit] or those claiming under them"); *Ark. Stats. 1894, § 3022* (admissible on a trial "between the persons named in the affidavit as expected parties, or their successors in interest"); *Cal. C. C. P. 1872, § 2038* (usable "between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove"); *Colo. C. C. P. 1891, § 370* (usable "if a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove or tend to prove"); *Conn. Gen. St. 1887, § 1083* (admissible in the cause for which they were taken and "in all other causes" with same subject-matter and with same parties or between heirs or representatives of petitioner and the other parties); *D. C. Comp. St. 1894, c. 20, § 14* (any Court may in its discretion admit "in any cause before it any deposition taken in *perpetuum*"); *Del. Rev. St. 1893, c. 56, § 2* (boundary cases; notice to owners and tenants required; depositions usable "against the parties to the petition and their privies in any suit or

common-law principle would be even broader than the statutes' terms, and

controversy in which the bounds which they concern shall come in question"); *Fla. Rev. St. 1892*, § 1141 (usable in suits "between the person at whose request it was taken and the persons named in the said written statement, or any of them, who were notified as aforesaid, or any persons claiming under either of the said parties, respectively, concerning the title, claim, or interest set forth in the statement; or, if notice by advertisement hereinbefore provided for shall have been given, then between the person at whose request it was taken, or any person claiming under him, concerning the claim, title, or interest set forth in the statement, and any other person"); *Ga. Code 1895*, §§ 3961, 3963 (the Court is to provide "for the most effectual notice"; but testimony "may be used against all persons, whether parties to the proceeding or not"); *Ill. Civil Laws 1897*, § 1393 (admissible in a trial "between the parties named in the petition or their privies or successors in interest touching the matter of controversy set forth in the petition"); *Ida. Rev. St. 1887*, § 6121 (like Cal. C. C. P. § 2088); *St. 1899*, Feb. 10, § 28 (depositions may be used "in any cause between the parties named in the affidavit or in any cause between persons claiming under either of said parties"); *Ill. Rev. St. 1874*, c. 51, § 46 (admissible "in any case to which the same may relate"; "and parties notified 'as unknown owners' . . . shall be bound to the same extent as other parties"); *Iud. Rev. St. 1897*, § 455 (usable "in any cause between the parties named in the affidavit [for taking], or in any cause between persons claiming under either of said parties"); *Ia. Code 1897*, § 4723 (usable on a trial "between the parties named in the petition, or their privies or successors in interest"); *Kan. Gen. St. 1897*, c. 95, § 387 (usable "if a trial be had between the parties named in the petition, or their privies or successors in interest"); *Ky. C. C. P. 1895*, § 611 (notice to the "expected adverse party" required; testimony usable in trial between the "expected parties or their representatives or successors"); *Mass. Pub. St. 169*, § 64, *Rev. L. 1902*, c. 175, § 64 (deposition *in perpetuum*, taken "so that it may be used against all persons," according to the statutory mode, "may be used by the person at whose request it was taken, or by any person who claims under him, against any person whatever, in any action or process, wherein is brought in question the title, claim, or interest set forth in the statement upon which the commission was founded"); *Minn. Gen. St. 1894*, §§ 5697, 5704 (usable in an action "between the person at whose request it was taken, and the persons named in the written statement, or any of them, or any person claiming under either of the said parties respectively, concerning the title, claim, or interest, set forth in the statement"); *Miss. Annot. Code 1892*, § 1775 (admissible "in any suit between the parties described in the written statement for procuring such testimony or their privies in interest"); *Mo. Rev. St. 1899*, § 4540 (admissible "in any cause or judicial proceeding to which they relate, in favor of any parties thereto,

or any or either of them, or his or their executors or administrators, heirs or assigns, or their legal representatives"); § 4557 (when taken to establish land-conveyers, admissible "in all cases to which they may relate"); *Mont. C. C. P. 1895*, § 3425 (like Cal. C. C. P. § 2088); *Nebr. Comp. St. 1899*, § 6000 (admissible on a trial "between the parties named in the petition, or their privies or successors in interest"); *Nev. Gen. St. 1885*, § 3444 (like Cal. C. C. P. § 2088); *N. H. Pub. St. 1891*, c. 226, § 9 (may be used in any cause where the matters concerned are in question); *N. M. Comp. L. 1897*, § 3064 (admissible "in any cause or judicial proceeding to which they relate, in favor of any parties thereto, or any or either of them, or their executors or administrators, heirs or assigns, or their legal representatives"); *N. D. Rev. C. 1895*, § 5711 (like Cal. C. C. P. § 2088); *Oh. Rev. St. 1898*, § 5878 (admissible in a trial "between the parties named in the petition or their privies or successors in interest"); *Okl. Stats. 1893*, § 4284 (admissible "if a trial be had between the parties named in the petition, or their privies or successors in interest"); *Ok. G. C. P. 1892*, § 863 (usable on a trial "between the persons named in the petition as parties actual, expectant, or possible, or their representatives or successors in interest"; see Hill's Codes for different provisions in an unenacted statute of 1870); *S. D. Stats. 1899*, § 6552 (like Okl. Stats. § 4284); *Tenn. Code 1896*, §§ 5671, 5672, 5682 (notice to the "opposite party" required; admissible, "in any suit between the parties to the petition" or their "privies in interest"); *Tex. Rev. Civ. Stats. 1895*, § 2277 (usable "in any suit which may be thereafter instituted by or between any of the parties to the statement, or those claiming under them"); *U. S. Rev. St. 1878*, § 867 ("Any court of the U. S. may, in its discretion, admit as evidence in any cause before it any deposition taken *in perpetuum rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof"); *Utah Rev. St. 1898*, § 3471 (like Cal. C. C. P. § 2088); *Wash. C. & Stats. 1897*, § 6038 (usable on a trial "between the person at whose request the deposition was taken and the person named in the statement, or any of them, or their successors in interest"); *Wis. Stats. 1898*, § 4121 (usable in an action "between the person at whose request it was taken and the persons named in the said written statement, or any of them, who were notified as aforesaid, or any person claiming under either of the said parties respectively concerning the title, claim, or interest set forth in the statement"); § 4134 (deposition taken by special form of notice as against all persons "may be used by the person at whose request it was taken or by any person claiming under him against any person whatever in any action or proceeding wherein shall be brought in question the title, claim, or interest set forth in the statement"); *Wyo. Rev. St. 1887*, § 3071 (admissible on a trial "between the parties named in the petition, or their privies or successors in interest").

would suffice to admit even where the case is not covered by the phraseology of the statute; *i. e.* the statute merely secures admissibility in certain instances, and is not intended to forbid admission in other instances.

It is to be noted that a deposition or former testimony, not offered as such, is not subject to this rule requiring identity of issues. Where the other testimony is offered, not as evidence of the truth of the facts asserted in it, but merely as an utterance having an indirect bearing, it is not hearsay (*post*, § 1789) and the ruling requiring cross-examination and identical issues does not apply. (1) Thus, testimony in another cause may be proved in a trial for *perjury* so far as it indicates the materiality in that cause of testimony now charged to be perjured.⁵ (2) In an action for *malicious prosecution*, the testimony on the original prosecution is not admissible from that point of view, because it could not have served as "probable cause" before it was delivered; yet it would be admissible in the ordinary way as testimony at a former trial, provided the witness is deceased or otherwise unavailable, and this principle, so long as parties were disqualified in their own behalf, would always admit the defendant's own testimony given at the original trial.⁶ (3) Where the deposition or testimony embodies an *admission by the opponent*, it is not subject to the present rule.⁷

§ 1388. **Parties or Privies the Same.** It is commonly said that the parties to the litigation in which the testimony was first given must have been the same as in the litigation in which it is now offered. But this limitation suffers in practice many modifications; and properly so, for it is not a strict and necessary deduction from the principle. At first sight, indeed, it seems fair enough to argue even that a person against whom former testimony is now offered should have to be satisfied with such cross-examination as any other person whatever, in another suit, may have chosen to employ. It is entirely settled that in some such cases he must be satisfied, namely, in cases where the other person was a privy in interest with the present party. The reason for such cases is that there the interest to sift the testimony thoroughly was the same for the other person as for the present person. The principle, then, is that where the interest of the person was calculated to induce equally as thorough a testing by cross-examination, then the present opponent has had adequate protection for the same end. Thus, the requirement of identity of parties is after all only an incident or corollary of the requirement as to identity of issue. It ought, then, to be sufficient to inquire *whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has*; and the determination of this ought to be left entirely to the trial judge.

Nevertheless the Courts have not, in name at least, often gone so far as to accept so broad a principle.

⁵ 1893, *People v. Lem You*, 97 Cal. 224, 226, 32 Pac. 11 (because "all that was sought to be proven here was the mere fact that certain testimony had been given").

⁶ The cases involve other distinctions, and are collected *post*, § 1417.

⁷ Cases cited *ante*, § 1075; 1855, *Williams v. Cheney*, 3 Gray 215, 217, 220.

(1) It is well settled that the former testimony is receivable if the difference of parties consists merely in a difference of *nominal parties* only, or in an addition or subtraction on either side of parties not now concerned with the testimony.¹

(2) It is well settled that the former testimony is receivable if the then party-opponent, though a different person, had the *same property-interest* that the present opponent has. The application of this doctrine is usually thought to involve a resort to the technicalities of the substantive law determining privity in interest. It is, of course, often necessary to consider to some extent the rules of substantive law that may be pertinent to show the interest of the prior party; for example, where the prior opponent was the present opponent's intestate or grantor, one cannot determine that the interests are sufficiently the same without considering the law of property. But it does not follow that the rules of property should be resorted to as affording mechanically a solution of the question in evidence. That question is merely whether a thorough and adequate cross-examination has been had. It is conceivable that, by an excessively strict application of the rule, only a prior cross-examination by the very same party, with the same counsel, might have been deemed sufficient (*ante*, § 1371). So pedantic a strictness could not be maintained; but such relaxation as is conceded must be made with a sole view to the substantial fulfilment of the principle involved, and not with a view to any extrinsic and unrelated rules. Whether the test of the evidence-principle would or would not in a given instance lead to the same result as the property-rule is immaterial. There is no necessary dependence of the former upon the latter. The latter should be kept in its place, and should be the servant, not the master, of the principle of evidence. In spite of all this, there is an unfortunate judicial inclination to reverse the true relations of the rules, and to ignore the living principle of evidence while resorting to the doctrines of substantive law to obtain a merely mechanical rule for solution. Two aspects of this tendency may be noticed:

(a) It is sometimes said, for example, that "the same rule applies as in cases of *res judicata and estoppel*";² it is asked whether the present oppo-

¹ For example: 1834, *Wright v. Tatham*, 1 A. & E. 3 (T. claimed against W. as heir of J. M., while W. claimed under a will of J. M. T. first filed a bill in Chancery against W. and three others, and evidence was taken on an issue framed at law in which W. was plaintiff. Then T. brought an ejectment action against W., in which John Doe was the nominal plaintiff. It was held, when the testimony of a deceased witness B. at the former trial was offered in the second action, that (1) the nominal difference in the parties on T.'s side, and (2) the addition of three new parties on W.'s side, could not prevent the use of the testimony as between T. and W.; Tindal, C. J.: "Mr. T., the lessor of the plaintiff" in this action, had precisely the same power of objecting to the competency of B., the same right of cross-ex-

amination, and of calling witnesses to discredit or contradict his testimony, on the former trial, as he would have had if Mr. W. had been the sole plaintiff in that suit or as he would have had now if B. had been alive and subpoenaed as a witness").

² 1866, *Morgan v. Nicholl*, L. R. 2 C. P. 117 (the plaintiff's son, supposing the plaintiff dead and claiming as heir, had brought an action of ejectment for the same property against the defendant's father, now dead; testimony at the former trial was rejected; Erle, C. J.: "The present plaintiff is for this purpose as distinct a person from his son as a perfect stranger; he does not in any way claim through him, and he cannot be injured by anything his son may have done at a former trial").

ment is "bound" by the former proceeding;³ and the niceties of property-law are frequently investigated in order to ascertain whether the prior opponent held by a title precisely coincident with the present opponent's. Now, this resort to extraneous rules is, for the reasons above suggested, fallacious in theory and misleading in practice. In *Morgan v. Nicholl*,⁴ for example, it is perfectly apparent that the son in the prior suit was a person having precisely the same interest to litigate as the present father, and therefore that the son's cross-examination would have been an adequate one; although the judgment against the son could not, by the rules of *res judicata*, bind the father. Again, in litigation by a tenant for life, involving only the validity of a will or of a prior grant, it is clear that nothing will turn on the precise quantity of his estate, and that his cross-examination to the points in dispute will be adequate to justify the use of the testimony against the remainderman in his subsequent litigation involving the same issue; yet the judgment against one would not bind the other, because the one does not claim under the other. Again, there is no privity between the parties to a criminal prosecution and a civil action for the same injury; yet testimony given at the former ought to be admitted in the latter. It is thus apparent that the proper application of the principle of evidence cannot be mechanically restricted by the rules of judgments and land-titles.

(b) Again, proceeding upon the same fallacious notion, it is sometimes said that there must be "reciprocity" or "mutuality," *i. e.* that former testimony, already cross-examined by B, cannot now be offered by A against B unless B could now have offered it against A.⁵ But for this there is not a shadow of justification. The sole question is whether B has had an adequate opportunity by cross-examination to sift this testimony; this, by hypothesis, he has had; and so the rule is satisfied. It is quite immaterial whether A would have been able to object (for example, because he came afterwards into the suit) to its use against him; the testimony is not offered against A, but by A; and the whole object of the present rule is to protect the opponent against whom the testimony is offered, *i. e.* B, and B has already been thus protected. To exclude the testimony against B, who has been protected,

³ 1747, *Eade v. Lingood*, 1 Atk. 203 (bill by creditors against T. L. and his daughter M. L., charging fraud in pretending that an estate in his daughter M. L.'s name was bought with her money, not his; the examination of the daughter M. L. as a witness in bankruptcy proceedings against T. L. shortly before was rejected, because "M. L. is not at all bound by the proceedings in a commission of bankruptcy against T. L.").

⁴ Note 4, *supra*.

⁵ 1836, *Atkins v. Humphreys*, 1 Moo. & Rob. 523 (whether a conveyance to A. S. or partner was *bona fide* as against the defendants interested in the grantor's estate; in a suit by A. S. against these defendants to set aside the conveyance, depositions taken by A. S. had been used by these defendants; held, that the

now plaintiffs, assignees of A. S.'s firm, could not use them, because "there is no reciprocity"); 1836, *Humphreys v. Pensam*, 1 Myl. & C. 580, 586 (same litigation; same ruling by L. C. Cottenham, but here the plaintiffs are said to be the assignees of only one A. C., one of the partners of A. S.); 1835, *Norris v. Mosen*, 3 Watts 470 (Huston, J.: "Certain other heirs of J. N. had brought a former ejectment against the present defendant to recover their respective shares. . . . The present defendant could not use depositions taken in that cause against the present plaintiffs, for they had no opportunity to cross-examine, and it must be reciprocal"); 1821, *Boudereau v. Montgomery*, 4 Wash. C. C. 186. This doctrine goes back a long distance: 1669, *Rushworth v. Pembroke*, Hardr. 472.

because A, who does not need or want protection, has not been protected, is as absurd as it would be to forbid A to use against B a witness disqualified for B by interest, on the ground that A could have objected to B's production of the witness on B's behalf, — which no one ever thought of maintaining. The fallacious doctrines of the foregoing limitations have been properly criticised in the following passage :

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. VI, c. XII (Bowring's ed. vol. VII, p. 171): "Another curious rule is, that, as a judgment is not evidence against a stranger, the contrary judgment shall not be evidence for him. If the rule itself is a curious one, the reason given for it is still more so: 'Nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary': a maxim which one would suppose to have found its way from the gaming-table to the bench. If a party be benefited by one throw of the dice, he will, if the rules of fair play are observed, be prejudiced by another; but that the consequence should hold when applied to justice, is not equally clear."

The rulings in the different jurisdictions exhibit varying degrees of liberality; and naturally the result depends much on the facts of the particular case.⁶

⁶ In the following list, rulings of no service as precedents have not been stated in detail; statutes dealing additionally with the subject have been placed in the notes to the preceding section: *England*: 1664, *Terwit v. Gresham*, *Frem. Ch.* 184, 1 *Eq. Cas. Abr.* 227, *Cas. Ch.* 73 (depositions in former cause on same subject, admitted, though the parties did not claim under the former parties, but "the tenants were then parties"); 1669, *Rushworth v. Pembroke*, *Hardr.* 472 (tenants and lord of manor, in respective suits; excluded); 1686, *Coke v. Fountain*, 1 *Vern.* 413 (depositions in action against father, not read against son not claiming as heir); 1695, *Bath v. Bathursea*, 5 *Mod.* 9 (depositions in former suit against plaintiff by other parties, admitted "because the defendant shelters himself under the other's title"); 1702, *Lord Peterborough v. Duchess of Norfolk*, 1 *Vern.* 264, 3 *Brown P. C.* 539, 545, *semble* (depositions against a tenant for life, not usable against a reverser or remainder-man); 1703, *Nevil v. Johnson*, 2 *Vern.* 447 (depositions on bill of testator's creditors to set aside fraudulent conveyance, read upon legatees' bill for same cause against same grantees); 1747, *Eade v. Lingood*, 1 *Atk.* 203 (see note 3, *supra*); 1810, *Banbury Peerage Case*, in *App.* to *LeMarchant's Gardiner Peerage Case*, 410 (issue of legitimacy; testimony under bill to perpetuate, filed in 1640, excluded; inadmissible "in any cause in which the parties were not the same parties as the parties in the cause in Chancery, or did not claim under some or one of them"); 1826, *Pratt v. Barker*, 1 *Sim.* 1, 5 (depositions not read against parties afterwards joined); 1826, *Doe v. Passingham*, 2 *C. & P.* 440, 445 (tenant for life and remainder-man as privies; not decided as to this point); 1826, *Goodenough v. Alway*, 2 *Sim. & St.* 481; 1827, *Williams v. Broadhead*, 1 *Sim.* 151; 1834, *Wright v. Tatham*, 1 *A. &*

E. 3 (see note 1, *supra*); 1834, *Doe v. Derby*, *Ib.* 783, 786; 1836, *Atkins v. Humphreys*, 1 *Moo. & Rob.* 523 (see note 5, *supra*); 1836, *Humphreys v. Pensaun*, 1 *Myl. & C.* 580, 586 (see note 5, *supra*); 1852, *Hulin v. Powell*, 3 *C. & K.* 323 (admitting testimony formerly given for the defendant R. in a suit for the same land by the same plaintiff against R., whose expenses were paid by the present defendant, also a claimant; *Williams, J.*, "The admissibility of depositions in cases of this kind does not depend on mere technical grounds; and one question is, Had the lessor of the plaintiff an opportunity of cross-examining the witness? He certainly had, and I see no fair reason for supposing that the cross-examination would have been to a different effect, whether the lessor of the plaintiff knew or did not know whether Mr. P. was the real defendant"); 1866, *Morgan v. Nicholl*, *L. R.* 2 *C. P.* 117 (see note 2, *supra*); 1881, *Llanover v. Homfray*, *L. R.* 19 *Ch. D.* 229; 1894, *Printing Tel. & C. Co. v. Drucker*, 2 *Q. B.* 801 (action for capital instalments; plea, false representations inducing to become a shareholder; testimony in a similar action by the same plaintiff against another person pleading the same defence, excluded); *Canada*: 1877, *Domville v. Ferguson*, 17 *N. Br.* 40, *semble* (successive actions against agent and principal for wrongful detention of goods; the principal's testimony in the first suit, held admissible in the second); 1900, *Carte v. Dennis*, 5 *N. W. Terr.* 32, 40 (an examination of a defendant, on discovery, is admissible against a co-defendant if the latter has had an opportunity of cross-examination; here a rule of Court applied in part); 1894, *Walkerton v. Erdman*, 20 *Ont. App.* 444, 23 *Can. Sup.* 352 (action for injuries in a ditch, the defendants being a municipal corporation and H.; the deceased person's deposition was taken, after notice to

§ 1389. Deposition used by Either Party; Opponent's Use of a Deposition taken but not read. It has sometimes been thought—perhaps under the

the former defendant only, and the action was abated by death, and renewed by his representative under the statute; held, by three judges to two, that the deposition was admissible against the former defendant, because the testimony related to an issue of claim the same in substance, and because the judgment might be rendered against the former defendant only; good opinion by King, J.); *United States: Ala.*: 1847, *Holman v. Bank*, 12 Ala. 369, 408; 1851, *Loug v. Davis*, 18 Id. 801, 802 (former party deceased, represented here by administrator; admitted); 1850, *Clealand v. Hulic*, lb. 347 (similar); 1883, *Goodlett v. Kelly*, 74 Id. 219 (in the former suit the present parties were reversed, except that a now defendant K., transferee of the others, was not then a party; admitted); 1886, *Turnley v. Hanna*, 82 Id. 139, 143, 2 So. 483; 1896, *Wells v. Mge. Co.*, 109 Id. 430, 20 So. 136 (defendant administrator succeeded by administrator *d. b. n.*, and a new claimant added as defendant after revivor of the bill; testimony in the preceding action admitted against them); 1897, *Smith v. Keyser*, 115 Id. 455, 22 So. 149 (the plaintiff acted in the one suit individually, in the other as executrix; admitted); 1901, *Simmons v. State*, 129 Id. 41, 29 So. 929 (testimony at a trial of another person for the same offence, excluded); *Cal.*: 1887, *Fredericks v. Judah*, 73 Cal. 604, 608, 15 Pac. 305 (former party executrix, present party heir; admitted); 1889, *Marshall v. Hancock*, 80 Id. 82, 85, 22 Pac. 61; 1889, *Briggs v. Briggs*, lb. 253, 22 Pac. 334 (present party claiming under deed of gift of former party; admitted); 1897, *Lyons v. Marcher*, 119 Id. 382, 51 Pac. 559 (action by L. against F. A. M. and C. A. M.; deposition in former suit by L. against F. A. M., C. A. M., D. L. M., and A. E. M., offered by L., excluded; ruling not sound); 1898, *McDonald v. Cuttler*, 120 Id. 44, 52 Pac. 120; 1899, *Wolters v. Ross*, 126 Id. 644, 59 Pac. 143 (actions consolidated by Court order; depositions in each mutually admissible); *Del.*: 1866, *Dawson v. Smith*, 3 Honst. 335, 340; *Ga.*: 1878, *Haslam v. Campbell*, 60 Ga. 650, 654; 1881, *Hughes v. Clark*, 67 Id. 19, 23; 1881, *Atlanta & W. P. R. Co. v. Veuable*, lb. 697, 699 (former party, a mother suing for personal injuries; present party, her child suing for her death from those injuries; admitted); *Ill.*: 1857, *Wade v. King*, 19 Ill. 301, 308 (successors in interest; admitted); 1864, *Goodrich v. Hanson*, 33 Id. 498, 508 (former party, an agent pleading property in principal, in replevin; present party, the principal suing in trover; admitted); 1871, *Hutchings v. Corgan*, 57 Id. 71 (intestate and administrator are privies); *Ind.*: 1876, *Indianapolis & S. L. R. Co. v. Stout*, 53 Ind. 158 (deceased and representative are privies); *Ia.*: 1869, *Shaul v. Brown*, 28 Ia. 37, 50; 1884, *Atkins v. Anderson*, 63 Id. 739, 743, 19 N. W. 323 (former party the assignor of present party; admitted); 1897, *Krueger v. Sylvester*, 100 Id. 647, 69 N. W. 1059 (assault

and battery; testimony on a prior criminal charge, of assault with intent to commit injury, for the same act, admitted; "the admissibility of such evidence seems to turn on the right to cross-examine, rather than on the precise identity of the parties"); 1897, *Brown v. Zachary*, 102 Id. 433, 71 N. W. 413 (deposition taken before opponent's joinder as party, excluded); 1897, *Stete v. Smith*, lb. 656, 72 N. W. 279 (former charge of murder against T.; the testimony of a deceased witness there offered by the State, now received from this defendant to prove the circumstances of the same killing); *Ky.*: 1830, *Arderry v. Com.*, 3 J. J. Marsh. 183; 1871, *Kerr v. Gibson*, 8 Bush 129 (new party joined by amendment; deposition not admitted as to him); 1895, *Oliver v. R. Co.*, — Ky. —, 82 S. W. 759 (excluding, in an action by a wife, joining husband, for personal injuries, a deposition taken in a former action by the husband for loss of service by the same injuries; *Lewis, J.*: "While reason for the rule mentioned does not exist to the same extent as if there had been different occurrences or transactions, we can very well see how disregard of it by the Court might have taken defendant by surprise, and deprived it of the advantage of developing, on cross-examination, admissions and confessions of the wife it was not permitted to show in the other suit"); *La.*: 1826, *Hennen v. Monro*, 4 Mart. N. S. 449, 451 (action by a shipper against a vessel owner for general-average contribution; in a prior action for loss of the goods in question charging the defendant as carrier, defendant had succeeded; testimony of deceased and absent witnesses at that trial was now offered and admitted); 1901, *State v. N. O. Waterworks Co.*, 107 La. 1, 31 So. 395 (excessive water-rates; testimony at a former suit, brought by private persons on the same contract proceeded upon by the State in the case at bar, and involving the same issues, admitted); *Md.*: 1843, *Mitchell v. Mitchell*, 1 Gill 66, 83 (proponent deceased, and administrator not then made a party; a deposition taken then on behalf of that side, though with notice, insufficient under St. 1828, c. 165, the deposition not being taken by "either party"); *Mass.*: 1843, *Warren v. Nichols*, 6 Metc. 261 (general principle stated); 1873, *Yale v. Comstock*, 112 Mass. 268 (transferee and transferor of land are privies); *Mich.*: 1902, *Waterhouse v. Waterhouse*, 130 Mich. 89, 89 N. W. 585 (testimony in a former trial, one of the then parties in interest being now only a next friend; excluded); *Minn.*: 1890, *Lougee v. Bray*, 42 Minn. 323, 44 N. W. 194 (H. and B. coming in by separate pleas as intervenors, but tendering the same issue, a deposition taken by H. was admitted for B.); *Miss.*: 1877, *Strickland v. Hudson*, 55 Miss. 235, 241; *Mo.*: 1870, *Parsons v. Parsons*, 45 Mo. 265 (discontinued suit by son against father, revived against latter's widow; admitted); 1872, *Coughlin v. Hanesler*, 50 Id. 126; 1879, *Adams v. Raigner*,

influence of the preceding fallacies — that where the party taking a deposition has not chosen to put it in as evidence, the opponent, against whom it was taken, is not at liberty to do so. So far as the present principle is concerned there is no support for this prohibition. The chief reliance of the few Courts that enforce it seems to be an opinion weighted with the great name of Chief Justice Shaw :

1837, *Shaw, C. J.*, in *Dana v. Underwood*, 19 Pick. 99, 104 : " Where one party takes a deposition, it is at his option to use it or not, as he thinks fit; and it has been held that where a deposition taken by one party is returned and filed, and the party taking it does not think proper to use it, it cannot be read by the other party without consent. One reason for this, among others, is obvious: the parties are under very different rules as to the mode of putting their questions to a deponent. The taker is restrained from asking leading questions; the adverse party may put a leading question. A party may try the experiment of taking the deposition of a person known to be a willing witness for the other side, or, believing that he is favorable to his own side, finds the contrary in the progress of the examination; the adverse party, finding him a willing witness on his side, puts leading questions and gets out answers which he could not do if he were his own witness; now if this deposition, instead of being used at the option of a taker, may be used by the adverse party without and against his [the taker's] consent, it would be wholly reversing the rules of examination and going counter to the reasons on which those rules were established. . . . The strong, and in our judgment the decisive objection, is, that

69 id. 363 (successor in title; admitted); 1879, *Breeden v. Feurt*, 70 id. 624 (administrator reviving intestate's suit; admitted); *Nebr.*: 1870, *Holmes v. Boydston*, 1 *Nebr.* 346, 354 (depositions taken before amendment by adding former partners as plaintiffs, admitted); *N. H.*: 1858, *Orr v. Hadley*, 36 *N. H.* 580; *N. Y.*: 1906, *Jackson v. Bailey*, 2 *John.* 20 (general principle); 1818, *Jackson v. Lawson*, 15 id. 544; 1829, *Jackson v. Crissey*, 3 *Wend.* 252 (transferee of land, held not privies); 1890, *Wood v. Swift*, 81 *N. Y.* 31 (testimony taken before referee before compulsory joining of new party opponent, not admitted against him, even though liberty to re-cross-examine had been allowed; clearly erroneous); *N. C.*: 1884, *Bryan v. Malloy*, 90 *N. C.* 508, 510; 1891, *Stewart v. Rositer*, 108 id. 588, 591, 13 *S. E.* 234; *Oh.*: 1834, *Bryan v. O'Connor*, 41 *Oh. St.* 363, 372 (depositions not admissible against parties brought in after the taking); 1891, *McClaskey v. Barr*, 47 *Fed.* 155, 165 (deposition of life-tenant, taken to show ownership of fee, admitted under Ohio statute in partition-suit to show identity of co-tenants out of possession); *Pa.*: 1824, *Watson v. Gilday*, 11 *S. & R.* 342; 1827, *Walker v. Walker*, 16 id. 379, 381 (depositions in suit against one only of present defendants holding by separate title, not admitted against the other); 1828, *McCully v. Barr*, 17 id. 445, 451; 1839, *Cooper v. Smith*, 8 *Watts* 536, 539 (ejectment against successor in interest; admissible); 1861, *Wright v. Campsty*, 41 *Pa.* 111; 1882, *Galbraith v. Zimmerman*, 100 id. 374, 376 (former party represented by heirs; admitted); *S. C.*: 1847, *Mathews v. Colburn*, 1 *Strobh.* 269; 1903, *State v. Milam*, 65 *S. C.* 321, 43 *S. E.* 677 (trial of M., followed by a

second trial of M. & McC., for the same offence; testimony of a deceased witness at the first trial held admissible, as against M., though not against McC.); *S. D.*: 1896, *Smith v. Hawley*, 8 *S. D.* 363, 66 *N. W.* 942; 1897, *Salmer v. Latkrop*, 10 id. 216, 72 *N. W.* 570 (depositions taken by the plaintiff; the addition before trial of two nominal plaintiffs, held not to prevent its use against the defendant); *U. S.*: 1821, *Boudreau v. Montgomery*, 4 *Wash. C. C.* 18 (five heirs as parties in one action, and all about one hundred, in the present action; excluded); 1832, *Boardman v. Reed*, 6 *Pet.* 322, 340; 1851, *Philadelphia W. & B. R. Co. v. Howard*, 13 *How.* 307, 335 (one co-plaintiff in former suit now lacking; admitted); *Va.*: 1799, *Rowe v. Smith*, 1 *Call* 487.

The statute making survivors incompetent to testify against deceased opponents may have bearing here; see *Speyrer v. Bennett*, 79 *Pa.* 415 for the effect of such disqualification on the use of the survivor's former testimony, see post § 1409.

How far the use of a judgment between other parties is allowable (particularly, a conviction of a principal against an accessory) is not a question of evidence (as noted ante, § 1347); see the following cases: 1832, *R. v. Turner*, 1 *Mod. Cr. C.* 347 ("many of the judges appeared to think" that the conviction of a principal was not receivable); 1899, *Kirby v. U. S.*, 17 *U. S.* 47, 19 *Sup.* 574 (a statute making the judgment of conviction of principal in embezzlement or larceny conclusive evidence of the fact of embezzlement or larceny of such goods, in a prosecution against a knowing receiver of such stolen or embezzled goods, held unconstitutional).

party would be allowed to introduce a deponent as his own witness whom he has had the right to cross-examine and the adverse party has not."¹

The answers to this argument are not difficult to discover: (1) The vital assumption of the above opinion is incorrect, namely, that leading questions would have been forbidden to the taker of the deposition; for it is well settled (*ante*, §§ 773, 774) that, if the deponent had proved to be an unwilling or hostile witness, the taker could have put leading questions. (2) The objection stated in the opinion, even if it were correctly stated, would apply equally to one calling a hostile witness to the stand; yet no one supposes that in such a case the calling party, on discovering the witness' hostility, could withdraw him and compel the opponent to call him; so that, on the theory of the above opinion, a party taking a deposition would be given a peculiar advantage in suppressing testimony, which he would not have if he called the same witness to the stand. (3) Finally, the whole notion of cross-examination refers to one's right to probe the statements of an opponent's witness, not one's own witness; thus, if A has taken X's deposition or called X to the stand, and B has cross-examined, it is not for A to object that he has not had the benefit of cross-examination; that benefit was not intended for him nor needed by him; it was intended only to protect against an opponent's witness, who would be otherwise unexamined by A; and if A has had the benefit of examining a witness called on his own behalf, he has had all that he needs, and the right to probe by cross-examination is B's, not A's. In the following passages the correct doctrine is vindicated:

1822, *Tilghman, C. J.*, in *Gordon v. Little*, 8 S. & R. 532, 548: "I do not perceive the force of this distinction between plaintiff and defendant. When the deposition is taken it ought to be filed; it is not the property of the party on whose behalf it was taken; nor has he any right to withhold it. But it often happens that the party at whose instance it was taken finds himself mistaken and the testimony proves to be unfavorable to him; in such case the adverse party has a right to make use of it [subject only to the condition of showing the witness personally unavailable]."

1846, *Golithwaite, J.*, in *Stewart v. Hood*, 10 Ala. 600, 607: "The question, then, comes to this: Can the adverse party, who has cross-examined, use the deposition taken at the instance of the other party? We do not well see what reasonable objection there is to such a course. If the witness was examined in open court, it is very certain we should never hear the objection of interest from the party offering him; and there certainly is no good to result from a practice which will permit a party first to ascertain by actual examination what a witness will swear, and then admit or exclude him at pleasure."

1840, *Williams, C. J.*, in *Nash v. State*, 2 Greene Ia. 286, 298: "Has he [the accused] been denied the benefit of this right [of confrontation of the witnesses]? The testimony was of his own procurement. The witnesses were selected by himself, and he propounded the questions which were answered by them. At his instance the depositions were re-

¹ *Accord*: 1889, *Anderson v. State*, 89 Ala. 12, 7 So. 429 (in criminal cases, against the accused; here the deposition had been taken but not used by him); 1854, *Sexton v. Brock*, 15 Ark. 345, 351 (opponent's deposition not usable because "he may be taken at a disadvantage, because he was restrained from putting leading questions on his examination in chief,

and . . . could not impeach or discredit them"); 1854, *Norvell v. Oury*, 13 Tex. 31 (excluded, where no cross-interrogatories had been filed, under a statute allowing either party to use "all depositions where cross-interrogatories have been filed and answered"); 1856, *Harris v. Leavitt*, 16 id. 340, 343 (similar).

turned and filed in the court, as a part of the case for hearing and in order to sustain his defence on the issue joined. The evidence, if relevant and material, was in the possession of the Court by his own act. . . . When filed, it was in the custody of the Court as evidence in the case. We cannot see under the circumstances how a moral wrong or injustice in fact was done to the prisoner."

1895, *Torrance, J.*, in *Ansonia v. Cooper*, 66 Conn. 184, 33 Atl. 905: "In most cases, depositions are taken for the purpose of being used by the party taking them. The cases where they are not so used are comparatively few in number; but in such cases, if the right to use the depositions be denied to the adverse party, it may work a great hardship and injustice. It will seldom be known in advance of the actual trial whether the party taking the depositions does or does not intend to use them, and, when it is known that he will not use them, it will usually be too late for the adverse party to avail himself of the testimony of the deponents in any way, although he may have relied on that testimony in support of his case. If this right be denied to the adverse party, it will in very many cases necessitate the taking of two sets of depositions of the same witnesses, involving a useless expenditure of time and money. We see no good reason why this should be done; at least, not in cases like the present, where the depositions were filed with the clerk in whose custody they must, by statute, remain, unless suppressed by the Court, until final judgment in the cause."³

³ Such is the result now practically everywhere accepted; in some jurisdictions a statute expressly so provides: *Eng.* 1825, *M'Intyre v. Layard*, Ry. & Moo. 203 (plaintiff allowed to use answers to interrogatories on a commission, given by defendant's witnesses but not put in by defendant; but the ruling was apparently with hesitation); 1836, *Procter v. Lanson*, 7 C. & P. 629 (Abinger, L. C. B.: "Under a judge's order, they are examined as much for one side as the other"); *Ala.* Code 1897, §§ 1867, 1871 (for depositions *in perp. mem.*); 1846, *Stewart v. Hood*, 10 Ala. 600, 607 (see quotation *supra*); 1903, *Curtis v. Parker*, 136 *id.* 217, 33 So. 935; *Alaska* C. C. P. 1900, § 656 (like Or. Annot. C. 1892, § 827); *Ariz.* P. C. 1887, §§ 2075, 2097 (in criminal cases, for depositions taken by accused); *Rev. St.* 1887, § 1849 (in civil cases, when cross-interrogatories have been filed and answered); § 1359 (testimony before committing magistrate); *Cal.* P. C. 1872, §§ 1345, 1362; C. C. P. 1872, §§ 2028, 2034, 2088; Commissioners' amendment of 1901 (the number of § 2034 changed to § 2021; the § 2028 repealed in 1901 and its substance enacted in § 2021; for the validity of these amendments, see *ante*, § 488); *Colo.* C. C. P. 1891, § 343 (usable by either party "against any party giving or receiving the notice", compare *ib.* § 344); § 370 (depositions *in perpetuam*, usable by either party); *Haw.* Civil Laws 1897, § 1392 (depositions *in perpetuam*); *Ida.* Rev. St. 1887, §§ 6066, 6070, 6121, 8169, 8189; *Ill.* : 1877, *Adams v. Russell*, 85 *Ill.* 284, 287 ("unless he obtains leave before the trial and withdraws it"); *Ind.* : 1872, *Woodruff v. Garner*, 39 *Ind.* 246, *semble* (the non-taker, after reading the deposition, allowed to introduce another taken by himself from the same witness); *Ia.* Code 1897, § 4723 (for *in perpetuam memoriam* depositions); 1849, *Nash v. State*, 2 *Greene* 286, 298 (accused's depositions allowed to be used by the prosecution; here prescribed by statute, but also independently decided as a

constitutional question); 1854, *Crick v. McClintic*, 4 *id.* 290; 1859, *Pelamouree v. Clark*, 9 *Ia.* 1, 21; 1862, *Wheeler v. Smith*, 13 *id.* 564; 1876, *Hale v. Gibbs*, 43 *id.* 380, 332; 1884, *Brown v. Byam*, 65 *id.* 374, 21 *N. W.* 684; 1885, *Citizens' Bank v. Rhutasel*, 67 *id.* 316, 319, 25 *N. W.* 261; *Kan.* Gen. St. 1897, c. 95, § 387 (depositions *in perp. mem.*); 1887, *Rucker v. Reid*, 36 *Kan.* 468, 13 *Pac.* 741; *Ky.* : 1817, *Rogers v. Barnett*, 4 *Bibb* 480 (objection that a deposition was taken at the instance of the appellant, the party not using it, overruled); 1850, *Young v. Wood*, 11 *B. Monr.* 123, 134 (same ruling); 1861, *Musick v. Ray*, 3 *Metc.* 427, 431; 1869, *Weil v. Silverstone*, 6 *Bush* 698, 700; 1871, *Sullivan v. Norris*, 8 *id.* 519, 520; 1903, *St. Bernard Coal Co. v. Southard*, — *Ky.* —, 76 *S. W.* 167; *La.* Rev. L. 1897, § 617 (civil cases); *Mo.* : 1837, *Polleys v. Ins. Co.*, 14 *Mo.* 141, 147, 153 (by a majority; a deposition left on file after the first term may be read by the opponent); *Mass.* : 1852, *Linfield v. O. C. R. Co.*, 10 *Cush.* 562, 570 (the non-taker may compel the reading of the answers to a deposition taken but not used by the opponent; unless, the deposition having been taken for the purpose of meeting the testimony of an opposing witness who is after all not introduced, the taker has given prior notice of his conditional purpose); *Minn.* : 1886, *Smith v. Capital Bank*, 34 *Minn.* 436, 26 *N. W.* 234 (even under a stipulation "to be introduced . . . on behalf of said" party taking it); *Mo. Rev. St.* 1899, § 4540 (depositions *in perpetuam*); 1846, *Greene v. Chickering*, 10 *Mo.* 109, 111 (deposition filed may be read by the opponent); 1862, *McClintock v. Curd*, 32 *id.* 411, 417 (nor is notice required); *Mont.* C. C. P. 1895, §§ 3360, 3362, 3425 (like *Cal.* C. C. P. §§ 2028, 2034, 2088); *P. C.* §§ 2490, 2513 (like *Cal.* P. C. §§ 1345, 1362); *Nebr.* : 1883, *Converse v. Meyer*, 13 *Nebr.* 190, 15 *N. W.* 340; 1901, *Ulrich v. McCaughey*, 63 *id.* 10, 88 *N. W.* 150; 1901, *Hamilton B. S. Co. v. Milliken*, 62 *id.* 116, 86 *N. W.*

But the propriety of allowing the non-taker's use of the deposition, so far as the present principle is concerned, must be distinguished from the propriety of allowing its use with reference to wholly distinct rules of evidence. The contrariety of rulings on the subject is chiefly due to the circumstance that different results may be reached according as one or another rule of evidence is being invoked. There are, besides the present rule, three others which may have to be considered. (a) The rule of Confrontation (*post*, § 1395) requires the deponent to be produced in person, if he can be, and this rule applies as well to the non-taker as to the taker of the deposition; so that, before using it, *the non-taker must show that the deponent is deceased or otherwise unavailable.*³ (b) The deponent may be disqualified by interest as a witness for the non-taker; in that case, it is necessary to inquire *whether the taker, by the mere taking without using, has so made the deponent his own witness* that he is barred from objecting to the deponent's disqualification for the non-taker; this involves the whole doctrine of impeaching one's own witness, and has been already dealt with elsewhere (*ante*, §§ 909, 913). (c) The non-taker may offer the deposition, not as the testimony of the deponent (*i. e.* from the present point of view), but as an assertion adopted by the taker and made his own by using it on a former occasion, *i. e.* as an admission by the party taking it and then using it; in this view the limitations of the present subject — as to parties, issues, cross-examination — disappear entirely, and the only question is whether the taker's former use of the deposition has been such that he can fairly be said to have adopted its statements as his own. This is a question of Admissions, dealt with elsewhere (*ante*, § 1075).⁴

913; Nev. Gen. St. 1885, §§ 3431, 3432, 3444, 4036; N. J.: 1903, Wallace M. & Co. v. Leber, — N. J. L. —, 55 Atl. 475; N. M. Comp. L. 1897, § 3046; N. Y. C. C. P. 1877, § 830, as amended by St. 1899, c. 352 (testimony at a former trial may be read "by either party"); § 911, C. Cr. P. 1881, §§ 631, 657; N. C.: 1805, Collier v. Jeffreys, 2 Hayw. 400; 1880, Strudwick v. Broadnax, 83 N. C. 401, 404; N. D. Rev. C. 1895, § 5711 (*in perpetuum*); §§ 8383, 8397 (criminal cases); 1902, First Nat'l Bank v. Minneapolis & N. E. Co., 11 N. D. 280, 91 N. W. 436 (statute applied); Okl. Stats. 1893, §§ 5357, 5371 (depositions taken for accused); Or. C. C. P. 1892, §§ 827, 863; 1902, Tobin v. Portland F. M. Co., 41 Or. 269, 68 Pac. 743; Pa.: 1822, Gordon v. Little, 8 S. & R. 532, 548; 1867, O'Connor v. American I. M. Co., 56 Pa. 234, 238; R. I. Gen. L. 1896, c. 244, § 27; S. D. Stats. 1899, § 6552 (*in perpetuum*); §§ 8818, 8832 (criminal cases); Tenn.: 1872, Brandon v. Mullenix, 11 Heik. 446, 449; 1897, Saunders v. R. Co., 99 Tenn. 130, 41 S. W. 1031; Tex. C. Cr. P. 1895, §§ 797, 798 (accused's depositions, taken not on the ground of non-residence or age or infirmity, cannot be used by him except after giving his consent "that the entire evidence or statement of the witness may be used against him by the State

on the trial"); Rev. Civ. Stats. 1895, § 2288 ("When cross-interrogatories have been filed and answered," either party may use the depositions); compare the earlier Texas citations, *supra*, note 1; U. S.: 1809, Yeaton v. Fry, 5 Cr. 335, 343 (defendant objected to plaintiff using defendant's deposition because defendant had not given plaintiff proper notice; Marshall, C. J.: "The admission of notice by the plaintiff is certainly sufficient, if notice to him was necessary"); Utah Rev. St. 1898, §§ 3454, 3459, 3471, 5037; so also for former testimony: §§ 3475, 5013; Va. Code 1887, § 3367; 1826, M'Mahon v. Spangler, 4 Rand. 51, 56, *semble*; Wash. C. & Stats. 1897, § 6027; W. Va. Code 1891, c. 130, § 37; 1869, Echols v. Stanton, 3 W. Va. 574, 578; Wis. Stats. 1898, § 40; 1862, Junneau Bank v. McSpedon, 15 Wis. 696 (good opinion by Paine, J.); 1873, Hazleton v. Union Bank, 32 id. 34, 44; Wyo. Rev. St. 1887, § 3071 (depositions *in perpetuum*).

³ The authorities are collected in § 1416.

⁴ Moreover, such use of a deposition by the non-taker does not authorize the use of testimony contained in the deposition but *not in itself admissible*: 1832, Wilson v. Calvert, 5 Sim. 194 (deposition taken by the plaintiff but not used by him, not admitted for the defendant, because it concerned a conversation of the de-

3. Conduct of the Cross-examination itself, as affecting Opportunity of Cross-examination.

§ 1390. Failure of Cross-examination through the Witness' Death or Illness.

There may have been an adequate opportunity of cross-examination (*ante*, § 1371), so far as depends upon the nature of the tribunal or the state of the issues and parties; yet the required opportunity may nevertheless practically have failed, through circumstances connected with the conduct of the examination. These circumstances may be distinguished under five heads: (1) the witness' death or illness intervening to prevent or curtail cross-examination; (2) the witness' refusal to answer on cross-examination or the party's prevention of his answer; (3) the witness' answering the direct examination "non-responsively," *i. e.* without dealing with the subject of the question; (4) the framing of the direct examination so as to prevent adequate cross-examination; (5) sundry circumstances preventing adequate cross-examination.

(1) Where the witness' death or lasting illness would not have intervened to prevent cross-examination but for the *voluntary act* of the witness himself or the party offering him—as, by a postponement or other interruption brought about immediately after the direct examination, it seems clear that the direct testimony must be struck out.¹ Upon the same principle, the same result should follow where the illness is but temporary and the offering party might have reproduced the witness for cross-examination before the end of the trial.² But, where the death or illness prevents cross-examination under such circumstances that *no responsibility* of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Nevertheless, principle requires in strictness nothing less. The true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss.³ Courts differ in their treatment of this difficult situation;⁴ except that, by general concession, a cross-examination begun but

fendant which was usable as an admission against him but not in his favor); 1880, *Forbes v. Snyder*, 94 Ill. 374, 378.

For the prohibition against the opponent's using a cross-examination when the direct examination has been excluded, see *post*, § 1893.

For the rule about putting in the whole of a deposition, see *post*, §§ 2103, 2115.

¹ 1880, *Sperry v. Moore's Estate*, 42 Mich. 361, 4 N. W. 13 (at the former trial, the examination of the witness had been stopped just before cross-examination, in order that the party offering might put on another witness; but the former witness died shortly after and before an opportunity for cross-examination was had; *Graves, J.*: "There was here no such opportunity [to cross-examine], and the want of it was caused by the claimant [the party offering], and the estate was in no way answerable for it,

and the testimony was excluded); 1844, *Forrest v. Kissam*, 7 Hill N. Y. 470.

² 1815, *Clements v. Benjamin*, 12 John. 299.

³ As in *Scott v. McCann, Md., infra*.

⁴ *Eng.*: 1828, *Jones v. Fort*, 1 M. & M. 196 (defendant's examination in bankruptcy was offered by plaintiff; the cross-examination had been postponed at the commissioners' request, and in the meantime the deponent was stricken with apoplexy; yet the examination was received, probably as containing admissions, and not as being strictly a mere witness' deposition); 1837, *R. v. Hagan*, 1 Jebb Cr. C. 127, *Ire.* (a witness fainted shortly after his cross-examination began; and, by a vote of 7 to 5 judges, that the direct examination should be received, the case standing "upon the same principle [as death], fatality or the act of God"; the leading case, with good opinions on both sides); 1892,

unfinished suffices if its purposes have been substantially accomplished. Where, however, the failure to obtain cross-examination is in any sense attributable to the cross-examiner's own consent or fault, the lack of cross-examination is of course no objection,⁵— according to the general principle (*ante*, § 1371) that an opportunity, though waived, suffices.

§ 1391. **Failure of Cross-examination through the Witness' Refusal to Answer or the Fault of the Party offering him.** (2) Where the witness, after his examination in chief on the stand, has refused to submit to cross-examination, the opportunity of thus probing and testing his statements has substantially failed, and his direct testimony should be struck out.¹ On the

R. v. Mitchell, 17 Cox Cr. 503 (dying woman examined, and after the cross-examination "had continued for about ten minutes," the magistrate stopped it on account of her condition; she died a few minutes later; held inadmissible, unless the cross-examination was being continued merely as a pretext); *Can.*: 1899, *Randall v. Atkinson*, 30 Ont. 242 (deposition of defendant, who had died pending adjournment and before cross-examination, without fault on either side admitted; exhaustive opinion by Rose, J.; but the analogies of chancery practice and of the statutory affidavit practice are emphasized); *U. S.*: 1892, *Scott v. McCann*, 76 Md. 47, 24 Atl. 536 (the deponent-party died during adjournment and before cross-examination; admitted, partly because of chancery precedents, partly because the surviving opponent had testified, and partly because the cross-examination was not "likely to modify his testimony in chief"; a sensible ruling); 1855, *Fuller v. Rice*, 4 Gray 343 (a witness fell ill at the 19th cross-interrogatory; testimony received; Shaw, C. J.: "No general rule can be laid down in respect to unfinished testimony. If substantially complete, . . . it ought not to be rejected"); 1858, *Lewis v. Ins. Co.*, 10 id. 511 (failure of memory through illness; testimony admitted); 1879, *Heath v. Waters*, 40 Mich. 471 (Carpbell, C. J.: "There are cases in which a failure to respond on cross-examination will justify the exclusion of at least so much of the direct testimony as it might have qualified"); 1894, *People v. Kindra*, 102 id. 147, 151, 60 N. W. 458 (witness dismissed by the judge after cross-examination at length; admitted, though the cross-examiner for unspecified reasons had asked for further cross-examination); 1844, *Forrest v. Kissam*, 7 Hill 470, overruling *Kissam v. Forrest*, 25 Wend. 652 (the witness died after direct examination, pending adjournment by consent; though it was otherwise inadmissible, the judges differed as to the sufficiency of the present ground); 1871, *People v. Cole*, 43 N. Y. 513 (the witness fainted at the end of the direct examination and became too ill to permit of cross-examination; Grover, J.: "The common-law rule . . . should be adhered to, although in some cases there may be an apparent hardship. No injustice is done to the party seeking to avail himself of the evidence to require that before its admission its truth shall be subjected to such tests as the experience of ages has shown

were necessary to render reliance thereon at all safe; and where this has been prevented without any fault of the adverse party, to exclude the evidence"; *Forrest v. Kissam* decision, be no authority, because the decision was stated on different grounds by different judges); 875, *Sturm v. Ins. Co.*, 63 id. 87 (Folger, J.: "It may be taken as the rule that, where a party is deprived of the benefit of the cross-examination of a witness by the act of the opposite party or by the refusal to testify or other misconduct of the witness, or by any means other than the act of God, the act of the party himself, or some cause to which he assented, the testimony given on the examination-in-chief may not be read"); 1878, *Hewlett v. Wool*, 67 id. 396 (the witness was ill and after repeated adjournments no cross-examination could be had; *semble*, that the fault of the witness or his party, or "any matter of substance," would exclude a deposition; *People v. Cole* and *Sturm v. Ins. Co.*, not mentioned); 1868, *Pringle v. Pringle*, 59 Pa. 290, *semble* (inadmissible, if cross-examination is prevented by act of God).

⁵ 1848, *R. v. Hyde*, 3 Cox Cr. 90 (the witness, a child, was very ill, and after the substance of the story had been obtained for the prosecution in taking the deposition, further questioning was abandoned; the counsel for the defendant declined to cross-examine, "as the child is evidently not in a fit state to answer," but did not ask for a postponement; the witness signed the deposition, and died shortly afterwards; Platt, B., conceded that "an attorney cannot shut out a deposition by abstaining from cross-examination"; but the argument that the condition of the child had precluded a satisfactory examination left him in doubt on the whole case); 1888, *Parnell Commission's Proceedings*, 7th day, *Times' Rep.* pt. 2, p. 66; 1896, *People v. Pope*, 108 Mich. 361, 66 N. W. 213, *semble* (here the witness fainted; but the opponent failed to move to strike out the direct testimony; held, admissible); 1879, *Hay's Appeal*, 91 Pa. 265, 268 (the plaintiff witness became disqualified, by the death of the opponent, after the direct examination and during adjournment, the opposing counsel having declined cross-examination before adjournment, on account of his client's absence; direct examination admitted, on the ground of waiver).

¹ 1885, *Rieger's Succession*, 37 La. An. 104 (note 2, *infra*); 1842, *Smith v. Griffith*, 3 Hill

circumstances of the case, the refusal or evasion of answers to one or more questions only need not lead to this result.² When such a refusal, however, occurs in answer to the *written interrogatories* of a deposition (taken on the Chancery model), the situation may require more strictness, for the deponent is not in a position to be coerced by the Court's summary process, and the opportunity of further probing the witness and of investigating the motive of the refusal and the materiality of the loss of evidence is not so abundant:

1838, *Shaw, C. J.*, in *Sarage v. Blanchard*, 20 Pick. 167, 172: "So far as the objection goes upon the assumption that a deposition must be rejected because some of the questions of the adverse party are not answered, as a general rule it is untenable. . . . [But] cases may be supposed where, if a witness is manifestly favorable to the party taking the deposition and declines answering pertinent and material questions to facts apparently within his knowledge, it would be a good ground for excluding the deposition altogether. It would show that the witness had violated his duty and his oath in not telling the whole truth, and the deposition would in effect be taken *ex parte*."

1846, *Nisbet, J.*, in *McCloskey v. Leadbetter*, 1 Ga. 551, 555: "This rule does not mean that a party shall be deprived of the benefits of his witness' testimony by failure of the other party to exercise the privilege of cross-examination, or by the dereliction of the commissioners, or by the contumacy of the witness. But it does mean that a party seeking the privilege of cross-examination shall not be forced to trial without it. It certainly does mean that interrogatories ought not to be read where cross-questions are filed and

N. Y. 333; 1879, *State v. McNinch*, 12 S. C. 95; 1896, *Millikan v. Booth*, 4 Okl. 713, 46 Pac. 489; so also the cases cited *ante*, § 1390.

² *Ala.*: 1845, *Gibson v. Goldthwaite*, 7 Ala. 281, 294 (failure to answer a question not material; deposition admitted); 1846, *Spence v. Mitchell*, 9 id. 744, 749 (failure to answer two questions directly, held not fatal, on the facts); 1857, *Harris v. Miller*, 30 id. 221, 224 (deposition suppressed, one answer being "evasive and incomplete"); 1861, *Black v. Black*, 38 id. 111, 112 (answer held not evasive, merely for referring to former direct answers); 1902, *Electric Lighting Co. v. Rust*, 131 id. 484, 31 So. 486 (deposition suppressed for evasive answers on material points); *D. C.*: 1896, *Clark v. Harmer*, 9 D. C. App. 1, 5, 7 (the witness was partly cross-examined, and then upon adjournment was requested by counsel to return on the next Court day, but no notice was given of this to the Court; the witness not re-appearing at all, the Court refused to strike out his testimony); *Ga.*: 1849, *William v. Turner*, 7 Ga. 343, 350 (deposition suppressed, for failure to answer one question; "it will not do to permit a witness to judge what questions he shall answer and what not"); 1850, *Thomas v. Kinsey*, 8 id. 421, 425 (answer held sufficient on the facts); 1858, *Heard v. McKee*, 26 id. 332, 342 (similar); 1895, *Senior v. State*, 97 id. 185, 22 S. E. 404 (the complainant in a rape case refused to point out which of two persons was the assaulter, and her testimony was excluded); *Ky.*: 1899, *Flannery v. Com.*, — *Ky.* —, 51 S. W. 572 (child's refusal to answer one question, not sufficient to justify exclusion); *La.*: 1885, *Rieger's*

Succession, 37 La. An. 104 (witness excused after direct examination, on the ground of illness, but repeatedly failing, when apparently able, to re-appear for cross-examination; excluded); 1888, *Townsend's Succession*, 40 id. 67, 73, 3 So. 488 (witness ordered to appear for further cross-examination, but failing to do so; admissible in trial Court's discretion); *Wis.*: 1882, *Trowbridge v. Sickler*, 54 Wis. 306, 309, 11 N. W. 581 (oral interrogatories; evasive answers held not to justify suppression of the deposition, on the facts; the cross-examiner "can repeat the questions or put others until the witness is forced to answer the precise point required, or fairly refuse; of course, refusal or evasion might be so gross as to indicate corruption and authorize a suppression of the whole deposition").

But a refusal to answer on a *privileged subject* cannot justify suppressing the direct examination; for the latter is equally liable with cross-examination to be balked by the privilege, and it is a mere accident on which side the privileged topic occurs: 1800, *Barber v. Gingell*, 3 Esp. 60, 62 (a witness' direct examination is not to be forbidden, because his cross-examination will probably include questions which he may be privileged not to answer). *Contra*: 1896, *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501 (on the facts of the case, the witness claiming on cross-examination his privilege on material points, the testimony was struck out).

Distinguish the controversy whether the question can be put (or read, in a deposition) even though the answer claims privilege (*post*, § 2268).

unanswered (provided they are such as by law ought to be answered), until the processes of the Court are exhausted to compel the witness to answer."

Courts treat this situation with varying degrees of strictness. It should be left to the determination of the trial judge, regard being had chiefly to the motive of the witness and the materiality of the answer.³

§ 1392. **Non-Responsive Answers; General or "Sweeping" Interrogatories.** (3) When a deposition is taken on *written interrogatories* filed beforehand, and the witness in an answer to a *direct* interrogatory departs from the subject of the question, the cross-examiner may be virtually deprived of cross-examination, because by not anticipating this answer he will not have framed his cross-interrogatories to probe the witness on that subject. This objection is obviously applicable to written interrogatories only;¹ but to that extent it has a just foundation:

1876, *Hallett, C. J.*, in *Marr v. Wetzel*, 3 Colo. 2, 6: "In taking evidence upon interrogatories attached to the *dedimus* or commission, the rule which requires that the witness shall answer the question put, without more, should be somewhat strictly applied. In such case the party against whom the deposition is to be used has no opportunity to cross-examine, except that which is afforded by filing cross-interrogatories to be attached to the commission. In drawing them he must often be governed entirely by the direct interrogatories filed by his adversary; and if these last give no light as to the subject upon which the witness is to be examined, he will be unable to cross-examine. Of this the deposition in the record affords an illustration. In the direct interrogatories there is nothing calling for the witness' knowledge as to the service of the process on the defendant in the State of Missouri, and yet such evidence was elicited. As to this the defendant had no opportunity to cross-examine."

Nevertheless, whether there has been a substantial failure of cross-examination will depend much on the materiality of the answer, the facts of the case as known to the cross-examiner, and the tenor of the cross-interrogatories; so that no fixed rule can be laid down. Apart from the present

³ 1846, *McCloskey v. Leadbetter*, 1 Ga. 551, 555 (deposition to impeach another witness, excluded because a single material question was left unanswered; quoted *supra*); 1880, *Schaefer v. R. Co.*, 66 id. 39, 43 (substantial answering of cross-interrogatories, sufficient); 1859, *Nicholson v. Desobry*, 14 La. An. 81, 83 (in the trial Court's discretion, the failure to answer a material interrogatory is ground for exclusion); 1838, *Savage v. Blanchard*, 20 Pick. 167 (quoted *supra*); 1863, *Robinson v. B. & W. R. Co.*, 7 All. 393, 395 (deposition suppressed, for a single evasive answer); 1864, *Stratford v. Ames*, 8 All. 577 (failure to answer one question does not exclude all, "unless his answer is so imperfect or evasive as to induce the Court to believe that he wilfully kept back material facts within his knowledge"); 1867, *McMahon v. Davidson*, 12 Minn. 357, 367 (answers must appear "fully and fairly given, without the suppression of any fact material to the case"); 1821, *Withers v. Gillespy*, 7 S. & R. 10, 16 (incomplete answers; rejected on the facts); 1867, *Crossgrove v. Himmelrich*, 54 Pa. 203, 208 (refusal

to answer an irrelevant question, held no ground for suppression); 1811, *Richardson v. Goklen*, 3 Wash. C. C. 109 (there was "no answer given to or notice taken of the general interrogatory"; excluded); 1816, *Nelson v. U. S.*, Pet. C. C. 235 (letters rogatory; deposition not suppressed, where the interrogatories were "substantially, though not formally" all answered); 1837, *Gass v. Stinson*, 3 Sumn. 98 (where the Chancery authorities are elaborately examined by Story, J.); 1898, *Bird v. Halsy*, 87 Fed. 671, 674 (refusal to answer a question suffices to exclude; but here admitted for the opponent's failure to compel answer or otherwise to make proper objection); 1894, *Hadra v. Bank*, 9 Utah 412, 414, 35 Pac. 508 (refusal to answer a question effecting the admissibility of the entire testimony; deposition excluded); 1822, *Trowbridge v. Sickler*, 54 Wis. 306 (cited *supra*, note 2).

¹ 1876, *Marr v. Wetzel*, 3 Colo. 2, 6 (see quotation *supra*); 1872, *Greenmen v. O'Connor*, 25 Mich. 30 (for a non-responsive answer on a material point, the testimony was held improperly admitted; "the right of cross-examination would

ground, there is no inherent objection to a non-responsive answer; in particular, the direct examiner cannot object to it, nor can the cross-examiner object to it when it is evoked by his own interrogatory.²

(4) A direct interrogatory may be so *general* or "*sweeping*" as to enable the witness, while responsively answering, to range over a variety of topics whose tenor the cross-examiner cannot by possibility have anticipated. In this way, for the same reason just noted, he may be substantially deprived of his right. Such a general interrogatory, to be sure, is often useful and has been traditionally employed to close a deposition taken by written interrogatories.³ Nevertheless, its capability of abuse is well understood; and the trial judge should have discretion to strike out the answer to it if a substantial injustice would result:

1897, *Fish, J.*, in *McBride v. Macon T. P. Co.*, 102 Ga. 422, 30 S. E. 999: "Strictly speaking, this was not an interrogatory at all, but a mere request or demand for general information in addition to that sought to be elicited by the preceding specific questions propounded to the witness. We cannot approve of this method of examination, as applied to a witness whose testimony is taken by interrogatories, notwithstanding it may be in accord with a practice commonly pursued by counsel in this State. Every interrogatory addressed to a witness should be sufficiently explicit to indicate to the opposite party the nature of the testimony expected. Obviously, a full and intelligent cross-examination of the witness is not possible, unless the questions propounded to him on his direct examination indicate with reasonable certainty the particular points as to which his testimony is desired. As strict matter of right, therefore, a party suing out a set of interrogatories cannot claim that the response of the witness to such a sweeping interrogation (if it may be called such) as that above quoted has been legitimately drawn forth, and is in consequence admissible in evidence. On the other hand, if the reply of the witness does not include matter not suggested by the preceding interrogatories put to him, the opposite party will not have been prejudiced by an abridgment of his right to a full opportunity to cross-examine the witness, and accordingly cannot justly complain in the event the Court declines to rule out the testimony thus elicited. Under such circumstances, the trial judge may very properly exercise his discretion in the premises, to the end that complete justice may be done as between the respective parties to the litigation."⁴

be thereby defeated entirely, because no cross-interrogatories can be expected to enter upon subjects not opened by the direct ones"); 1874, *Hamilton v. People*, 29 Mich. 173, 185 (the rule is confined to "settled written interrogatories"; "no such difficulty can arise where the witness is examined openly and orally").

² Cases cited *ante*, § 785.

³ Federal Equity Rules, No. 71 (the last written interrogatory shall be, in substance: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this case, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer").

⁴ The rulings have naturally varied much: 1848, *Yarborough v. Hood*, 13 Ala. 176, 180 (answer to a general interrogatory, held improperly excluded); 1877, *Blunt v. Strong*, 60 id. 572, 577 ("To such interrogatory no answer

should be allowed of matter that is not germane to the subject of some special inquiry, and in a measure the complement of testimony previously given"); 1898, *McBride v. Macon T. P. Co.*, 102 Ga. 422, 30 S. E. 999 ("State all the facts that will inure to the benefit of the plaintiff or the defendant in this case," held not a proper interrogatory in a deposition; quoted *supra*); 1820, *Porcival v. Hickey*, 18 John. 257, 264, 289 (Spencer, C. J.: "I perceive no abuse likely to follow from allowing the witnesses to state every material fact, under that interrogatory, not before drawn forth by the special interrogatories"); 1854, *Commercial Bank v. Union Bank*, 11 N. Y. 203, 210 (deposition not suppressed, for a general interrogatory with answers "pertinent to the matters in issue"; the opponent should have applied beforehand to remedy any surprise "either by a further examination of the same witnesses or otherwise"); 1827, *Rhoades v. Sellin*, 4 Wash. C. C. 722 (answer to a general interrogatory, admitted).

So far as the mode of direct interrogation may in any other way deprive the opponent of the adequate exercise of his right of cross-examination, through rendering it impossible to anticipate the subject, the trial judge may properly exclude the direct examination, to the extent of its impropriety.⁵

§ 1393. **Sundry Insufficiencies of Cross-Examination.** (1) (a) Where the cross-examination is hampered by the witness' *organic defects of speech*, hearing, or the like, the admissibility of the testimony should be left entirely to the trial judge.¹

(b) The *party's own presence* in the court-room during cross-examination can hardly be deemed essential; for his appearance by counsel gains him the benefit of the right. Nevertheless, some Courts have thought it improper (partly from the present point of view) to compel the party to retire from the room during the trial.²

(c) Where the witness testifies in a *foreign language*, the accused is entitled to understand it, so as to be able to cross-examine the witness. But if somehow such an understanding is attained, either by his own or his counsel's knowledge of the language or by the help of an interpreting third person, the precise mode of attaining it is immaterial.³

(d) Whether there has been a substantially adequate cross-examination where a deposition *written down in the accused's absence* has been *afterwards read over to him* by the magistrate in the witness' presence with liberty then

¹ 1902, *Wilkinson v. Wilkinson*, 133 Ala. 381, 32 So. 124 (divorce; on interrogatories propounded by the chancellor *ex mero motu* to the defendant; the plaintiff was held entitled to notice for purposes of cross-examination); 1848, *Stagg v. Pomeroy*, 3 La. An. 16 ("any further enquiries propounded by the plaintiff's counsel before the commissioner were *ex parte*, and to the disadvantage of the defendants, who had no opportunity of counteracting them by cross-examination"); 1897, *Anderson v. Bank*, 6 N. D. 497, 72 N. W. 916, *semble* (amendment of a declaration after deposition taken; the defendant not allowed to suppress the deposition because of no cross-examination on the amended pleading); 1884, *First National Bank v. Wirebach's Ex'r*, 106 Pa. 44 (deposition admitted, though new matter came up on the trial, as to which the deponent had not been cross-examined).

For the question whether *more than one counsel on a side* may cross-examine, see *ante*, § 783.

For the question whether a witness who has been *merely subpoenaed* or merely asked one question may be cross-examined, or must be called as his own witness by the cross-examiner, see *post*, § 1892.

² 1882, *Quinn v. Halbert*, 55 Vt. 228 (receiving testimony where the witness was dumb and could merely shake his head in assent or dissent, and the opportunity of cross-examination was thus very limited).

³ Cases cited *post*, § 1399 (confrontation), § 1841 (sequestration of witnesses), and the

following: 1876, *Crowe v. Peters*, 63 Mo. 429, 433 (on a suggestion that the defendant was by gestures and looks intimidating a witness, he was ordered from the room; held, erroneous, because it prevented his aid in the cross-examination; but a change of position, etc., might have been required; this is unsound, because it was the party's own fault).

For *intimidation by the cross-examiner*, see *ante*, §§ 781, 786.

⁴ 1888, *R. v. Ah Har*, 7 Haw. 319 (the constitutional right "is not complied with unless the accused is in some way made to understand their evidence," in order to avail himself of the right of cross-examination; but "if the accused has counsel who understands the evidence, whether directly from the witnesses or through an interpreter, the constitutional requirement is complied with, though the accused himself may not understand it"; yet the Court may, on request in such a case, order interpretation to the accused of the testimony as given by each witness; a request not made till the close of the prosecution's case is not seasonable); 1899, *Republic v. Yamane*, 12 id. 189 (*R. v. Ah Har* followed, and held equally applicable to capital cases); 1903, *Com. v. Lenonsky*, 206 Pa. 277, 55 Atl. 977 (testimony of an absent witness, given originally at a preliminary hearing, in the presence of the accused, a foreigner who understood the witness' language, held inadmissible, because he had no counsel to tell him that he had the right to cross-examine; unsound). Compare § 811, *ante*, § 1810, *post* (interpreters).

to cross-examine, is a question that has been several times discussed in England. It would seem that, under the circumstances of a given case, such an opportunity might be adequate.⁴

⁴ 1817, *R. v. Smith*, R. & R. 339 (admissible); 1817, *R. v. Forbes*, Holt 599, *Chambre, J.* (inadmissible); 1845, *R. v. Hake*, 1 Cox Cr. 223 (the witness' deposition was taken and authenticated on the 28th; on the 29th, the defendant and two co-defendants being present, the deposition was read over to all the defendants; it was not re-signed by the magistrates; *Erie, J.*: "The reading of it in the prisoner's presence is equivalent to a taking of it in his presence. . . . The object is to afford to the party charged an opportunity for cross-examination. Such an opportunity has been

held to be afforded by a reading over of the deposition where there is one prisoner only; that object is not the less secured because there are many prisoners"); 1852, *R. v. Day*, 6 *id.* 55, *Platt, B.* (the mere reading over to the accused a deposition already taken is not enough). Whether the *loss of a document* whose genuineness is disputed should exclude the testimony of an expert who has studied it, by reason of the consequent impossibility of cross-examining him upon its details, is a question involving the principles of handwriting testimony (*ante*, §§ 697, 1185, *post*, § 2015).

SUB-TITLE I (continued): THE HEARSAY RULE SATISFIED.

TOPIC II: BY CONFRONTATION.

CHAPTER XLV.

1. General Principle of Confrontation.

- § 1395. Purpose and Theory of Confrontation.
- § 1396. Witness' Presence before Tribunal may be Dispensed with, if not Obtainable.
- § 1397. Effect of Constitutional Sanction of Confrontation.
- § 1398. Same: State of the Law in the Various Jurisdictions.
- § 1399. Confrontation, as requiring the Tribunal's or the Defendant's Sight of the Witness.

2. Circumstances of Necessity making the Witness' Personal Presence Unavailable.

- § 1401. Preliminary Distinctions; (a) Deposition and Testimony; (b) Civil and Criminal Cases; (c) Taking and Using a Deposition.
- § 1402. General Principle of Necessity or Unavailability.
- § 1403. Specific Cases of Unavailability: (1) Death.
- § 1404. Same: (2) Absence from Jurisdiction.
- § 1405. Same: (3) Disappearance; Inability to Find; (4) Opponent's Procurement.
- § 1406. Same: (5) Illness, Infirmity, Age, preventing Attendance.

- § 1407. Same: (6) Imprisonment; (7) Official Duty or Privilege; (8) Distance of Travel.
- § 1408. Same: (9) Insanity, or other Mental Incompetency.
- § 1409. Same: (10) Interest.
- § 1410. Same: (11) Infamy.
- § 1411. Same: Statutes affecting Depositions *de bene esse*.
- § 1412. Same: Statutes affecting Depositions *in perpetuam memoriam*.
- § 1413. Same: Statutes affecting Former Testimony.
- § 1414. Proof of Unavailability of Witness.
- § 1415. If Witness is Available for Testifying, Deposition is not Usable.
- § 1416. Same: Rule not Applicable (1) to Deposition of Party-Opponent, or (2) to Deposition containing Self-Contradiction; but applicable (3) to Deposition of Opponent's Witness, and (4) to Former Testimony in Malicious Prosecution.
- § 1417. Same: Exceptions to the Rule for (1) Chancery and analogous Proceedings; (2) Commissions by *Dedimus Potestatem*; (3) Deposition *in Perpetuam Memoriam*; (4) Will-Probates; (5) Hasty Complaints.
- § 1418. Anomalous Jurisdictions in which No Necessity suffices to admit.

1. General Principle of Confrontation.

§ 1395. Purpose and Theory of Confrontation. In the period when the Hearsay rule is being established, and *ex parte* depositions are still used against an accused person (*ante*, § 1364), we find him frequently protesting that the witnesses should be "brought face to face," or that he should be "confronted" with the witnesses against him. The final establishment of the Hearsay rule, in the early 1700s, meant that this protest was sanctioned as a just one,—in other words, that Confrontation was required. What was, in principle, the meaning and purpose of this Confrontation? So far as there is a rule of Confrontation, what is the process that satisfies this rule?

It is generally agreed that the process of confrontation has two purposes, a main and essential one, and a secondary and subordinate one. (1) The main and essential purpose of confrontation is *to secure the opportunity of cross-examination*. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining of immediate answers. That

this is the true and essential significance of confrontation is demonstrated by the language of counsel and judges from the beginning of the Hearsay rule to the present day:

1680, *I. C. J. Hale, Pleas of the Crown*, I, 306 (commenting on St. 5 & 6 Edw. VI, c. 12, § 12 (1552)); "which said accusers [of treason] at the time of the arraignment of the party accused, if they be then living, shall be brought in person before the party so accused, and avow and maintain that that they have to say to prove him guilty"; "Yet in case of treason, where two witnesses [*i. e.* accusers] are required, such an examination [before a justice of the peace] is not allowable, for the statute requires that they be produced upon the arraignment in the presence of the prisoner, to the end that he may cross-examine them."

1690, *Fenwick's Trial*, 13 How. St. Tr. 591, 633, 712 (before the House of Commons); Sergt. *Lovel* (for the prosecution): "We have Mr. Goodnan's examination under the hand of Mr. Vernon; we pray it may be read"; Sir B. *Shower* (for the accused): "Mr. Speaker, . . . I humbly oppose the reading of this examination, as not agreeable to the rules of practice and evidence, and that which is wholly new. . . . No deposition of a person can be read, though beyond sea, unless in cases where the party it is to be read against was privy to the examination and might have cross-examined him or examined to his credit, if he thought fit. . . . Our law requires persons to appear and give their testimony *in voce*; and we see that their testimony appears credible or not by their very countenances and the manner of their delivery; and their falsity may sometimes be discovered by questions that the party may ask them, and by examining them to particular circumstances which may lay open the falsity of a well-laid scheme, which otherwise, as he himself had put it together, might have looked well at first; and this we are deprived of, if this examination should be admitted to be read. . . . We oppose it at present for that we were not present nor privy nor could have cross-examined him"; Sir T. *Powis*, arguing: "How contrary this is to a fundamental rule in our law, that no evidence shall be given against a man, when he is on trial for his life, but in the presence of the prisoner, because he may cross-examine him who gives such evidence; and that is due to every man in justice."

1720, *Duke of Dorset v. Giriler*, Finch's Prec. Ch. 531: "The other side ought not to be deprived of the opportunity of confronting the witnesses and examining them publicly, which has always been found the most effectual method for discovering of the truth."¹

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. III, c. XIX: "Under the head of Confrontation may be found whatever advances (scanty indeed they will be seen to be) have been made in Roman procedure towards the introduction of that universal and equal system of interrogation above delineated and proposed, — consequently whatever part has been covered by the Roman law of the ground covered by the operation called Cross-examination in English law. The operation has two professed objects: one is the establishing the identity of the defendant, viz. that the person thus produced to the deponent is the person of whom he has been speaking; the other is that an opportunity may be afforded to the defendant, in addition to whatever testimony may have been delivered to his disadvantage, to obtain the extraction of such other part (if any) of the facts within the knowledge of the deponent as may operate in his favour. . . . [It is in Continental law] an imperfect modification of cross-examination, . . . a faint shadow of it."

1856, *Bartley, C. J.*, in *Summons v. State*, 5 Oh. St. 341: "Evidence of the statements of a deceased witness on a former trial . . . would seem to be now confined to cases where opportunity for cross-examination had been afforded, and therefore to cases where the accused had been confronted by the deceased witness when the testimony was given on the former trial."

¹ See also Blackstone, *Commentaries*, III, 373.

1865, *Woodward, C. J.*, in *Houser v. Com.*, 51 Pa. 337: "Confronting witnesses does not mean impeaching their character, but means cross-examination in the presence of the accused. When the common law of England was transported to these colonies, it gave a person charged with a capital crime no compulsory process to obtain witnesses and entitled him to no examination by himself or his counsel of witnesses brought against him. . . . To remedy this state of the law, our constitutions all declared — what statutes had then provided in England — that the accused should have an impartial trial by jury, should have process for witnesses and be entitled to counsel to examine them, and to cross-examine those for the prosecution in the presence of (*confronting*) the accused."

1878, *Boreman, J.*, in *U. S. v. Reynolds*, 1 Utah 323: "On the former trial she was under oath, and subject to cross-examination by the defendant, and then he was confronted by the witness. The main objects of producing the witness upon the stand had been attained."

1801, *Earl, J.*, in *People v. Fish*, 125 N. Y. 150, 26 N. E. 319: "It is quite a valuable right to a prisoner to be confronted upon his trial with the witnesses against him, so that he may cross-examine them and the jury see them and thus judge of their credibility. . . . The evidence of the witness was taken in his presence where he had the opportunity to cross-examine him, where he did in fact cross-examine him, and thus he had all the protection that the Bill of Rights and the Constitution were intended to secure him."

Thus the main idea in the process of confrontation is that of the opportunity of cross-examination; the former is merely the dramatic feature, the preliminary measure, appurtenant to the latter.

(2) There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a *witness' deportment while testifying*, and a certain subjective moral effect is produced upon the witness.³ This subordinate advantage has been expounded in the following passages:

1836, *Putnam, J.*, in *Com. v. Richards*, 18 Pick. 437: "[Even] if you get the whole, it is very defective; for you cannot have a true representation of the countenance, manner, and expression of the deceased witness, which either confirmed or denied the truth of the testimony."

1857, *Ryland, J.*, in *State v. McO'Brien*, 24 Mo. 421: "There are many things, aside from the literal import of the words uttered by the witness while testifying, on which the value of his evidence depends. These it is impossible to transfer to paper. Taken in the aggregate, they constitute a vast moral power in eliciting the truth, all of which is lost when the examination is had out of court and the mere words of the witness are reproduced in the form of a deposition."

1882, *Campbell, J.*, in *People v. Sligh*, 48 Mich. 56: "The production of witnesses in open court is one of the best means of trying their credit; and every one knows how difficult it is to judge from written testimony of the demeanor and appearance which strike those who examined them. Still more difficult must it be to have the testimony reproduced."

³ In the earlier and more emotional periods, this confrontation was supposed (more often than it now is) to be able to unstring the nerves of a false witness; the following is merely one example: 1878, *Atkins' Examination*, 6 How. St. Tr. 1473, 1481 (one Captain Atkins was the chief witness against the accused, also named Atkins; the accused tells that at his examination, Lord Shaftesbury said, "Pray look one another in the face," so we gazed very earnestly, and my lord

Shaftesbury went on, speaking to Captain Atkins, 'Come, Captain Atkins, confess truly and ingenuously, have you belyed Mr. Atkins or no?' . . . After this sort my lord Shaftesbury pressed Captain Atkins very home; and while he was doing so, and we looking steadfastly upon each other, Captain Atkins' countenance changed very white; which I taking notice of, and observing to the lords, my lord marquis of Winchester cried, 'Where, where? I don't see it'").

1800, Chief Justice *Appleton*, *Evidence*, 220: "The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness, are soon detected. . . . The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control — fear, love, hate, envy, or revenge —, are all open to observation, noted and weighed by the jury."³

This secondary advantage, however, does not arise from the confrontation of the opponent and the witness; it is not the consequence of those two being brought face to face. It is the witness' presence before the tribunal that secures this secondary advantage, — which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination.

§ 1396. **Witness' Presence before Tribunal may be Dispensed with, if not Obtainable.** The question, then, whether there is a right to be confronted with opposing witnesses is essentially a question whether there is a right of cross-examination. If there has been a cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination (under the rules examined *ante*, §§ 1371–1393) disposes of any objection based on the so-called right of confrontation.

Nevertheless, the secondary advantage, incidentally obtained for the tribunal by the witness' presence before it — the demeanor-evidence — is an advantage to be insisted upon wherever it can be had. No one has doubted that it is highly desirable, if only it is available. But it is merely desirable. Where it cannot be obtained, it need not be required. It is no essential part of the notion of confrontation; it stands on no better footing than other evidence to which special value is attached; and just as the original of a document (*ante*, § 1192) or a preferred witness (*ante*, § 1308), may be dispensed with in case of unavailability, so demeanor-evidence may be dispensed with in a similar necessity. Accordingly, supposing that the indispensable requirement of cross-examination has been satisfied, the only remaining inquiry is whether the demeanor-evidence, to be obtained by the witness' production before the tribunal, is available.

This inquiry — the conditions of unavailability of demeanor-evidence, by reason of death, illness, and the like — remains now to be made. But first the effect must be considered of the constitutional sanction, in the United States, of the principle of confrontation; for this has often erroneously affected the judicial attitude towards demeanor-evidence.

§ 1397. **Effect of Constitutional Sanction of Confrontation.** In the United States, most of the Constitutions have given a permanent sanction to the principle of confrontation, by provisions requiring that in criminal cases the

³ So also *Blackstone*, III, 373.

accused shall be "confronted with the witnesses against him" or "brought face to face" with them.¹ The question thus arises whether these consti-

¹ *Ala.*: 1876, Art. I, § 7 ("In all criminal prosecutions the accused has a right . . . to be confronted by the witnesses against him"); *Ark.*: 1874, Art. II, § 10 ("In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him"); *Cal.*: 1879, Art. I, § 13 ("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"); *P. C.* § 686 ("In a criminal action the defendant is entitled . . . to be confronted with the witnesses against him, in the presence of the Court"; except as quoted *ante*, § 1388); *Colo.*: 1876, Art. II, § 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"); *Conn.*: 1875, Art. I, § 9 ("In all criminal prosecutions, the accused shall have the right . . . to be confronted by the witnesses against him"); *Del.*: 1851, Art. I, § 7 ("In all criminal prosecutions, the accused hath a right . . . to meet the witnesses in their examination face to face"); 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"); *Fla.*: 1887, Decl. of R., § 11 ("In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face"); *Ga.*: 1877, Art. I, § 1, par. 5 ("Every person charged with an offence against the laws of this State . . . shall be confronted with the witnesses testifying against him"); so also *Cr. Code* 1895, § 8; *Ill.*: 1870, Art. II, § 9, ("In all criminal prosecutions the accused shall have the right . . . to meet the witnesses face to face"); *Ind.*: 1851, Art. I, § 13 ("In all criminal prosecutions the accused shall have the right . . . to meet the witnesses face to face"); *Ia.*: 1857, Art. I, § 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"); *Kan.*: 1859, Bill of R., § 10 ("In all prosecutions, the accused shall be allowed . . . to meet the witness face to face"); *Ky.*: 1891, § 11 ("In all criminal prosecutions the accused has the right . . . to meet the witnesses face to face"); *La.*: 1879, Art. VIII ("In all criminal

prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him"); 1890, Art. IX (similar); *Me.*: 1849, Art. I, § 6 ("In all criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him"); *Md.*: 1867, Decl. of R., Art. XXI ("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"); *Mass.*: 1780, Decl. of R., Art. 12 ("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"); so also *Pub. St.* 1882, c. 201, § 4; *Mich.*: 1850, Art. VI, § 28 ("In every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him"); *Comp. L.* 1897, § 11796 (to "meet the witnesses who are produced against him face to face"); *Minn.*: 1857, Art. I, § 6 ("In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him"); *Miss.*: 1890, Art. III, § 26 ("In all criminal prosecutions the accused shall have a right . . . to be confronted by the witnesses against him"); *Mo.*: 1875, Art. II, § 22 ("In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face"); *Mont.*: 1889, Art. III, § 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"); *P. C.* 1895, § 1855 (like *Const.* Art. III, § 16); *Nebr.*: 1875, Art. I, § 11 ("In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face"); *Nev.*: *Gen. St.* 1885, § 3910 ("In a criminal action, the defendant is entitled . . . to be confronted with the witnesses against him in the presence of the Court"; but provision is made for use of testimony taken on preliminary hearing); *N. H.*: 1793, Part I, art. 15 ("Every subject shall have a right . . . to meet the witnesses against him face to face"); *N. J.*: 1844, Art. I, § 8 ("In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him"); *N. M.*: *Comp. L.* 1897, § 3765 ("In all criminal prosecutions, the accused . . . shall be confronted with the witness against him"); § 1047 ("to meet the witness face to face"); *N. C.*: 1875, Art. I, § 11 ("In all criminal prosecutions, every man has the right . . . to confront the accusers and witnesses with other testimony"); *Oh.*: 1851, Art. I, § 10 ("In any

tutional provisions affect the common-law requirement of confrontation, otherwise than by putting it beyond the possibility of abolition by an ordinary legislative body. The only opening for argument lies in the circumstance that these brief provisions are unconditional and absolute in form, *i. e.* they do not say that the accused shall be confronted "except when the witness is deceased, ill, out of the jurisdiction, or otherwise unavailable," but imperatively prescribe that he "shall be confronted." Upon this feature the argument has many times been founded that, although the accused has had the fullest benefit of cross-examining a witness now deceased or otherwise unavailable, nevertheless, the witness' presence before the tribunal being constitutionally indispensable, his decease or the like is no excuse for dispensing with his presence.

That this argument is unfounded cannot be doubted; and the answer to it may be put in several forms: (1) There never was at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination. There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names. This much is clear enough from the history of the Hearsay rule (*ante*, § 1364), and from the continuous understanding and exposition of the idea of confrontation (*ante*, § 1395). It follows that, if the accused has had the benefit of cross-examination, he has had the very privilege secured to him by the Constitution.²

(2) Moreover, this right of cross-examination thus secured was not a right

trial, in any Court, the party accused shall be allowed . . . to meet the witnesses face to face"; *Okl. Stats.* 1893, § 4874 ("In a criminal action the defendant is entitled . . . to be confronted with the witnesses against him in the presence of the Court"); *Or.*: 1859, Art. I, § 11 ("In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face"); *Pa.*: 1874, Art. I, § 9 ("In all criminal prosecutions, the accused hath a right . . . to meet the witnesses face to face"); *R. I.*: 1842, Art. I, § 10 ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"); *S. C.*: 1832, Art. I, § 13 ("Every person shall have a right . . . to meet the witnesses against him face to face"); 1895, Art. I, § 18 ("In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him"); *S. D.*: 1889, Art. VI, § 90 ("In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face"); *Stats.* 1899, § 8285 (a defendant is entitled "to be confronted with the witnesses against him in the presence of the court"); *Tenn.*: 1870, Art. I, § 9 ("In all criminal prosecutions, the accused hath the right . . . to meet the witnesses face to face"); so also Code 1896, § 7355; *Tex.*: 1876, Art. I, § 10 ("In all criminal prosecutions, the accused . . . shall be confronted with the witnesses against him"); *U. S.*: 1787, Amendment VI ("In all criminal prosecutions, the accused shall

enjoy the right . . . to be confronted with the witnesses against him"); *Utah*: 1895, Art. I, § 12 ("In criminal prosecutions the accused shall have the right . . . to be confronted by the witnesses against him"); *Rev. St.* 1898, § 4513 (like Cal. P. C. § 686); *Vt.*: Ch. I, Art. 10 ("In all prosecutions for criminal offences, a person hath a right . . . to be confronted with the witnesses"); so also *Stats.* 1894, § 1861; *Vt.*: 1869, Art. I, § 10 ("In all capital or criminal prosecutions, a man hath a right . . . to be confronted with the accusers and witnesses"); 1902, Art. I, § 8 (same, omitting "capital or"); *Wash.*: Art. I, § 22 ("In criminal prosecutions, the accused shall have the right . . . to meet the witnesses against him face to face"); *W. Va.*: Art. III, § 11 ("In all such trials [of crimes and misdemeanors], the accused shall . . . be confronted with the witnesses against him"); *Wis.*: Art. I, § 7 ("In all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face"); *Wyo.*: 1889, Art. I, § 10 ("In all criminal prosecutions the accused shall have the right . . . to be confronted with the witnesses against him").

² This first answer plainly disposes of all objections to the use of cross-examined depositions and former testimony. But the use of dying declarations and other exceptional statements can only be met by the further answers set forth in (2) and (3).

devoid of exceptions. The right to subject opposing testimony to cross-examination is the right to have the Hearsay rule enforced; for the Hearsay rule is the rule requiring cross-examination (*ante*, § 1362). Now the Hearsay rule is not a rule without exceptions; there never was a time when it was without exceptions. There were a number of well-established ones at the time of the earliest constitutions, and others might be expected to be developed in the future. The rule had always involved the idea of exceptions, and the constitution-makers indorsed the general principle merely as such. They did not care to enumerate exceptions; they merely named and described the principle sufficiently to indicate what was intended,—just as the brief constitutional sanction for trial by jury, though absolute in form, did not attempt to enumerate the excepted cases to which that form of trial was appropriate nor to describe the precise procedure involved in it,—just as the brief prohibition against “abridging the freedom of speech” was not intended to ignore the exception for defamatory statements,—just as the brief guarantee of the right to have counsel was not intended to prohibit a prosecution where no counsel could be found by the accused,—just as the prohibition against involuntary servitude does not abolish the father’s common-law right to the services of his child. The rule sanctioned by the Constitution is the Hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein.

(3) The net result, then, under the constitutional rule, is that, so far as testimony is required under the Hearsay rule to be taken infra-judicially, it shall be taken in a certain way, namely, subject to cross-examination,—not secretly or *ex parte* away from the accused. The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially—this depends on the law of evidence for the time being,—but only what mode of procedure shall be followed—*i. e.* a cross-examining procedure—in the case of such testimony as is required by the ordinary law of evidence to be given infra-judicially.

These answers are represented in the following passages:

1852, *Lumpkin, J.*, in *Campbell v. State*, 11 Ga. 374: “The admission of dying declarations in evidence was never supposed in England to violate the well-established principles of the common law that the witnesses against the accused should be examined in his presence. The two rules have co-existed there certainly since the trial of Ely in 1720, and are considered of equal authority. . . . The right of a party accused of a crime to meet the witnesses against him face to face is no new principle. It is coeval with the common law. Its recognition in the Constitution was intended for the twofold purposes of giving it prominence and permanence.”

1852, *Yerger, J.*, in *Lambeth v. State*, 23 Miss. 322, 357: “The admission of these [dying] declarations was established as a rule of evidence by the Courts of the common law, almost coeval with the foundations of that law itself. The general principle of the common law, with few exceptions, has always been that ‘hearsay evidence’ could not be admitted. But simultaneous with the adoption of this rule, an exception was made to it in the case of the ‘dying declarations’ of the deceased on the trial of a party charged with his murder. . . . When the bill of rights was adopted by the framers of our Constitution, they were aware of this rule of evidence of the common law. They found it

adopted into and forming a part of the jurisprudence of the country. The object they had in view, in adopting the clause referred to, was not to introduce a new or abolish an old rule of evidence. Their intention was not to declare or specify the nature, character, or degree of evidence which the Courts of the country should admit. Their aim was simply to re-assert a cherished principle of the common law which had sometimes been violated in the mother country in political prosecutions; leaving to the Courts to decide, according to the rules of law, upon the nature and kind of evidence which a witness, when confronted with the accused, might be permitted to give."

1856, *Bartley, C. J.*, in *Summons v. State*, 5 Oh. St. 341: "This right . . . has application to the personal presence of the witness on the trial and not to the subject matter or competency of the testimony to be given. . . . If the right secured by the bill of rights applied to the subject matter of the evidence, instead of the witness it would exclude in criminal cases all narration of statements or declarations by other persons heretofore received as competent evidence."

1857, *Leonard, J.*, in *State v. McO'Brien*, 24 Mo. 416, 435: "The purpose of the people was not, we think to introduce any new principle into the law of criminal procedure, but to secure those that already existed as part of the law of the land from future change by elevating them into constitutional law. . . . It was never supposed in England, at any time, that this privilege was violated by the admission of a dying declaration, or of the deposition of a deceased witness under proper circumstances; nor, indeed, by the reception of any other hearsay evidence established and recognized by law as an exception to the rule. . . . These exceptions to the general rule were never considered violations of the rule itself; they grew out of the necessity of the case, and are founded in practical wisdom; *Ryland, J.*: "The provision . . . does not make a new rule of evidence; it does not declare what may be or may not be proper and lawful evidence on the trial of a criminal prosecution; it relates to the position of the witness in lawfully detailing such facts as may be lawfully submitted to the jury in a criminal prosecution. . . . He must be in court. So must the accused. He shall not detail his knowledge of the facts in a dark or secret chamber, in the absence of the accused, to be afterwards read against the accused before the jury."*

1892, *Cassoday, J.*, in *Jackson v. State*, 81 Wis. 127, 131, 51 N. W. 89: "The right of the accused to meet the witnesses face to face was not granted, but secured, by the constitutional clauses mentioned. It is the right, therefore, as it existed at common law that was thus secured. That right was subject to certain exceptions."

It is important to appreciate this, the true interpretation of the constitutional provisions, because the erroneous answer has occasionally been advanced, the "witness" who is to be brought face to face is merely the person now reporting another's former testimony or dying declaration, and that thus the constitutional provision is satisfied by the production of that second person.⁴ The fallacy here is that the statements of the former witness or dying declarant are equally testimony, since they are offered as assertions offered to prove the truth of the fact asserted (*ante*, § 1361), and the question must therefore still be faced whether these testimonial statements are covered by the constitutional provision.⁵ That they are not so covered is a conclusion

* 1900, *State v. Moore*, 156 Mo. 204, 56 S. W. 883 ("The discussion in that case [*State v. McO'Brien*] . . . constitute a chapter in our judicial history which will forever command the admiration of the bench and bar of our State").

⁴ 1837, *Smith, J.*, in *Woodside v. State*, 2 How. Miss. 665 ("[In dying declarations] the murdered individual is not a witness. . . . His

declarations are regarded as facts or circumstances connected with the murder. . . . It is the individual who swears to the statements of the deceased that is the witness, not the deceased").

⁵ 1858, *Napton, J.*, in *State v. Houser*, 26 Mo. 437 ("To say that the witness who must meet the accused 'face to face' is he who re-

which can only be reached by the other and safer answers already noticed. It is well to have the sound theory fully understood and accepted, because, if the other should temporarily prevail, its overthrow and the exposure of its fallacies might be thought to involve the overthrow of the exceptions to the Hearsay rule. The revision and extension of the exceptions is gradually progressing, and it is well to appreciate fully that there is in this progress nothing inconsistent with constitutional sanctions. So bold are nowadays the attempts to wrest the Constitution in aid of crime, and so complaisant are the Courts in listening to fantastic and unfounded objections to evidence, that the permissibility of such changes should not be left in the slightest doubt.

§ 1398. *Same: State of the Law in the Various Jurisdictions.* (1) In dealing with *depositions* and *former testimony*, our Courts have almost unanimously received them in criminal prosecutions, as not being obnoxious to the constitutional provision. The leading opinions were rendered chiefly between 1840 and 1860. Up to 1886, apparently the only contrary precedent not overruled was an early Virginia case,¹ afterwards often cited, which professed to decide the question merely on English precedent, and not on constitutional grounds, and proceeded on the authority of an earlier English treatise,² which in turn went upon the authority of Fenwick's Trial, — a parliamentary decision precisely to the opposite effect,³ and misunderstood by the writer of the treatise. This early Virginia ruling, of so little weight in itself, served however to keep a doubt alive; and in the last generation a few ill-considered rulings in other jurisdictions have followed it.⁴ Apart from these rulings, it is well and properly settled that such evidence — assuming always that there has been a due cross-examination — is admissible for the State in a criminal prosecution, without infringing the Constitution.⁵

peats what the dying man has said, is a mere evasion. . . . [He is not] the witness whose testimony is to affect the life or liberty or property of the accused. It is the dying man who is speaking through him, whose evidence is to have weight and efficacy sufficient, it may be, to take away the prisoner's life. The living witness is but a conduit-pipe, — a mere organ, through whom this evidence is conveyed to the Court and jury".

¹ 1827, *Finn v. Com.*, 5 Rand. 708.

² Peake, *Evidence*, 60 (1801).

³ See the trial fully considered *ante*, § 1364.

⁴ *Ala.*: 1889, *Anderson v. State*, 89 Ala. 12, 7 So. 429 (here the statute expressly required consent of the defendant; but in this case the deposition had been taken by the defendant, and was not put in by him); *Ark.*: 1895, *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102, *semble* (depositions; but see the earlier cases in the next note); *Ill.*: 1887, *Tucker v. People*, 122 Ill. 583, 593, 13 N. E. 809 (said *obiter* that the use of depositions in a criminal case "would be a direct denial of the right to meet the witnesses face to face"; no authority cited; see the contrary later case in the next note); *Ia.*: 1871,

State v. Collins, 32 Ia. 36, 40 (see the contrary later case in the next note); *Kan.*: 1897, *State v. Tomblin*, 57 Kan. 841, 48 Pac. 144, *semble*; *Ky.*: 1886, *Kaelin v. Com.*, 84 Ky. 354, 368, 1 S. W. 594 (said *obiter*; no precedent cited; see *contra* the case cited in the next note); *Mont.*: 1893, *State v. Lee*, 13 Mont. 248, 33 Pac. 690 (but see the later case in the next note); *Okl.*: 1897, *Watkins v. U. S.*, 5 Okl. 729, 50 Pac. 88; *Tex.*: 1896, *Cline v. State*, 36 Tex. Cr. App. 320, 36 S. W. 1099 (apparently attempting, in a singularly unenlightened opinion, to overrule the long line of Texas precedents cited in the next note); *Va.*: 1827, *Finn v. Com.*, 5 Rand. 708; 1853, *Com. v. Brogy*, 10 Gratt. 722, 732 (*Finn's Case* approved; but nothing said of the constitutional question).

⁵ Besides the following cases, many others cited in the sections *post*, after § 1402, use such evidence in criminal cases without expressly passing upon the constitutional question: *Ala.*: 1875, *Horton v. State*, 18 Ala. 488, 495; *Ark.*: 1860, *Pope v. State*, 22 Ark. 372; 1881, *Green v. State*, 38 id. 304, 321; 1894, *Vaughan v. State*, 58 id. 353, 370, 24 S. W. 885; 1895, *McNamara v. State*, 60 id. 400, 30 S. W. 762;

(2) The same result has been reached with regard to the constitutionality of evidence admissible by way of exception to the Hearsay rule. The use of *dying declarations* has been often thus passed upon, and without any dissenting rulings.⁶ A like consequence must of course also follow for the other exceptions to the Hearsay rule, and has been expressly sanctioned for *official*

Cal.: 1872, *People v. Murphy*, 45 Cal. 137; 1884, *People v. Oiler*, 66 id. 101, 4 Pac. 1066; 1893, *People v. Douglass*, 100 id. 1, 5, 34 Pac. 490, *semble*; 1895, *People v. Chin Hane*, 108 id. 597, 41 id. 697; 1897, *People v. Sierp*, 116 id. 249, 251, 48 Pac. 88; (because the Constitution has no confrontation-clause); 1897, *People v. Cady*, 117 id. 10, 48 Pac. 908; for a peculiar statutory distinction in this State, see the end of this note; *Colo.*: 1895, *Ryan v. People*, 21 Colo. 119, 40 Pac. 775 (under Const. art. 2, sects. 16, 17); *Del.*: 1855, *State v. Oliver*, 2 Houst. 589; *Ga.*: 1856, *Williams v. State*, 19 Ga. 403; *Ida.*: 1890, *Terr. v. Evans*, 2 Ids. 627, 632; *Ill.*: 1870, *Barnett v. People*, 54 Ill. 325, 330 (former testimony); 1898, *Gillespie v. People*, 176 id. 238, 52 N. E. 250; *Ia.*: 1884, *State v. Fitzgerald*, 63 Ia. 272, 19 N. W. 202; *Ky.*: 1855, *Walston v. Con.*, 16 B. Mont. 35; *La.*: 1876, *State v. Harvey*, 23 La. An. 105; 1903, *State v. Kline*, 109 La. 622, 33 So. 618; 1903, *State v. Banks*, 111 id. 22, 35 So. 370; 1903, *State v. Wheat*, ib. 860, 35 So. 955 (the rule is not different under the Constitution of 1898); *Mass.*: 1838, *Com. v. Richards*, 18 Pick. 437; *Mich.*: 1895, *People v. Case*, 105 Mich. 92, 62 N. W. 1017; *Minn.*: 1895, *State v. George*, 60 Minn. 503, 63 N. W. 100; *Miss.*: 1837, *Woodsides v. State*, 2 How. 665; 1886, *Owens v. State*, 63 Miss. 450, 452 (former testimony; probably overruling *Dominges v. State*, 7 Sm. & M. 475); 1899, *Lipscomb v. State*, 76 id. 223, 25 So. 158; 1902, *Dikes v. State*, 80 id. 353, 31 So. 744, *semble*; *Mo.*: 1857, *State v. McO'Brien*, 24 Mo. 416 (see quotation *supra*); 1858, *State v. Houser*, 26 id. 433; *Mont.*: 1895, *State v. Byers*, 16 Mont. 565, 41 Pac. 708; *Nev.*: 1877, *State v. Johnson*, 12 Nev. 123; *N. Y.*: 1876, *Howard v. Moot*, 64 N. Y. 262, 268 (St. 1821, c. 19, relating to the perpetuation of testimony, without cross-examination, held constitutional); 1902, *People v. Elliott*, 172 id. 146, 64 N. E. 837; *Oh.*: 1853, *Summons v. State*, 5 Oh. St. 341; 1857, *Robbins v. State*, 8 id. 163; *Pa.*: 1873, *Br. v. Com.*, 73 Pa. 321, 325; 1892, *Com. v. Cleary*, 148 id. 26, 38, 23 Atl. 1110; *Tenn.*: 1838, *Anthony v. State*, Meigs 265; 1850, *Kendrick v. State*, 10 Humph. 484 (overruling, in effect, *State v. Atkins*, 1 Overt. 229); 1885, *Baxter v. State*, 15 Lea 660; 1871, *Greenwood v. State*, 35 Tex. 587, 591; *Tex.*: 1876, *Johnson v. State*, 1 Tex. App. 333, 338, 344 ("the constitutional objection . . . is now no longer an open question"); 1876, *Black v. State*, ib. 368, 383; 1879, *Sullivan v. State*, 6 id. 319, 339; 1880, *Dunlap v. State*, 9 id. 179, 188; 1897, *Steagald v. State*, 22 id. 464, 490; 1888, *Gilbreath v. State*, 26 id. 315, 318; *U. S.*: 1851, *U. S. v. Macomb*, 5 McLean 286; 1895, *Mattox*

v. U. S., 156 U. S. 237, 240, 15 Strep. 337; 1889, *Brown, J., Robertson v. Baldwin*, 165 id. 27, 17 Sup. 326; *Utah*: 1876, *U. S. v. Reynolds*, 1 Utah 322; *Wash.*: 1897, *State v. Cushman*, 17 Wash. 544, 50 Pac. 412; *W. Va.*: 1899, *Carrico v. R. Co.*, 39 W. Va. 86, 89, 19 S. 571 (left undecided); *Wis.*: 1892, *Jackson v. State*, 81 Wis. 127, 130, 51 N. W. 89.

In *California* there is no limitation of sort, supposed to rest upon P. C. § 686 (quoted *ante*, § 1388) and apparently excluding testimony at a former trial, while admitting testimony given before a committing magistrate, because the statute in terms authorizes the latter only. 1881 *People v. Chung Ah Clue*, 57 Cal. 567; 1881, *People v. Quire*, 59 id. 343; 1893, *People v. Gardner*, 98 id. 127, 131, 32 Pac. 880; 1894, *People v. Gordon*, 99 id. 227, 233, 33 Pac. 907; 1898, *People v. Brennan*, 121 id. 495, 53 Pac. 1098 (charges of rape, extortion, etc.; testimony at the preliminary examination excluded; reason obscure); 1901, *People v. Bird*, 132 id. 261, 35 Pac. 259 (testimony at a former trial is inadmissible for the prosecution, by reason of the omission to enumerate such a case in P. C. § 686, but the accused may use such testimony).

In *U. S. v. Zueker*, 163 U. S. 710, 16 Sup. Ct. 641, the Court merely decided that a suit by the Government for duties payable (the plaintiff not having chosen to prosecute criminally for the evasion of the tax) was not a "criminal prosecution" under U. S. Const. Am. 6, and hence the question whether a deposition was properly taken in France was not affected by that clause.

• 1858, *People v. Glenn*, 10 Cal. 36; 1858, *Campbell v. State*, 11 Ga. 374 (see quotation *supra*); 1893, *Govt. v. Herring*, 9 Haw. 18; 189; 1858, *State v. Nash*, 7 Ia. 377; 1858, *Walston v. Com.*, 16 B. Mour. 34; 1858, *State v. Brunotto*, 13 La. An. 45; 1853, *Com. v. Carey*, 12 Cush. 246; 1852, *Lambeth v. State*, 23 Miss. 322, 357 (see quotation *ante*, § 1397); 1898, *People v. Corey*, 157 N. Y. 1024, 51 N. E. 1024; 1850, *State v. Tilghman*, 11 Ired. 55; 1890, *State v. Kindle*, 47 Oh. St. 361, 24 N. E. 485; 1902, *State v. Wing*, 66 id. 407, 64 N. E. 514 (for the exceptions in general); 1886, *State v. Saunders*, 14 Or. 300, 12 Pac. 441; 1888, *State v. Murphy*, 16 R. I. 533; 1900, *State v. Jeswell*, 22 id. 136, 46 Atl. 405; 1857, *Burr v. State*, 18 Tex. 731; 1876, *Black v. State*, Tex. App. 368, 384; 1895, *Mattox v. U. S.*, 156 U. S. 237, 243, 15 Sup. 337; 1897, *Brown, J. in Robertson v. Baldwin*, 165 id. 275, 17 Sup. 326; 1896, *State v. Baldwin*, 15 Wash. 15, 49 Pac. 650; 1870, *Miller v. State*, 25 Wis. 386; 1877, *State v. Dicklason*, 41 id. 299, 308; 1899, *Jackson v. State*, 81 id. 130, 137, 51 N. W. 89.

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statements,⁷ and for reputation.⁸ The anomalous recent contrary rulings noticed under the former head and in the preceding paragraph above are interesting instances of that finical wisdom which looks back over a century of unquestioned professional practice and imagines sophomorical quiddities which the fathers of the profession, living at the Constitution's birth, never dreamed of.

(3) The constitutional provision, so far as it may apply in a given case for lack of cross-examination, may of course be waived by the accused.⁹

§ 1399. **Confrontation, as requiring the Tribunal's or the Defendant's Sight of the Witness.** So far, then, as the essential purpose of confrontation is concerned, it is satisfied if the opponent has had the benefit of full cross-examination. So far, furthermore, as a secondary and dispensable element is concerned, the thing required is the presence of the witness before the tribunal so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom. In asking whether these two requirements are fulfilled, the inquiry, for the first element, is determined by the rules already examined (*ante*, §§ 1373-1393). For the second element, there is little room for dispute in the application of the principle; it is satisfied if the witness, throughout the material part of his testimony, is *before the tribunal* where his demeanor can be adequately observed. It is possible to quibble over the precise fulfilment of this requisite in a given instance;¹ but it will ordinarily

⁷ 1887, *Tucker v. People*, 122 Ill. 583, 593, 13 N. E. 809 (certificate of marriage; the constitutional provision "has no reference to record evidence which may during the progress of a criminal trial become necessary to establish some material fact"); 1886, *State v. Matlock*, 70 Ia. 229, 30 N. W. 495 (county marriage records, not excluded by the Constitution); 1888, *State v. Smith*, 74 id. 580, 583, 38 N. W. 492 (approving *State v. Matlock*); 1894, *State v. Behrman*, 114 N. C. 797, 804, 19 S. E. 220 (the use of official records does not violate the constitutional prohibition; here, a foreign marriage certificate was otherwise objectionable as unauthenticated); 1869, *Reeves v. State*, 7 Cohlw. 96, 101, 108 (official paper on file; McClain, J., diss.; but the majority take the untenable stand that "the paper is the witness," and that production of a certified copy, where by law the original need not be produced, is in effect a confrontation). *Contra*: 1868, *State v. Reidel*, 26 Ia. 430, 436 (notary's certificate of protest, not receivable in a criminal case to show no funds); 1887, *People v. Foster*, 64 Mich. 717, 720, 31 N. W. 596 (official signal-service record of weather; entrant required to be produced in a criminal case, upon the present principle); 1903, *People v. Goodrode*, — id. —, 94 N. W. 14 (clerk's certificate of no record of marriage, excluded, under the Constitution; distinguishing *People v. Jones, supra*).

The following seem to belong here: Ky. Stats. 1899, § 4643 (official stenographic report not usable in criminal case except by defendant's consent); 1899, *Cutler v. Terr.*, 8 Okl. 101, 56 Pac. 861 (statutory permission for use

of official reporter's stenographic notes does not allow them to be used in a criminal case except by calling the reporter).

⁸ 1888, *State v. Waldron*, 16 R. I. 192, 14 Atl. 847.

⁹ 1870, *State v. Polson*, 29 Ia. 133, 135; 1884, *State v. Fooks*, 65 id. 452, 21 N. W. 561; 1898, *State v. Olds*, 106 id. 110, 76 N. W. 644; 1881, *State v. McNeil*, 33 La. An. 1332, 1335; 1896, *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783 (*ex parte* examination of bastardy-prosecutrix; failure to object is a waiver); *State v. Rogers*, 119 id. 793, 26 S. E. 142 (same). Compare § 1371, *ante*.

The testimony of an *absent witness*, received by consent of the prosecution to avoid a continuance, is therefore not within the prohibition: 1900, *Ruiz v. Terr.*, 10 N. M. 120, 61 Pac. 126 (but here it was put upon the ground that the witness' agreed testimony turned out to be favorable to the defendant).

¹ The following are instances of amusing legal pedantry: 1896, *Bennett v. State*, 62 Ark. 516, 36 S. W. 947 (holding erroneous the action of the trial Court in proceeding with the examination of witnesses during the accused's absence in the water-closet); 1899, *State v. Mannion*, 19 Utah 505, 57 Pac. 543 (a witness for the State claiming to be afraid of the defendant, the Court placed him back in the room, out of sight and hearing of the witness; held improper, on the absurd ground that the dictionaries define "confront" as meaning "to bring face to face," and that the constitutional provision was thus violated; *Bartch, C. J.*, dissenting as to the reasoning). Compare the cases cited *ante*, § 1393.

be easy to determine whether in substance the desired object of the law has been obtained.²

2. **Circumstances of Necessity making the Witness' Personal Presence Unavailable.**

§ 1401. **Preliminary Distinctions; (a) Deposition and Testimony; (b) Civil and Criminal Cases; (c) Taking and Using a Deposition.** Before examining the circumstances of that necessity which dispenses with the witness' personal presence for testifying (*ante*, § 1396), it is desirable to notice certain distinctions which here play a more or less important part.

(a) There is on principle no distinction between a *deposition* and *former testimony* as to the conditions upon which either may be used at the trial. So far as the circumstances make it impossible to obtain the witness' personal presence for testifying, by reason of his death, illness, absence from the jurisdiction, and the like, the impossibility exists in precisely the same degree for a deposition and for former testimony, — supposing, of course, that in each case there has been cross-examination. There is on principle not the slightest ground for failing to recognize all the dispensing circumstances as equally sufficient for both kinds of testimony. Nevertheless, there is in most jurisdictions more or less inconsistency on this subject; and it can never be safely assumed that a Court will treat both kinds in the same way. There are usually independent lines of precedents for the two kinds of testimony. This is due, of course, to the peculiar inability of the common-law Courts to authorize depositions (*ante*, § 1376), in consequence of which the treatment of depositions has been handled apart by itself as a special legislative problem. The statutes, in granting the power to order depositions, have usually specified the conditions of necessity allowing their admission, and this statutory specification has rarely been sufficiently thoughtful of all the possible kinds of necessity; the result is an unfortunate patchwork of statutes and decisions. Presumably the statutory enumeration will not be treated as intended to exclude other causes unenumerated; this ought to be the construction.

As between depositions *de bene esse* and *in perpetuam memoriam*, there are also to be found differences uncalled for on principle. The statutes authorizing depositions of the latter sort have seldom enumerated the conditions of use, and the judicial precedents are rare. The precedents and statutes will therefore here be distinguished according as they apply to former testimony and to depositions *de bene esse* and *in perpetuam memoriam*.

(b) There is on principle no distinction, as to the conditions of necessity

² 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1341 (Stafford: "I beg your lordships that he may look me in the face"; the witness was turned to the Court; "I desire the letter of the law, which says my accuser shall come face to face"; L. H. S. Finch: "My lord, you do see the witness; that is enough for face to face"); 1886, *Skaggs v. State*, 108 Ind. 57, 8 N. E. 696

(the prosecutrix, in a rape case, was deaf and dumb, and being shocked at a question put to her, ran out into an adjoining room; the interpreter followed her, obtained an answer, and returned with her, in about one minute, and then reported the answer to the Court; held, that no substantial right was prejudiced).

for using depositions and former testimony, between *civil* and *criminal cases*. If absence from the jurisdiction (for example) is a necessity in the one class of cases, it is equally a necessity in the other. The needs of public justice are as strenuous as those of private litigation. It is even more necessary that an offender against the community be duly punished than that a debtor discharge his private obligation. Our traditional tenderness for accused persons explains to some extent the prevalence of this distinction in some jurisdictions. But there are also two legal principles that chiefly account for the distinction where it is found: (1) The constitutional provision requiring the confrontation of witnesses with the accused is regarded in a few jurisdictions (*ante*, § 1398) as preventing any use, by the prosecution in criminal cases, of depositions and former testimony; (2) the statutory authorization for taking depositions has in some jurisdictions culpably failed to give that power on behalf of the prosecution in criminal cases; accordingly, if such a deposition is there offered, it is rejected for the simple reason that there never was authority in any officer to take it; the deposition is legally non-existent.¹

(c) There is a distinction to be observed between the statutory conditions upon which an *order to take* a deposition may be granted and those upon which it may be *used when taken*. The statutes empowering Courts to order the taking of depositions usually specified also the cases in which such an order could issue, — the witness' illness, or impending departure, or the like. Now there may be, by the time of the trial, no actual necessity for using a deposition taken merely in anticipation of a possible necessity; hence, the conditions of necessity for using the deposition are in law independent of the conditions of policy on which the order for taking may have issued. The order for taking concerns a preliminary stage of the trial, the machinery of preparing evidence; they are therefore without the present purview. Until the deposition is offered on the trial, the question of admissibility is not raised. The statutes prescribing the mode of taking prescribe also usually the conditions of admissibility; but they sometimes make no provisions of the latter sort, and then resort may have to be had to the provisions of the former sort to ascertain the legislative intention.

§ 1402. **General Principle of Necessity or Unavailability.** The principle upon which depositions and former testimony should be resorted to is the simple principle of necessity, — *i. e.* the absence of any other means of utilizing the witness' knowledge. If his testimony given anew in court cannot be had, it will be lost entirely for the purposes of doing justice if it is not received in the form in which it survives and can be had. The only inquiry, then, need be: Is his testimony in court unavailable? We may of course distinguish further between testimony unavailable by any means whatever and testimony unavailable without serious inconvenience. The common-law rulings certainly stopped at unavailability of the former sort; conditions of the latter sort rest wholly on statutory sanction. But the common-law principle

¹ The cases depending upon this reason are placed *post*, § 1418.

clearly went in theory as far as the former line, *i. e.* there are indications of a principle broad enough to sanction any case in which the present testimony is in fact *unavailable by any means whatever*. Such a broad principle was never fully and consistently enforced in practice; but it clearly existed *in gremio legis*:

Ante 1726, *Gilbert*, C. B., *Evidence*, 61: "In this case the deposition is the best that can possibly be had, and that answers what the law requires."

1812, *Elton*, L. C., in *Andrews v. Palmer*, 1 Ves. & B. 22: "The depositions, if published, could not be read at law unless it was proved to the satisfaction of the Court that the witness could not be examined at the trial."

1835, *Johnson*, J., in *State v. Hill*, 2 Hill S. C. 609: "What a deceased witness, or one who from other causes has become incapacitated to give evidence, has sworn upon a former trial, is admitted on the principle that it is the best of which the case admits."

1808, *Green*, J., in *Wells v. Ins. Co.*, 187 Pa. 166, 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 is reasonable and just."

1842, Professor *Simon Greenleaf*, *Evidence*, § 168: "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 from 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 by the finger of the law."

It remains to examine the precedents dealing with specific instances of unavailability. Some of these rulings have been rendered under the terms of express statutes (*post*, §§ 1411-1413); but it is not always practicable to distinguish whether a statute affected the ruling. The possible cases may be grouped under three heads, according as the witness (*a*) is not available even for the purpose of serving legal process to attend, or (*b*) is available for the purpose of process, but not of actual attendance, or (*c*) is available for the purpose of process and attendance, but not of actually testifying.

§ 1403. **Specific Cases of Unavailability; (1) Death.** This has always been the typical and acknowledged case of unavailability, and is equally conceded to suffice for depositions and for former testimony.¹ The jurisdictions in which, by anomaly, it is not deemed sufficient are those (*post*, § 1418) in which, for constitutional or other reasons, no use at all is permitted, in criminal cases, of either depositions or former testimony.

§ 1404. **Same: (2) Absence from Jurisdiction.** Where the witness is out of the jurisdiction, it is impossible to compel his attendance, because the process of the trial Court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless.¹ Three conditions, however,

¹ For early illustrations, see the history of the Hearsay rule, *ante*, § 1364. For others, see *ante*, § 1398. For the use of reputation to evidence the witness' death, see *post*, § 1626.

¹ 1705, Lord Holt, C. J., in *Altham v. Anglesea*, Gilb. Eq. Rep. 18.

have been by some Courts suggested as essential in order that the present testimony may be regarded as unavailable in the fullest sense :

(a) The absence, it is sometimes said, must be by way of *residence*, not merely of temporary sojourn, because otherwise the trial could be postponed until his return.² This, however, seems too strict a rule ; by his absence he is at the time actually unavailable, no matter when he is to return ; and, if the witness is not of such importance as to require a postponement until his return, still more if the opponent does not desire or consent to a postponement, there is no reason for distinguishing between temporary and permanent absence.

(b) It is sometimes said that an effort should have been made to *persuade the witness' voluntary attendance* ;³ and no doubt the trial Court's discretion might occasionally make such a requirement ; but it is unnecessary to prescribe this as a general rule.

(c) It has also been suggested⁴ that an effort should have been made to obtain the *witness' deposition by commission* ; but this is futile, for a deposition is no better than his former testimony.

This ground of admission, then (absence from the jurisdiction of trial), is generally accepted for *testimony at a former trial* ;⁵ a few Courts, following

² See the Alabama cases, *infra*.

For the person's declarations as *evidence of intent not to return*, see post, § 1725.

³ 1877, Rothrock, C. J., in *Shisser v. Burlington*, 47 la. 302.

⁴ *Shisser v. Burlington*, *supra* ; 1870, Berney v. Mitchell, 34 N. J. L. 341.

⁵ *Eng.* : 1737, *Fry v. Wood*, 1 Atk. 445 ; *Can.* : 1852, *Roe v. Jones*, 3 Low. Can. 58 ; 1859, *Sutor v. McLean*, 18 U. C. Q. B. 490, 492 (re-entrant out of the jurisdiction, admitted) ; 1866, *Abel v. Light*, 3 All. N. Br. 423, 427 ; *Ala.* : 1851, *Long v. Davis*, 18 Ala. 803 ("permanent absence") ; 1860, *Mims v. Sturtevant* 38 id. 64 ; 1883, *Lowe v. State*, 88 id. 47, 50, 5 So. 435 (absence for an indefinite time, sufficient, even in criminal case) ; 1888, *South v. State*, ib. 617, 620, 6 So. 52 (permanent absence, sufficient) ; 1888, *Perry v. State*, 87 id. 30, 33, 6 So. 425 (permanent or indefinite absence, sufficient) ; 1890, *Pruitt v. State*, 92 id. 41, 9 So. 406 (absence "for such an indefinite time that his return is merely contingent or conjectural," sufficient) ; 1891, *Lucas v. State*, 96 id. 51, 11 So. 216 (preceding definition held not here satisfied on the facts) ; 1893, *Lowery v. State*, 98 id. 45, 50, 13 So. 8 ; 1894, *Thompson v. State*, 106 id. 67, 75, 17 So. 512 (same) ; 1894, *Burton v. State*, 107 id. 68, 73, 18 So. 240 (indefinite absence, sufficient) ; 1895, *Thompson v. State*, 106 id. 67, 17 So. 512 ; ("left the State permanently ; or for such an indefinite time that his return is contingent and uncertain") ; 1897, *McMinn v. State*, 113 id. 86, 21 So. 418 ; 1897, *Mitchell v. State*, 114 id. 1, 22 So. 71 ; *Burton v. State*, 115 id. 1, 22 So. 585 ; 1898, *Dennis v. State*, 118 id. 72, 23 So. 1002 ; 1900, *Lett v. State*, 124 id. 64, 27 So. 256 (non-residence in jurisdiction suffices) ; 1900, *Birmingham N. Bank v. Bradley*, — id.

—, 30 So. 546 (former testimony of one who had "removed from the State and was at the time without the jurisdiction," admitted) ; 1902, *Jacobi v. State*, 133 id. 1, 32 So. 158 (removal from the State "permanently or for an indefinite time," suffices) ; 1902, *Jacobi v. Alabama*, 187 U. S. 133, 23 Sup. 48 (by the law of Alabama, the testimony is receivable if the witness is "beyond the jurisdiction of the Court, whether he has removed from the State permanently or for an indefinite time") ; 1903, *Southern Car & F. Co. v. Jennings*, 137 Ala. 247, 34 So. 1002 (witness "staying indefinitely at M. in this State ;" not sufficient) ; *Ark.* : 1874, *Hurley v. State*, 29 Ark. 23 ; 1883, *Dolan v. State*, 40 id. 461 ; 1884, *Vaughan v. State*, 58 id. 353, 370, 24 S. W. 885 ; 1900, *Wilkins v. State*, 68 id. 441, 60 S. W. 30 ; *Cal.* : 1873, *People v. Devine*, 46 Cal. 48 ; 1894, *Benson v. Shotwell*, 103 id. 163, 168, 37 Pac. 147 ; *Ga.* : 1869, *Adair v. Adair*, 39 Ga. 75, 77 ; 1878, *Eagle & P. M. Co. v. Welch*, 61 id. 445 ; 1893, *Pittman v. State*, 92 id. 480, 17 S. E. 856 ; 1893, *Atlanta & C. A. R. Co. v. Gravitt*, 93 id. 369, 371, 20 S. E. 550 (whether a witness is "inaccessible" under Code § 3782 is for the trial judge's determination) ; 1900, *Owen v. Palmour*, 111 id. 385, 36 S. E. 989 ; *la.* : 1877, *Shisser v. Burlington*, 47 la. 302 (provided an effort has been made to secure the witness' voluntary attendance or his deposition) ; 1890, *Bunk v. Gifford*, 79 id. 311, 44 N. W. 558 (residence in another county, sufficient, by statute) ; *Kan.* : 1902, *Atchison T. & S. F. R. Co. v. Osborn*, 64 Kan. 187, 67 Pac. 547 ; *Ky.* : 1895, *Reynolds v. Powers*, 96 Ky. 431, 29 S. W. 299 ; 1896, *Louisville Water Co. v. Upton*, — id. —, 36 S. W. 520 ; *La.* : 1882, *State v. Douglass*, 34 La. An. 523, 524 ; 1882, *State v. Jordan*, ib. 1219 ; 1898, *State v. Madison*, 50 id. 679, 23

an early New York ruling, refuse to recognize it at all;⁶ a few others refuse to recognize it in criminal cases particularly.⁷ For *depositions* this cause was at common law established as sufficient,⁸ subject in occasional rulings

So. 622 (residence out of the State, sufficient); 1901, *State v. Banks*, 108 La. 480, 31 So. 53 (permanent absence is necessary); 1903, *State v. Kilns*, 109 id. 603, 33 So. 618 (absence from the State, with no reasonable probability of a return, held sufficient); 1903, *State v. Banks*, 111 id. 22, 35 So. 370 (permanently absent from the State; testimony at a preliminary hearing admitted; the prior ruling, *supra*, was made in construing a special statute, No. 123 of 1898, relating to certain New Orleans criminal cases); *Md.*: 1829, *Rogers v. Raborg*, 2 G. & J. 60; *Mich.*: 1878, *Howard v. Patrick*, 38 Mich. 799; 1899, *Wheeler v. Jennison*, 120 id. 422, 79 N. W. 643; *Miss.*: 1892, *Minneapolis M. Co. v. R. Co.*, 51 Minn. 304, 315, 53 N. W. 639; (not necessary to try first for his deposition); 1893, *King v. McCarthy*, 51 id. 190, 195, 55 N. W. 960 ("not likely to return within the jurisdiction," sufficient); 1908, *Hill v. Winston*, 73 id. 80, 75 N. W. 1050 (residence in another State, sufficient); *Mont.*: 1903, *Raynolds v. Fitzpatrick*, — Mont. —, 72 Pac. 510 (absence not sufficiently shown, on the facts); *Nebr.*: 1893, *Omaha v. Jensen*, 35 Nebr. 63, 52 N. W. 833; 1894, *Omaha S. R. Co. v. Elkins*, 39 id. 480, 53 N. W. 164 (mere absence sufficient); 1896, *Love v. Vaughn*, 43 id. 451, 67 N. W. 464; 1897, *Ord. v. Naab*, 50 id. 335, 69 N. W. 964; 1899, *Wittenberg v. Molyneux*, 59 id. 203, 80 N. W. 824, *semble*; *Or.*: 1900, *Wheeler v. McFerron*, 38 Or. 103, 62 Pac. 1015; *Pa.*: 1818, *Magill v. Kuffman*, 4 S. & R. 317; 1824, *Forney v. Haddaghar*, 11 id. 203; 1898, *Giberson v. Mills Co.*, 187 Pa. 513, 41 Atl. 525 (sufficient; nor need efforts be made to secure his attendance); *Tex.*: 1879, *Sullivan v. State*, 6 Tex. App. 319, 33; 1847, *Steaguid v. State*, 22 id. 464, 483, 3 S. W. 771; 1837, *Conner v. State*, 23 id. 378, 394, 5 S. W. 189; 1838, *Gilbreath v. State*, 26 id. 315, 318, 9 S. W. 619; *U. S.*: 1897, *Chicago St. P. M. & O. R. Co. v. Myers*, 25 C. C. A. 486, 80 Fed. 361 (if his personal attendance cannot be secured); *Vt.*: 1902, *McJovern v. Smith*, — Vt. —, 53 Atl. 323 (nor is it necessary to try to procure his attendance or to search for him).

⁶ 1826, *Wilbur v. Seldan*, 6 Cow. 164; 1834, *Crary v. Sprague*, 12 Wend. 45; 1871, *Berney v. Mitchell*, 31 N. J. L. 341; 1876, *Collins v. Com.*, 12 Bush 273. In *Cassady v. Trustees*, 105 Ill. 567 (1893), the testimony was excluded on the facts of the case.

⁷ 1896, *Owens v. State*, 63 Miss. 450, 452; 1858, *State v. Houser*, 26 Mo. 439; 1843, *People v. Newman*, 5 Hill N. Y. 296; 1827, *Finn v. Com.*, 5 Rand. 703; 1853, *Com. v. Brogy*, 10 Gratt. 722, 732 (not sufficient in a criminal case, even for defendant); 1891, *U. S. v. Angell*, 11 Fed. 43. In Alabama, the rulings in *Dupree v. State*, 33 Ala. 383, and *Harris v. State*, 73 id. 497, are superseded by the later ones in note 5, *supra*.

⁸ *Eng.*: 1688, *Thatcher v. Waller*, T. Jon. 53 (deposition before coroner of one beyond sea admitted; it was "all one as if he were dead" for earlier English rulings, see *ante*, § 1364); 1705, *Aitham v. Angiesca*, Glib. Eq. Rep. 11; 11 Mod. 212; 1729, *Patterson v. St. Clair*, Barnard. K. B. 268; 1744, *Ward v. Syke*, Ridgw. t. Harw. 193; 1772, *Birt v. White*, Dick. 473; 1806, *Fonsick v. Agar*, 6 Esp. (deposition of one already on board ship, admitted); 1808, *Falconer v. Hanson*, 1 Cam. 172; 1841, *Robinson v. Markis*, 2 Moo. & R. 376 (mere inability to find does not suffice to establish absence); 1849, *Varicau v. French*, C. & K. 1008 (absence in Australia, held sufficient); 1856, *R. v. Austen*, 7 Cox 653 (mere absence in the witness' own country without a showing of inability to secure his presence by request, not sufficient); 1873, *Ex parte Huguet*, 12 id. 551 (a French witness refused to stay, and returning to France; admissible per *Martin*, B., and, *semble*, *Pollock*, B.; *semble contra*, *Kelly*, C. B.); *Can.*: 1900, *R. v. Foythe*, 4 N. W. Terr. 398 (the evidence of absence must be such as reasonably to satisfy the trial judge); *Ala.*: 1839, *McCutchen v. McCutchen*, 9 Port. 650, 654 (that the witness had "started to move to the State of Arkansas with his family," though he expected to stop the way in another county with relatives, sufficient); 1851, *Long v. Davis*, 18 Ala. 801, 8 (permanent absence, sufficient; no effort to obtain him necessary); *Conn.*: 1854, *Larkin Avery*, 23 Conn. 304, 318 (absence on a journey other than the one contemplated at the taking of the deposition, sufficient; *semble*, fact of absence is determinable by trial Court); *Ida.*: 1890, *Terr. v. Evans*, 2 Ida. 627, 632, 23 Pac. 232 (overruled by *State v. Potter*, — id. —, 57 Pac. 431, cited *post*, § 1418); *Ind.*: 1899, *Missouri K. & T. R. Co. v. Elliott*, Ind. T. 407, 51 S. W. 1038 (deposition of railroad employee, residing out of the jurisdiction, but frequently coming within it during their employment, admitted); *Ill.*: 1885, *Gardner v. Meeker*, 169 Ill. 40, 48 N. E. 3 ("non-resident" includes one residing in another county but within the State, and his deposition on oral interrogatories may be received); *Mass.*: 1850, *Kinney v. Berran*, 6 Cush. 394 (mere inability to find is not sufficient to prove absence); *N. C.*: 1897, *Cunningham v. Cunningham*, 121 N. C. 413, 28 S. E. 525 (evidence of absence held sufficient, the trial Court having discretion); *Pu.*: 1819, *Carpenter v. Groff*, 5 & R. 165; *Vt.*: 1839, *Johnson v. Sargent*, Vt. 195; *W. Va.*: 1897, *Hoopes v. DeVaughn*, 43 W. Va. 447, 27 S. E. 251 (non-resident may appear from the deposition itself as well as from the statutory affidavit at the time of application). *Contra*: 1897, *State v. Tomblin*, 57 Kan. 841, 48 Pac. 144 (and in spite of the fact that the defendant himself had caused

others refuse cause was rulings to

the distinctions above noted; and by statute it has been almost universally provided for.⁹

§ 1405. Same: (3) Disappearance; Inability to Find; (4) Opponent's Procurement. (3) If the witness has disappeared from observation, he is in effect unavailable for the purpose of compelling his attendance. Such a disappearance is shown by the party's inability to find him after diligent search. The only objection to recognizing this ground of unavailability is the possibility of collusion between party and witness: but supposing the Court to be satisfied that there has been no collusion and that the search has been bona fide, this objection loses all its force. For former testimony¹

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Eq. Rep. 18;
St. Clair, 1
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v. Sargent, 42
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taking; this is indeed using the law to shield crime); 1893, State v. Hunsason, 5 Wash. 499, 504, 32 Pac. 111 (not sufficient in criminal cases for either party).

The rule has been held to be the same for the deposition of the party himself, though this seems erroneous; 1896, Standard L. & A. Ins. Co. v. Tinney, 73 Miss. 726, 19 So. 662 (party out of State; admissible). Compare § 1416, post.

⁹ The statutes are collected in § 1411, post. The statute's omission should not injure the established common-law principle. But if the statute has not even given the power to order a deposition taken out of the State it would seem to be inadmissible because legs non-existent; 1886, Kuelin v. Com., 84 351, 397, 1 S. W. 594 (statutory limits ad exclusive; therefore the accused cannot take the deposition of a person abroad).

¹ Eng.: 1623, Anon., Goddolt 326: ("If a party cannot find a witness, then he is as if were dead unto him," and his former testimony may be read, "so as the party make oath that he did his endeavor to find his witness, but that he could not see him nor hear of him"); 1685, Oates' Trial, 10 How. St. Tr. 1227, 1285 (Oates: "My lord, I will then produce what he swore at another trial;" L. C. J. Jeffreys: "Why, where is he? Is he dead?"; Oates: "My lord, it has cost a great deal of money to search him out; but I cannot anywhere meet with him, and that makes my case so much worse that I cannot, when I have done all that man can do to get my witnesses together. I sent in the depth of winter for him, when I thought my trial would have come on before; and I could never hear of him;" L. C. J.: "Look you, though in strictness, unless the party be dead, we do not use to admit of any such evidence, yet if you can prove anything he swore at any other trial, we will induce you so far"); 1726, Gilbert, Evidence, 60; Ala.: 1895, Thompson v. State, 106 Ala. 67, 17 So. 512; 1897, Mitchell v. State, 114 id. 1, 22 So. 71 ("after diligent search is not found within the jurisdiction of the Court," sufficient; mere inability to find at the usual residence or in the county, not sufficient); 1902, Jacobi v. State, 133 id. 1, 32 So. 158 (a "fruitless search for him in every county in which there is any apparent likelihood of his being found," may suffice, as amounting to proof

of removal from the jurisdiction; requirements of such a search considered); Ark.: 1878, Shackelford v. State, 33 Ark. 539; 1886, Swoel v. State, 47 id. 183, 1 S. W. 68; 1894, Vaughan v. State, 58 id. 353, 370, 24 S. W. 885 ("upon diligent inquiry cannot be found"; the trial Court's discretion to control); 1895, McNamara v. State, 60 id. 400, 30 S. W. 762; 1896, Harwood v. State, 63 id. 130, 37 S. W. 301; Conn.: 1902, Mechanics' Bank v. Woodward, 74 Conn. 698, 51 Atl. 1084 (former testimony of a witness "who has since gone to parts unknown," admitted, under Pub. Acts 1895, § 503, c. 116); Ga.: 1880, Gunn v. Wales, 65 Ga. 537, 541 (after which, Williams v. State, 19 id. 403, is probably of no consequence); 1890, Atlanta & S. R. Co. v. Rondall, 85 id. 302, 314, 11 S. E. 706; Ia.: 1896, Spanning v. R. Co., 93 Ia. 205, 67 N. W. 227 (information given to an officer serving a subpoena, as indicating the sufficiency of search on which to base a return of not found); La.: 1876, State v. Harvey, 28 La. An. 105; 1884, State v. Coudier, 36 id. 291; 1894, State v. White, 46 id. 1273, 1276, 15 So. 623; 1898, State v. Timberlake, 50 id. 308, 23 So. 276; Miss.: 1898, Hill v. Winton, 73 Miss. 80, 75 N. W. 1020 (person's declarations as to residence, and sheriff's return of not found, received); Pa.: 1895, Seitz v. Seitz, 169 Pa. 510, 32 Atl. 594, scmbic; Tex.: 1879, Sullivan v. State, 6 Tex. App. 319, 342; U. S.: 1890, Yates v. U. S., 178 U. S. 458, 20 Sup. 993 (testimony of one who had escaped through the negligence of the prosecuting officers, excluded); Utah: 1902, State v. King, 24 Utah 482, 68 Pac. 413 (under Rev. St. 1898, § 4513). Contra: 1837, R. v. Hagan, 8 C. & P. 169; 1834, Crary v. Sprague, 12 Wend. 45 (Nelson, J.: "Even diligent inquiry, without being able to find the witness, is not sufficient, though it is obvious there can be scarcely a shade of difference between the two cases, death and absence, either in principle or hardship"); 1902, State v. Wing, 66 Oh. 407, 64 N. E. 514 (prior testimony of a witness not found after diligent search, and believed to be without the State, held not admissible in a criminal case, unless the absence was due to the accused's connivance).

For the admissibility of statements made to the searchers, as evidence of inability to find, see post, § 1789; and compare the rulings for lost documents, ante, § 1196.

this cause of unavailability has long been recognized. It ought equally to suffice for *depositions*.²

(4) If the witness has been by the *opponent procured* to absent himself, this ought of itself to justify the use of his deposition or former testimony,³—whether the offering party has or has not searched for him, whether he is within or without the jurisdiction, whether his place of abode is secret or open; for any tampering with a witness should once for all estop the tamperer from making any objection based on the results of his own chicanery.

§ 1406. *Same*: (5) *Illness, Infirmary, Age, preventing Attendance.* Any physical incapacity preventing attendance in court, except at the risk of serious pain or danger to the witness, should be a sufficient cause of unavailability; and this has been almost universally recognized by Courts.¹ Certain distinctions, however, have from time to time received special notice. (a) The *duration* of the illness need only be in probability such that, with regard to the importance of the testimony, the trial cannot be postponed.² (b) As to the *degree* of the illness, the traditional phrase, "so ill as not to be able to travel," sufficiently indicates the requirements of common sense; and the "ability" is to be considered with reference to the risk of pain or danger to the witness. That the illness should be such as to make it impracticable to take the witness' deposition at his home has been said by one Court to be the correct limitation;³ but this is certainly incorrect, for a deposition obtained from a person during illness could not be any better than his former cross-examined testimony or deposition, and would probably be much less trustworthy.⁴ There is no reason why the application of the general principle in a given instance should ever come before a Court of Appeal; to the trial Court should be left the determination of the existence of the necessity in particular case.

There is further no distinction properly to be made between *former testi-*

¹ 1895, *Burton v. State*, 107 Ala. 68, 18 So. 210; 1903, *People v. Witley*, 138 Cal. 576, 72 Pac. 177; 1828, *Tompkins v. Wiley*, 6 Rand. 212 (due diligence not shown on the facts); 1819, *Pettibone v. Derringer*, 4 Wash. C. C. 219. *Contra*: 1866, *Lord Morly's Case*, Kelyng 55 ("Agreed, that if a witness who was examined by the coroner be absent, and oath is made that they have used all their endeavors to find him and cannot find him, that is not sufficient to authorize the reading of such examination"; compare this case *ante*, § 1364, note 47); 1851, *R. v. Scaife*, 5 Cox Cr. 243, 17 Q. B. 243.

² 1692, *Harrison's Trial*, 12 How. St. Tr. 351; 1851, *R. v. Scaife*, 5 Cox Cr. 243 (procurement by a co-defendant, held not sufficient as to a defendant not procuring); 1898, *Peddy v. State*, 31 Tex. Cr. 547, 21 S. W. 542 (removal by contrivance of a private prosecutor does not affect the use by the State); 1876, *U. S. v. Reynolds*, 1 Utah 322, 98 U. S. 158. *Contra*: 1856, *Bergen v. People*, 17 Ill. 427.

³ *Contra*, for former testimony: 1827, *Doe v. Evans*, 3 C. & P. 221, Vaughan, II.; 1893, *Cox v. McKenna*, 158 Mass. 207, 210, 33 N. E. 38 (for criminal cases).

⁴ 1891, *Mitchell, J.*, in *Thornton v. Britton*, 144 Pa. 130, 22 Atl. 1048: "The determination of this question in each case as it arises rests largely in the discretion of the Court. On a trial for murder, for instance, the judge presiding would feel it his duty to enforce the attendance of a witness having knowledge of the crucial facts, even at some risk to the witness' health or life; while in a civil action he might feel free to hold that a much smaller risk to the witness would be sufficient to excuse him from personal attendance."

⁵ 1870, *Berney v. Mitchell*, 34 N. J. L. 341.

⁶ 1828, *Mathews, J.*, in *Miller v. Russell*, Mart. N. S. La. 268.

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mony⁵ thus rendered necessary, and *depositions*;⁶ although the statutes (*post*, § 1411) have dealt with the latter in almost every jurisdiction.

§ 1407. **Same: Attendance prevented by (6) Imprisonment, (7) Official Duty or Privilege; (8) Distance of Travel.** (6) The witness' imprisonment for crime, supposing him not to be disqualified for infamy, is no reason for excusing his non-production; for his production can presumably be obtained

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⁵ The rulings recognizing this ground for
uit; former testimony are as follows: *Eng.*:
1737, *Fry v. Wood*, 1 Atk. 445; 1831, *R. v.*
Savage, 5 C. & P. 143; the ensuing rulings
are under St. 11 & 12 Vict. c. 42, allowing
testimony before a committing magistrate to be
used when the witness is "so ill as not to be
able to travel"; most of them are obstinately
narrow; 1850, *R. v. Harris*, 4 Cox Cr. 440
(bowel-complaint, not sufficient on the facts);
1850, *R. v. Harney*, lb. 441 (woman's confinement
a week before, sufficient); 1850, *R. v.*
Ulmer, ib. 441 (old; not sufficient); 1862, *R.*
v. Stephenson, 9 bl. 156 (woman daily expecting
confinement; sufficient in trial Court's discre-
tion); 1862, *R. v. Welton*, lb. 296 (illness
must be proved by medical man); 1871, *R. v.*
Hull, 12 bl. 31 (bowel complaint two days
before, not sufficient); 1874, *R. v. Farrell*, 12 bl.
606; L. R. 2 Cr. C. R. 116 (the witness was "very
nervous and 74 years of age"; "it might be
dangerous for her to be examined at all," and
particularly in open court; but the deposition
was held not admissible); 1876, *R. v. Thompson*,
13 bl. 182 (the witness was 87 years of age and
"in a state of great state of nervous excitement
that it would be attended with great risk to her
life to bring her into court to give evidence";
"it might bring on an attack of apoplexy";
there is no actual disease or illness, only a
predisposition to it"; but the deposition was
excluded); 1878, *R. v. Heeson*, 14 bl. 42 (de-
position of a woman in daily expectation of
confinement was admitted); 1878, *R. v. Wel-
lings*, L. R. 3 Q. B. D. 428 (same; here it was
pointed out that the degree of illness should be
left to the discretion of the trial judge); 1887,
R. v. Prunty, 16 Cox Cr. 344 (unsworn state-
ment of child, under St. 48 & 49 Vict. c. 69,
post, § 1828, not receivable as a deposition in
her absence through illness, under St. 11 & 12
Vict. c. 42); *La.*: 1828, *Miller v. Russel*, 7
Mart. N. S. La. 263 (see citation *supra*); 1882,
State v. Granville, 34 La. An. 1088 ("lying
sick in hospital," sufficient on the facts); 1903,
State v. Wheat, 111 La. 860, 35 So. 955 (testi-
mony before the committing magistrate, of one
since become too ill to be able to attend, ad-
mitted; the trial Court's determination of the
facts is generally to control; on a rehearing,
the testimony was held inadmissible because the
witness could attend at the next term and
because the prosecution had misled the defence
by applying for a continuance); *Md.*: 1829,
Rogers v. Baborg, 2 G. & J. 60; *Mich.*: 1878,
Howard v. Patrick, 38 Mich. 795, 799; 1900,
Siefert v. Siefert, 123 bl. 664, 82 N. W. 511
(temporary illness, not sufficient); *N. J.*: 1870,

Berney v. Mitchell, 34 N. J. L. 341 (see citation
supra); *Pn.*: 1827, *Pipher v. Lodge*, 16 S. & R.
214, 221 (inability to travel, not sufficiently
shown on the facts); 1874, *Emig v. Diehl*, 76 Pa.
378; 1881, *McLain v. Com.*, 99 id. 97 (for
civil cases; for criminal cases, question reserved);
1891, *Thornton v. Britton*, 111 bl. 130, 22 Atl.
1043 (*supra*, note 2); 1893, *Perrin v. Wells*,
155 id. 209, 300, 26 Atl. 543 (too ill to be
present, sufficient).

⁶ *Eng.*: 1666, *Land Motly's Case*, Kelyng
55 (before *vo. nec.*); 1682, *Lutterell v. Reynell*,
1 Mod. 282; 1700, *Altham v. Angleson*, 11 id.
212, per Gould, J.; 1719, 2 Lilly's Pract. Reg.
703 ("A witness who by reason of sickness,
extreme age, or other cause, cannot come to a
trial, may by order of Court be examined in the
court, before any Judge of the Court where the
cause depends, in the presence of the attorneys
of each side; and the testimony so taken shall
be allowed to be given in evidence at the
trial"); 1752, *Bradley v. Crackenthorp*, Dick.
182 ("the witness being aged and infirm and
unable to travel," it sufficed); 1785, *Jones v.*
Jones, 1 Cox 184 (deposition of one "above
80 years of age and unable to attend in person"
admissible); 1803, *Palmer v. Aylchury*, 15 Ves.
Jr. 176 ("in such a state of health as not to be
capable of attending"); 1813, *Corbett v. Curlett*,
1 Ves. & B. 335, 342 (order in chancery made
for depositions to be read at law if the deponent
proved "unable to attend" the trial by reason
of illness; Lord Eldon lays down the conditions
on which such an order will be made before-
hand in chancery); 1817, *Morrison v. Arnold*,
19 bl. 672 ("sick, incapable of travelling, or
prevented by accident," is sufficient; said of
depositions *in perp. mem.*); *Conn.*: 1775, *Avery*
v. Woodruff, 1 Root 76 ("The deposition of a
woman who lived within 20 miles of the court,
that had a child of a month old, dangerously
sick so that the mother could not leave it"
was admitted, as "within the reason of the
statute"); *Ga.*: 1874, *Baker v. Lyman*, 53 Ga.
339, 341, 350 (excluding a deposition where the
witness was not too ill to be able to testify);
N. H.: 1859, *Hayward v. Barron*, 38 N. H.
366; *N. C.*: 1903, *Willeford v. Bailey*, 132
N. C. 402, 43 S. E. 928 (witness "unable to
talk and physically unable to remain in court";
deposition received); *Okla.*: 1897, *Hanley v.*
Banks, 6 Okl. 79, 51 Pac. 662 ("infirmary"
does not include the case of a wife kept at the
bedside of her sick husband by the necessity of
attending him); *Vt.*: 1869, *Johnson v. Sargent*,
42 Vt. 195 (old age); *Va.*: 1893, *Taylor v. Mal-
lory*, 96 Va. 18, 30 S. E. 472.

by order of Court.¹ So far, of course, as this is not the case, there is good reason for using his former testimony or deposition;² a new deposition, obtained in prison, could be no better than either of this.³ In some jurisdictions a statute specifically regulates the matter.

(7) An *official duty* may be sufficient cause for not producing the witness engaged in that duty; the sufficiency should be left to the trial Court.⁴ Where the witness, exercising a *privilege* as an official (*post*, §§ 2206, 2370-2372) refuses to attend and his attendance is not compellable, the case falls under the present principle of impossibility of compelling attendance, and an excuse for non-production clearly exists.⁵

(8) On grounds of the *personal inconvenience* of attendance from a distance, statutes (*post*, §§ 1411, 1412) have almost everywhere provided, for the case of depositions, that residence beyond a certain number of miles, or without the county, shall allow the use of a deposition; the same cause should be equally sufficient for using former testimony, though this has rarely been provided.⁶ In a few statutes (*post*, § 1411) this notion of personal inconvenience has been given such consideration that in cities of a certain size depositions are in general admissible on the ground that "to require the personal attendance of witnesses would involve them in great pecuniary loss and involve a sacrifice of their personal interests without any corresponding personal advantage."⁷ This policy is a poor one. In the first place, there is no reason for exalting the sacrifices of a wholesale merchant or a banker above those of a farmer; one deserves no more consideration than the other; moreover, the sacrifice in rural districts may be even greater, for it may require a whole day for a farmer to travel to and from the court, while a city merchant may easily be kept informed by his clerk by telephone of the course of a trial and need usually not give up more than an hour or two for the purpose. In the second place, the notion that any citizen's private interests

¹ 1896, *State v. Conway*, 56 Kan. 682, 44 Pac. 627 (former testimony admissible, *semble*, where by a life-sentence of imprisonment civil death has ensued, but not here where a year's sentence produced no such result and a deposition could have been taken in prison or the prisoner brought into court; opinion obscure).

² 1851, *Switzer v. Boulton*, 2 Grant U. C. 693 (witness in the penitentiary and refusing to be re-examined, knowing that he could not be punished for contumacy more severely than by imprisonment; former testimony received).

³ 1900, *People v. Putnam*, 129 Cal. 258, 61 Pac. 961 (conditions determined for granting order to produce convicts under statute).

⁴ 1798, *Mushrow v. Graham*, 1 Hayw. 361 (deposition of a Collector of Imposta received, as one of those "the duties of whose offices oblige them to attend at a particular place for the discharge thereof"); 1828, *Noble v. Martins*, 7 Mart. N. S. 282 (deputy sheriff officially engaged elsewhere; admitted).

⁵ Distinguish the following: 1856, *Dubois' Case*, Wharton, Digest of International Law, I,

663, *Lawrence's Wheaton's International Law*, 393 (upon the Netherlands minister's consenting to give his deposition out of court, but not subject to cross-examination, the district-attorney at Washington declined to take it, as "it would not be admitted as evidence"). For the case of the King, see *ante*, § 1384.

⁶ Most of the following cases have reference to one of the statutes given *post*, § 1411: *Former testimony*: 1883, *Broach v. Kelly*, 71 Ga. 698, 704 (in adjacent county, insufficient); 1896, *Spaulding v. R. Co.*, 98 Ia. 205, 67 N. W. 227 (absence from the county, sufficient); 1885, *State v. Allen*, 37 Ia. An. 685 (not in the parish, *semble*, sufficient); *Deposition*: 1848, *McLane v. State*, 4 Ga. 335 (deposition by commission taken for defendant of persons within the State, excluded, because the authorizing statute covered civil cases only); 1869, *Riegel v. Wilson*, 60 Pa. 388, 392, *semble* (residence more than 40 miles distant, sufficient).

⁷ 1896, *Atkinson, J.*, in *Western & A. R. Co. v. Busser*, 95 Ga. 584, 23 S. E. 207, quoted *post*, § 1417.

should override his duty to the community is a false one. The principle that the whole community, and every member of it, should join in rendering all possible aid to the establishment of truth and justice is a fundamental one in civilized society (*post*, § 2192). An occasional reminder of these duties is a wholesome thing; and the attendance for that purpose upon a session of a court of justice tends vividly to strengthen the appreciation of this vital principle. That the citizen should by law be encouraged and abetted in shirking his fundamental duty to aid in the vindication of the rights of his fellow-citizens is reprehensible. Such statutes should nowhere be imitated.

§ 1408. **Same: (9) Insanity, or other Mental Incompetency.** A witness who has become *insane* is no longer qualified; his testimony in court is no longer available; and by universal concession his former testimony¹ or deposition² may therefore be used. So also the loss of any one of the faculties necessary for testimony (*ante*, § 478) furnishes an equal reason, whether the loss occurs through disease or through senility. This may be the case where the lost faculty is that of *speech*,³ or (under certain circumstances) of *sight*,⁴ or of *memory*;⁵ and it would seem that a total loss of memory through lapse of time alone should equally suffice, providing the Court is entirely satisfied of the fact of the loss.⁶

§ 1409. **Same: (10) Disqualification by Interest in the Cause.** A disqualification by subsequently-acquired *interest* makes the witness' present testimony unavailable, and hence should suffice to allow resort to his deposition or former testimony. This doctrine was not accepted in early English common-law practice,¹ followed by our Courts in a few in-

¹ 1880, *Marler v. State*, 67 Ala. 62 (Somerville, J.: "There is no real or practical difference between the death of the mind and the death of the body"); 1895, *Thompson v. State*, 106 id. 67, 17 So. 512; 1868, *Cook v. Stout*, 47 Ill. 531; 1892, *Walkup v. Com.*, — Ky. —, 20 S. W. 221; 1878, *Howard v. Patrick*, 38 Mich. 799; 1883, *Whitaker v. Marsh*, 62 N. H. 478 (in effect overruling a contrary statement in *State v. Staples*, 47 id. 119).

² 1790, *R. v. Eriswell*, 3 T. R. 707; 1841, *R. v. Marshall*, Car. & M. 147 (even where temporary only).

³ 1857, *R. v. Cockburn*, 7 Cox Cr. 265 (stroke of paralysis rendering the witness unable to hear or to speak; sufficient).

⁴ 1705, *Kinsman v. Crooke*, 2 Ld. Raym. 1166 (the witness had become blind; his deposition in chancery was used for those parts of his testimony which depended on his consultation of documents); 1883, *Houston v. Blythe*, 60 Tex. 509, 512 (sufficient, where the witness had lost his eyesight and the testimony necessarily involved the examination of documents).

⁵ 1861, *R. v. Wilson*, 8 Cox Cr. 453 (illness of the brain affecting memory, sufficient); 1895, *Central N. & B. Co. v. Murray*, 97 Ga. 326, 22 S. E. 972 (loss of memory by old age); 1874, *Emig v. Diehl*, 76 Pa. 373 ("such a state

of senility as to have lost his memory of the past"); 1879, *Rothrock v. Gallagher*, 91 id. 112 ("bereft of memory by senility or sickness"); 1819, *Drayton v. Wells*, 1 Nott & McC. 247; 1879, *Railroad v. Atkins*, 70 Tenn. 250.

⁶ The difficulty is that the witness must be called in order that this fact may appear, so that in practical application there would be no dispensation of his presence; moreover, he might in some cases be able to use the deposition or report of testimony as a record of past recollection (*ante*, §§ 737, 761). *Sanctioning the above cause*: 1901, *State v. N. O. Waterworks Co.*, 107 La. 1, 31 So. 395 (former testimony of a witness who, "by reason of the lapse of time, 15 years, and his age, was no longer able to remember the facts testified to," held admissible; following *Jack v. Woods*, Pa., *infra*); 1857, *Jack v. Woods*, 29 Pa. 378, *semble*. *Repudiating it*: 1868, *Cook v. Stout*, 47 Ill. 531, *semble*; 1861, *Robinson v. Gilman*, 43 N. H. 297; 1883, *Velott v. Lewis*, 102 Pa. 326, 333; 1819, *Drayton v. Wells*, 1 Nott & McC. 248.

¹ 1702, *Holcroft v. Smith*, 1 Eq. Cas. Abr. 224 (Common Pleas); 1718, *Baker v. Fairfax*, 1 Str. 101. So also for depositions in *perpetuam memoriam*: 1703, *Tilley's Case*, 1 Salk. 286 (the witness had by inheritance become interested; "Trevor, C. J., held that they ought

stances.² But it was well established in English chancery practice,³ and would probably be generally followed in our Courts.⁴ The analogies of the case of an attesting witness (*ante*, § 1316) are in harmony with this result.

§ 1410. **Same: (11) Disqualification by Infamy.** The same principle recognizes disqualification by *infamy* as cause for using a deposition or former testimony;¹ but this has been denied by a few Courts,² apparently upon the notion that competency at the time of trial is essential. If this were true, then death itself, as well as insanity and interest, would be insufficient to allow the use of a deposition. There is no support for such a notion; the time of the witness' testifying is here the time of the deposition or former testimony; his qualifications then to speak the truth are alone concerned.³

§ 1411. **Same: Statutes affecting Depositions de bene esse.** The conditions of necessity in which a witness' present testimony in court cannot be had are now in almost every jurisdiction dealt with, in part at least, by statutes.¹ The causes enumerated in such statutes are seldom more than three

[to be read]; for that he was disabled to give evidence by the act of God, so that it was in effect the same thing as if he were dead. Tracy and Blencow *contra*"; and the K. B. agreed with the majority).

² 1892, Messimer v. McCray, 113 Mo. 392, 339, 21 S. W. 17 (deponent incompetent since taking of deposition, excluded); 1848, Fagin v. Cooley, 17 Oh. 44, 50; 1808, Irwin v. Reed, 4 Yeates 512; 1823, Chess v. Chess, 17 S. & R. 412 (these Pennsylvania cases are no longer law; see the cases in note 4, *infra*); 1896, Moore v. Palmer, 14 Wash. 134, 44 Pac. 142 (party made incompetent by opponent's death).

The following ruling seems erroneous: 1859, Hayward v. Barron, 38 N. H. 371 (liability to self-incrimination, not sufficient).

³ 1702, Holcroft v. Smith, 2 Freem. 260, 1 Eq. Cas. Abr. 224; 1715, Gosse v. Tracy, 2 Vern. 699, 1 P. Wms. 287; 1743, Haws v. Hand, 2 Atk. 615 (interest sufficient, though the interest arose by the witness' own act in becoming administrator and therefore plaintiff; Hardwicke, L. C.); 1750, Glynn v. Bank, 2 Ves. Sr. 42; 1774, Brown v. Greenly, Dick. 504.

⁴ 1898, Bowie v. Hume, 13 D. C. App. 286, 318 (testimony of one disqualified by survivorship, admitted); 1804, Gold v. Eddy, 1 Mass. 1; 1843, Sabine v. Strong, 6 Metc. 277; 1875, Evans v. Reed, 78 Pa. 415, 84 id. 254 (party becoming incompetent as survivor; former testimony admissible); 1876, Pratt v. Patterson, 81 id. 114 (same; former testimony); 1880, Walbridge v. Knipper, 96 id. 50 (same); 1879, Hay's Appeal, 91 id. 265, 268 (deposition; same); 1882, Galbraith v. Zimmerman, 100 id. 374 (same; former testimony); 1898, Wells v. Ins. Co., 187 id. 166, 40 Atl. 802 (physician becoming subject to privilege by passage of statute; deposition admitted).

¹ 1847, State v. Valentine, 7 Ired. 225, 227.

² 1887, St. Louis I. M. & S. R. Co. v. Harper, 50 Ark. 157, 159, 6 S. W. 720 (subsequent infamy does not admit; but here the Court added a touch of the absurd by ruling that

even the ensuing death by hanging of the convicted felon did not admit his deposition); 1898, Redd v. State, 65 id. 475, 47 S. W. 119; 1817, LeBaron v. Crombie, 14 Mass. 235; 1882, Webster v. Mann, 56 Tex. 119.

³ Compare §§ 483, 583, *ante*.

⁴ For certain decisions and other statutes which concern *bastardy* and *probate of wills*, see *post*, §§ 1413, 1417; for the following statutes in their bearing on the rules of *notice and cross-examination*, see *ante*, §§ 1380-1382:

ENGLAND: In criminal cases: 1867, St. 30 & 31 Vict. c. 35, § 2 (admissible if the witness is dead or if "there is no reasonable probability that such person will ever be able to travel or to give evidence"); in civil cases, the following series of statutes were progressively enacted, the Rules of 1883 being now in force (these statutes are cited more fully *ante*, § 1380): 1830-1, St. 1 Wm. IV, c. 22, § 10 (deposition may not be read unless "the deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity to attend the trial"); 1873, Rules of Procedure, under Judicature Act of 1873, c. 66, No. 36 (depositions are allowed where the witness' attendance in court "ought for some sufficient cause to be dispensed with"); 1875, Rules of Supreme Court, under Judicature Act of 1875, c. 77, Order XXXVII, Rule 4 ("where it shall appear necessary for purposes of justice" depositions may be authorized and received in evidence); Rule 18 ("Except where by this Order otherwise provided, or directed by the Court or a Judge, no deposition shall be given in evidence at the hearing or trial of any cause or matter without the consent of the party against whom the same may be offered, unless the Court or Judge is satisfied that the deponent is dead or beyond the jurisdiction of the Court, or unable from sickness or other infirmity to attend the hearing or trial"); 1883, Nadln v. Bassett, L. R. 25 Ch. D. 21 (personal identity of plaintiff; commission to take plaintiff's testimony in New Zealand, refused on the facts); 1887, Bur-

or four in number, and never include all those recognized by the Courts at common law. It would therefore be an error to treat the statutory enumera-

ton v. Railway, 35 W. R. 536, Ksy, J. (the witness, under the above Order, must be "incapable of being examined").

CANADA: *Dom. Rev. St.* 1886, c. 135, §§ 96, 102, 103 (in proceedings in the Supreme or Exchequer Court, any person's deposition may be ordered when in the Court's opinion it is "owing to the absence, age, or infirmity, or the distance of the residence of such person from the place of trial, at the expense of taking his evidence otherwise, or for any other reason, convenient to do so"; the depositions may be used without further proof, "saving all just exceptions"); *Crim. Code* 1892, § 683 (depositions on commission out of Canada; the rules for criminal cases to be "as nearly as practicable" the same as in civil cases); § 686 (the deposition of a sick person taken under ib. § 681 is admissible if the person is dead or if "there is no reasonable probability that such person will ever be able to attend at the trial to give evidence"); § 687 (a deposition at a prior investigation of the charge is admissible if the witness "is dead, or so ill as not to be able to travel, or is absent from Canada"); *B. C. Rev. St.* 1897, c. 52, § 134 (county courts; like *Ont. Rev. St.* 1897, c. 60, § 143); § 137 (like ib. § 144); c. 56, § 55 (Supreme Court; "on special grounds," the Court may order that *viva voce* testimony be dispensed with); c. 62, §§ 30, 31 (special rules prescribed for divorce); *Man. Rev. St.* 1902, c. 40, Rule of Court 464 (deposition may be admitted on terms directed by the Court); Rules 469, 470 (production of affidavit for cross-examination may be required); Rules 485, 499 (depositions taken on commission of any "aged or infirm person resident within Manitoba, or of any person who is about to withdraw therefrom or who is residing without the limits thereof," may be taken; they may be given in evidence "without any other proof of the absence from this country" than the solicitor's or agent's affidavit of belief); c. 38, § 135 (affidavit of a party or witness without the judicial district or the province may be received, in county courts; but "where it is reasonably practicable," the judge may require his appearance); c. 41, § 59 (Surrogate Court may allow testimony by deposition, where the witness "is without the limits of Manitoba, or where by reason of his illness or otherwise the Court does not think fit to enforce the attendance of the witness in open court"); *N. Br. Consol. St.* 1877, c. 53, § 30 (in the St. John City Court, depositions may be read, provided it appear "that such witness is not then within the said city and county, or that he is sick or infirm, and unable to attend the trial"); c. 37, § 186 (Supreme Court; depositions of witnesses taken in the Province by reason of illness, etc., are receivable; but if they "shall at the time of the trial be in the Province and able to travel, they shall be required to give their testimony *viva voce* at such trial"); § 194 (Supreme Court; other depositions and commissions; the examination shall not be read unless the deponent "is

out of the Province, or dead, or unable from sickness or other infirmity to attend the trial"); c. 49, § 78 (Supreme Court in equity; depositions may be read as in c. 37, § 194); *Neuf. Coua. St.* 1892, c. 50, Rules of Court 33, par. 1 (like *Ont. Rules*, § 483); par. 17 (except as otherwise ordered, no deposition shall be received unless the witness "is dead, or beyond the judicial district in which the court is held, or at such a distance as in the opinion of the Court or judge shall justify the admission of the deposition instead of the attendance of the witness, or is unable from sickness or other infirmity to attend"); *N. W. Terr. Consol. Ord.* 1898, c. 21, Rule 263 (like *Ont. Rules*, § 483); Rule 267 (deposition may be received "on such terms if any" as the Court directs); Rule 280 (except as otherwise directed, no deposition shall be received unless "the deponent is dead or beyond the jurisdiction of the court or unable from sickness or other infirmity to attend"); *N. Sc. Rev. St.* 1900, c. 163, § 41 (the deposition of a judge of the Supreme Court may be used "if he is, owing to official business, unable to attend such trial"); c. 159, § 41 (in municipal courts, a deposition may be read when the witness is "absent from the county, aged, infirm, or otherwise unable to travel"); *Rules of Court* 1900, Ord. 35, R. 1 ("any witness whose attendance in court ought for some sufficient reason to be dispensed with" may by order of Court be examined before a commissioner); R. 4 (the Court may empower a party to give a deposition in evidence "on such terms if any as the Court or judge directs"); R. 17 (except as otherwise provided in this Order or directed by a judge, no deposition shall be given in evidence without consent, unless the deponent "is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial"); *Ont. Rev. St.* 1897, c. 11, § 26 (in controverted elections, the depositions taken before the examiner may be used); c. 59, § 29 (in the Surrogate's Court, a deposition may be taken where the witness "is without the limits of Ontario, or where by reason of his illness or otherwise the Court does not think fit to enforce the attendance of the witness in open court"); c. 60, §§ 141, 142 (the deposition of a person without the Province may be taken, but, if he is the party applying or an employee of his, not unless "a saving of expense will be caused thereby, or unless it is clearly made to appear that the person is aged, infirm, or unable from sickness to appear as a witness"); § 143 (a deposition may be taken, if it appears that "a material and necessary witness residing within the Province is sick, aged, or infirm, or that he is about to leave the Province, and that his attendance at court as a witness cannot by reason thereof be procured"; it "may be used upon the trial, saving all just exceptions"); § 144 ("a witness who resides in a remote part of the Province and at a great distance from the place of trial, if it be clearly made to appear

tions as exhaustive; they can seldom be construed as other than declaratory of rules already recognized. Nor is there any objection on principle to this

that his attendance cannot be procured, or that the expense of his attendance would be out of proportion to the amount involved in the action, or would be so great that the party desiring his attendance, should not under the circumstances be required "to incur it, may be examined by deposition"; c. 90, § 10 (on a trial at the general sessions, a deposition taken before the magistrate at the original hearing may be used if the deponent "is dead, or is so ill as not to be able to attend and give evidence, or is absent from Ontario," or "after diligent inquiry cannot be found to be served with a subpoena"); Rules of Court 1897, § 43^a (affidavit not to be authorized, if the witness "can be produced"; quoted *ante*, § 1380); c. 485 (deposition to be admitted "on such terms as may seem just" to the judge); *P. E. I. St.* 1889, § 56 (depositions shall not be read unless the witness "is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or infirmity or other sufficient cause to attend the trial").

UNITED STATES: *Alabama*: Code 1897, § 1833 (deposition may be taken (1) if witness is a woman, or (2) "from age, infirmity, or sickness, is unable to attend court," or (3) resides "more than 100 miles from the place of trial, computing by the route usually traveled, or resides out of or is absent from the State," or (4) is "about to leave the State and will probably not return until after the trial," or (5) when "the claim or defense, or a material part thereof, depends exclusively on the evidence of the witness," or (6) when the witness is "the Governor, secretary of State, State treasurer, State auditor, attorney-general, superintendent of education, commissioner of agriculture, examiner of public accounts, or the head of any other department or bureau of the State government, chancellor, judge, or clerk of any court of record, register in chancery, or sheriff; or president, director, or other officer of a bank incorporated in this State; postmaster or other officer of the United States; or practicing physician or lawyer; or a person constantly employed on any steamboat or other water-craft, or on any turpentine, or manufactory, or about the engine or other machinery of a railroad, or is a superintendent, secretary, treasurer, master of road repairs, or conductor of any railroad; or is a telegraph operator; or a teacher of a public or private school actually engaged in teaching, or a minister of the gospel, or pastor of a religious society in charge of any diocese, parish, church, district, or circuit"); § 1846 (deposition not usable "if it appear at the trial that the cause for which it was taken, or some other cause, does not then exist, unless such witness is dead or of unsound mind"); § 1847 (where the witness resides in county and affidavit of necessity of personal attendance is made, deposition must be suppressed, "unless the witness, from age, infirmity, or sickness, is unable to attend court"); § 2631 (in justices' courts, depositions may be taken also of witnesses residing out of county

and 10 miles distant); § 5289 (in criminal cases, defendant may take the deposition of "any witness who from age, infirmity, or sickness, is unable to attend court; or who resides out of the State, or more than 100 miles from the place of trial, computing by the route usually traveled; or who is absent from the State; or where the defense, or a material part thereof, depends exclusively on the testimony of the witness"); § 5291 (so also for prosecution's witness within the State, on defendant's written consent filed); § 5292 (a deposition is not admissible "if it appear that the witness is alive and able to attend court and within its jurisdiction"); § 5293 (convict's deposition may be taken by defendant); *Alaska*: C. C. P. 1900, §§ 644, 657, (like Or. Annot. C. 1892, §§ 814, 828, except that § 644, subd. 3, substitutes "about to go more than 100 miles beyond the place of trial"); *Arizona*: P. C. 1887, § 2075 (deposition of witnesses in Territory taken by accused, admissible if the witness "is unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the Territory"); § 2097 (deposition of a witness residing out of Territory, taken by accused, admissible if "the witness is unable to attend from any cause whatever"); *Rev. St.* 1887, § 1850 (in civil cases, "no deposition of a witness, except when the witness is a female, shall be permitted to be read in evidence unless the party offering the same, his agent, attorney, or some competent person, shall first make oath that the witness is without the limits of the county where the suit is pending, or that such witness is dead, or that by reason of age, sickness, infirmity, or official duty, such witness is unable to attend court"); §§ 984, 999 (testimony on contested probate of will, admissible in subsequent contests over the will if the witness "is dead or has permanently removed from this Territory"); *Arkansas*: *Stats.* 1894, § 2978 (deposition is usable (1) "where the witness does not reside in the county where the action is pending, or in an adjoining county, or is absent from the State, or is in the military service of the United States, or of this State"; (2) "where the witness is the Governor, Secretary of State, auditor or treasurer of this State, a judge or clerk of a court, a president, cashier, teller, or clerk of a bank, a practicing physician, surgeon, or lawyer, or keeper, officer, or guard of the penitentiary"; (3) "where, from age, infirmity, or imprisonment, the witness is unable to attend court, or is dead"; (4) "where the witness resides 30 miles or more" from the place of trial, "unless the witness is in attendance on the court"); § 2980 (the Court may order personal attendance, on affidavit that his testimony "is important, and that the just and proper effect of his testimony cannot, in a reasonable degree, be obtained without an oral examination before the jury"); § 2118 (depositions for the accused in criminal cases are usable "upon the death of the witness or his becoming mentally

result. So far as the statute confers a judicial power to order the taking of a deposition, the power exists only so far as specified by the statute, be-

incapable of testifying, or physically incapable of attending the trial or giving his testimony, or a non-resident of the State, or absent therefrom, so that he could not be summoned"; but in last two cases defendant's affidavit "that he has tried in good faith to procure the attendance of such witness and been unable to do so" is necessary); § 7414 (on a will-probate, the attesting-witness' deposition is admissible if he resides out of State, or is confined in "another county or corporation" under legal process, or is "unable from sickness, age, or other infirmity, to attend," or resides more than 50 miles distant); § 7425 (testimony on application for probate, and "any deposition lawfully taken out of Court," "of witnesses who cannot be produced at a trial afterward before a jury," is admissible); *California*: C. C. P. 1872, §§ 2020, 2021 (deposition of a witness out of the State may be taken, 1, when he is a party, or an officer or member of a corporation-party, or a beneficiary of the action; 2, when he resides out of the county; 3, when he is "about to leave the county . . . and will probably continue absent when the testimony is required"; 4, when he, "otherwise liable to attend the trial, is nevertheless too infirm to attend"; 5, for a motion or like proceedings; 6, when the witness "is the only one who can establish facts or a fact material to the issue; provided that the deposition of such witness shall not be used if his presence can be procured at the time of the trial"); § 2032 (if taken under subd. 2, 3, or 4, above, "proof must be made at the trial that the witness continues absent or infirm, or is dead"); Commissioners' amendment of 1901 (by substituting for the entirety of § 2021 a provision that depositions taken and returned may be read except as provided in § 2032, and then by prescribing in § 2032 that "the deposition cannot be read unless proof be made at the trial that the witness is absent from the county in which his testimony is to be used, or resides out of such county and more than 30 miles from the county seat thereof, or that he is too infirm to attend the trial, or is dead; but such proof need not be made when the witness is a party to the action or proceeding, or, when his deposition was taken, resided out of the county and more than 80 miles from the county seat, nor when the testimony is produced on a motion, or in any other case where the oral examination of the witness is not required"; for the validity of this amendment, see *ante*, § 488); § 1997 (production of a witness imprisoned in the county may be required); P. C. 1872, § 686 (testimony before a committing magistrate, or a deposition taken conditionally for the prosecution, admissible if the witness is "dead, or insane, or cannot with due diligence be found within the State"; see the interpreting decisions cited *ante*, § 1398); § 1204 (motion for mitigation or aggravation of sentence; depositions allowed, under certain conditions); § 1345

(depositions taken for the accused, usable if the witness is "unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the State"); § 1346 (deposition of a jail-prisoner may be taken, subject to the foregoing); § 1362 (depositions taken on commission out of the State by the accused may be read upon a showing "that the witness is unable to attend from any cause whatever"); *Colorado*: C. C. P. 1891, § 341 (deposition may be taken where the witness (1) is a party or a beneficiary, (2) "resides out of the county," (3) "is about to leave the county . . . and will probably continue absent when the testimony is required," (4) "though otherwise liable to attend the trial, is nevertheless too infirm to attend," (5) "is for any other cause expected to be unable to attend the trial"); § 343 ("If the deposition be taken by reason of the absence, or intended absence, from the county of the witness, or because he is too infirm to attend, proof by affidavit or oral testimony shall be made at the trial that the witness continues absent or infirm, to the best of deponent's knowledge or belief. The deposition thus taken may also be read in case of the death of a witness"); Const. 1876, Art. II, § 17, Annot. Stats. 1891, § 4834 (deposition by either party in a criminal case, admissible, unless "in the opinion of the Court, the personal attendance of the witness might be procured by the prosecution or is procured by the accused"); § 4674 (depositions of witnesses to a will, "non-resident" or "resident out of the county" of application for probate, admissible); § 4679 (testimony of witnesses at probate to be admissible on contest in chancery); § 2650 (deposition may be taken for trial before justice of the peace of witness "unable to attend on account of sickness, age, or other cause"); § 2651 (same for witness residing out of the county); *Columbia (District)*: Comp. St. 1894, c. 70, § 33 (wills; if "any of the witnesses to the same shall reside out of the district, or be temporarily absent therefrom at the time, when the will or codicil shall be so exhibited," their testimony by deposition may be taken and used); c. 71, § 19 (testimony taken by commission of a witness residing out of the District, admissible, without any conditions specified); § 25 (deposition of a witness residing more than 100 miles from Washington may be taken on commission by defendant in criminal case); e. 20, § 4 (deposition in a civil cause not usable, "unless it appears to the satisfaction of the Court that the witness is then dead, or gone out of the United States, or to a greater distance than 100 miles, . . . or that by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court"); Code 1901, § 1058 (depositions *de bene* may be taken of witnesses more than 100 miles distant, infirm or aged, etc.; but "if at the time of the trial the witness can be produced to testify in open court, the deposition shall not be read in evi-

cause the power did not exist at common law (*ante*, § 1376). But where a deposition had been lawfully taken — before a common-law judge in person,

dence; but if the attendance of the witness can not be produced, then the said deposition shall be admissible in evidence"; § 1060 (depositions taken on commission shall not be admitted at the trial "if at the time the witness be present in the District, and his attendance can be obtained by the process of the court"); *Connecticut*: Gen. St. 1837, § 1068 (depositions may be taken, in civil actions, of persons (1) living out of the State, (2) living more than 20 miles from place of trial, (3) "going to sea or out of the State," (4) "by age or infirmity unable to travel to court," (5) confined in jail; but nothing is said as to their admission); § 1069 (for persons more than 60 years old, depositions may be taken, and used if deponent is "unable to attend and testify"); *Delaware*: Rev. St. 1893, c. 77, § 16 (the mother's deposition in a bastardy case, admissible "if her attendance cannot be procured"); *Florida*: Rev. St. 1892, §§ 1123, 1132 (deposition may be taken if the witness "reside out of the county" or "be bound on a voyage to sea, or be about to go out of the State to remain until after the trial," or "be very aged or infirm," or upon affidavit that party "believes that a material part of his claim or defence depends upon the testimony of such witness"; no conditions of admissibility specified); § 1142 (deposition may be taken of an attesting-witness to a will residing out of the State); § 1818 (on adjournment or continuance before a justice of the peace, depositions of witnesses in attendance may be taken and used on trial "as if such testimony were given at the trial"); § 1805 (at a probate contest, a deposition is usable if "the personal attendance of any witness cannot be obtained, or if it be manifested inconvenient for any witness to attend"); § 2912 (accused person may take depositions of absent persons whose testimony is material and necessary, if they "reside beyond the jurisdiction of the court, or are so sick and infirm that with diligence their attendance cannot be procured at the same or the next succeeding regular or special term at which the case may be tried"); § 2917 (such a deposition is not to be read "when the attendance of the witness can be procured," or if the deponent "has absented himself by the procurement, inducement, or threats of the accused, or of any person in his behalf"); *Georgia*: Code 1895, § 5297 (deposition may be taken in a civil cause on interrogatories, if the witness (1) resides out of the county, (2) "from the condition of his health, from age or otherwise, he cannot attend the court, or from the nature of his business or occupation it is not possible to secure his personal attendance without manifest inconvenience to the public or to third persons, — such as postmasters, public carriers, physicians, school-teachers, etc."; (3) is about to remove from the county, or to leave home on business, for a sojourn or a tour, which will extend "beyond the term of the Court"; (4) "all female witnesses"; (5) "the only witness to a material point in the

case"; but nothing is provided as to the conditions of receiving these depositions); § 5313 (in counties of 20,000 people, any witness' deposition may be taken; no conditions provided for receiving); *Hawaii*: Civil Laws, 1897, § 1374 (depositions are not to be read "unless it shall appear to the satisfaction of the Court" that the deponent is the opposite party, "or is beyond the jurisdiction of the court, or is resident in another circuit, or dead, or unable from permanent sickness or other permanent infirmity to attend."); *Idaho*: St. 1899, Feb. 10, § 6 (deposition may be used "in the trial of all issues, in any action, in the following cases: first, when the witness does not reside in the county, or when he resides in a county adjoining and more than 30 miles from place of trial, or is absent from the State; second, when the deponent is so aged, infirm, or sick as not to be able to attend the court or place of trial, or is dead; third, when the depositions have been taken by agreement of parties, or by the order of the court trying the cause; fourth, when the deponent is a State or county officer, or a practising physician, or attorney-at-law, and the trial is to be had in any county in which the deponent does not reside"; for the statutes repealed by this Act, see Rev. St. 1837, §§ 6053-6062, 8166-8189); *Illinois*: Rev. St. 1874, c. 51, § 25 (in suits at law, depositions of witnesses resident in the State may be taken wherever the witness "resides in a different county from that in which the court is held, is about to depart from the State, is in custody on legal process, or is unable to attend such court on account of advanced age, sickness, or other bodily infirmity"); § 26 (*ad ius potestatem* commission, allowed in civil causes for a witness residing in the State more than 100 miles distant, or not residing in the State, or engaged in the military or naval service of the United States or this State and out of this State); § 34 (every deposition duly taken and returned "may be read as good and competent evidence in the cause in which it shall be taken, as if such witness had been present and examined by parol in open court, on the hearing or trial thereof"); c. 148, § 4 (when an attesting-witness to a will "shall reside without the limits of this State," or the county in which probate is desired, "or shall be unable to attend said court," a deposition by commission may be taken and used); *Indiana*: Rev. St. 1897, §§ 432, 441 (deposition is usable when the deponent (1) does not reside in the county, or adjoining county, of trial, or is absent from the State; (2) is "so aged, infirm, or sick, as not to be able to attend," or is dead; (3) when the deposition is taken by agreement or by Court order; (4) when the deponent is "a State or county officer, or a judge, or a practicing physician, or attorney-at-law," and the trial is in a county of non-residence); § 1896 (defendant in a criminal case may by leave of Court have depositions taken of witnesses residing out of the State, but must first enter consent for similar deposi-

or before a master in chancery —, the conditions on which it could be used in a common-law court were a simple question of the admissibility of evi-

tions by prosecution on the same matter); § 434 (if a witness "is produced in Court," his deposition is not to be read, unless taken by agreement or by Court order); § 1061 (in divorce causes, the Court may "for good cause shown" receive depositions, though the witnesses could attend); *Iowa*: Code 1897, § 4684 (in a civil action, a deposition may be taken if the witness resides in a different county, or "is about to go beyond the reach of a subpoena," or is "for any other cause expected to be unable to attend court at the time of trial"); § 4709 (unless the record discloses a cause for taking, the proponent must show that "the witness is a non-resident of the county, or such other fact as renders its taking legal"); § 3285 (in a will probate, depositions are allowable of subscribing witnesses residing out of the State or judicial district); § 5224 (depositions taken by the accused "may be read in evidence"; no conditions named); *Kansas*: Gen. St. 1897, c. 95, §§ 357, 375, c. 102, §§ 171, 169 (depositions usable only "when the witness does not reside in the county" of trial, or "when from age, infirmity, or imprisonment the witness is unable to attend court, or is dead," or upon a motion, etc.); *Kentucky*: C. C. P. 1895, § 554 (deposition is usable if the deponent resides 20 miles or more away; is absent from State; is its Governor, secretary, register, auditor, or treasurer; or is judge or court clerk; or is postmaster, or bank president, cashier, teller, or clerk; or is practising physician, surgeon, or lawyer; or is keeper, officer, or guard of penitentiary; or is dead; or has become of unsound mind; or is prevented by infirmity or imprisonment from attendance; or is in the Federal or State military service); § 556 (on affidavit that the testimony is important and its "just and proper effect" cannot "in a reasonable degree" be attained otherwise, the Court may order personal attendance); C. Cr. P. 1895, § 153 (defendant's depositions in criminal cases are usable only in case of death, absence from State, or physical inability to attend for examination); Stats. 1899, §§ 4855, 4863 (attesting-witness to a will; deposition may be taken if he resides out of the Commonwealth, or is confined under legal process in another county or corporation, or is unable from sickness, age, or other infirmity to attend, or resides more than 50 miles away; this may be used on the jury trial if the witness "cannot be produced"); *Louisiana*: Rev. L. 1897, §§ 615, 617 (depositions may be taken by the clerk of court whenever the party desires; no conditions of using specified); § 3941 (deposition is allowable for a witness residing out of the parish of trial); § 3942 (deposition of a member of the religious order of Saint Ursuline Nuns in New Orleans); C. Pr. 1894, § 352 (party residing out of the parish may be examined on interrogatories without attendance); §§ 138, 425-439 (provision for taking depositions of non-residents, infirm persons, etc.; and "parties in all cases, except criminal and civil jury cases, may take testimony of wit-

nesses out of court, who reside in the parish where the cause is pending"); St. 1896, No. 124, Wolff's Rev. L. 278 (in criminal cases the deposition of a witness taken under detention is admissible "in case of the death or departure of said witness from the parish or other inability to attend court," but not "when the presence of said witness can be procured by subpoena"); *Maine*: Pub. St. 1883, c. 107, §§ 4, 17 (deposition shall not be used if the cause for taking no longer exists; those causes are (1) "so aged, infirm, or sick, as to be unable to attend"; (2) residence or absence out of the State; (3) being bound to sea on a voyage, or about to go without the State or more than 60 miles away, and not to return in season; (4) being a judge and prevented by official duty from attendance; (5) residing in another town; (6) residing in the same town, provided he is dead or permanently removed from the town at the time of trial; (7) being confined in prison until after the trial); c. 134, § 19, St. 1885, c. 307 (defendant and prosecution may take and use certain depositions as in civil causes; but the prosecution may not use its own if the defendant does not use his); c. 64, § 4 (admissible in probate proceedings when a will-witness lives out of the State, or more than 30 miles distant, or "by age or indisposition of body" is unable to attend); *Maryland*: Pub. Gen. L. 1888, Art. 35, §§ 15, 16 (depositions of witnesses "who cannot be brought" before Court or of non-resident witnesses "shall be admitted"; no conditions specified); § 19 (deposition of any witness taken may be used "in case only" of his death, or of juror's "inability to procure the attendance of such witness at the time of trial and probable continuance of such inability" until the next term); § 25 (certain depositions usable, if the deponent is dead or out of the State or "cannot be had to attend"); Art. 84, § 9 (deposition of master or "other transient person," in shipping offences, admissible if not within jurisdiction at time of trial); *Massachusetts*: Pub. St. 1882, c. 169, §§ 24, 34, Rev. L. 1902, c. 175, §§ 26, 36 (the reasons for taking are: residence more than 30 miles away; intention to go out of the Commonwealth and not return in time for the trial; "so sick, infirm, or aged, as to make it probable that he will not be able to attend"; the deposition is not to be used "if it appears that the reason for taking it no longer exists"; except the party producing it "shows a sufficient cause then existing"); *Michigan*: Comp. L. 1897, §§ 1036, 10142 (deposition may be taken if witness "is about to go or resides out of the State," or "more than 50 miles from the place of trial," or "beyond the jurisdiction of the court," or "when the witness is sick, aged, or infirm, or where there is reasonable cause for apprehension that his testimony cannot be had at the trial," or where "the purposes of justice will be aided thereby"; the deposition may be read, but nevertheless the Court may order "the production of the witness, if within the juris-

dence, and were constantly dealt with by the common-law courts, as the rulings in the foregoing sections indicate; hence, the principles already

diction"; and in any case either party may compel his attendance "if he is within the jurisdiction of the court and able to attend"; *Minnesota*: Gen. St. 1894, § 5663 (in civil causes, the deposition of a witness in the State may be taken if the witness "lives more than 30 miles from the place of trial, or is about to go out of the State and not to return in time for trial, or is so sick, infirm, or aged as to make it probable that he will not be able to attend at the trial"); § 5679 ("no deposition shall be used if it appears that the reason for taking it no longer exists," unless the party offering "shows any sufficient cause then existing for using such deposition"); § 5690 (deposition of a witness out of the State may be read on the trial); § 5005 (before a justice of the peace, a deposition is usable if the witness (1) is dead or resides without the county, (2) "is unable or cannot easily attend . . . on account of sickness, age, or other bodily infirmity," (3) "has gone out of the county without the consent or collusion of the party"); *Mississippi*: Annot. Code 1892, § 1747 (deposition in a civil case may be taken of a witness in the State, if he (1) is "about to depart from the State, or by reason of age, sickness, or other cause shall be unable, or likely to be unable, to attend the court"; (2) "when the claim or defense, or a material point thereof, shall depend upon the testimony of a single witness"; (3) when he is a judge of the Supreme Court, or circuit court, or chancellor, or "any other officer of the government of the State or of the United States, who, on account of his official duties, cannot conveniently attend"; (4) "when the testimony of the clerk of any court of record, or of any sheriff or justice of the peace, shall be required beyond the limits of the county of his residence"; (5) when a "female"; (6) when residing more than 60 miles distant); § 1748 (in a civil cause before a justice of the peace, allowable also for any witness residing in another county); § 1751 (commission may issue for non-residents); § 1756 (depositions to be admissible; but the opponent "may procure the attendance of such witness" and put him on the stand); § 1759 (deposition for a chancery bill may be taken if the witness is "sick, aged, infirm, or about to leave the State"); § 1763 (chancery deposition of "a party or other interested witness" is not to be admitted if the opponent file an affidavit ten days before trial that oral examination is "necessary to the attainment of justice," and if the witness "be alive at the time of trial and not unable to attend court on account of disability from permanent sickness, physical injury, or from weakness and disability incident to old age"); § 1764 (in causes testamentary, etc., in chancery, the party may examine in open court; but this is not to change "the rule as to non-resident witnesses or cases in which depositions generally are authorized"); § 1819 (non-resident subscribing witness to a will may testify by deposition); § 2245 (in *habeas corpus* proceed-

ings, "whenever the personal attendance of a witness cannot be procured, his affidavit, taken on reasonable notice to the adverse party, may be received"); *Missouri*: Rev. St. 1899, § 2567 (the accused may take the deposition of a witness who "resides out of the State, or, residing within the State, is enceinte, sick or infirm, or is bound on a voyage or is about to leave this State, or is confined in prison under sentence for a felony"); § 2568 (such depositions are to be read "in like cases" as in civil suits); § 2569 (the accused may also take conditional examinations by commission as in civil cases); § 2877 (civil suits; any witness' deposition may be taken conditionally); § 2904 (depositions are usable, "first, if the witness resides or is gone out of the State; second, if he be dead; third, if by reason of age, sickness, or bodily infirmity, he be unable to or cannot safely attend court; fourth, if he reside in a county other than that in which the trial is held, or if he be gone to a greater distance than 40 miles from the place of trial without the consent, connivance, or collusion of the party requiring his testimony; fifth, if he be a judge of a court of record, a practicing attorney or physician, and engaged in the discharge of his official or professional duty at the time of the trial"); § 4617 (if an attesting witness to a will "shall reside without the United States, or out of this State and within the United States, or within this State and more than 40 miles" from place of probate, "or if such witness shall be prevented by sickness from attending at the time when any will may be produced for probate," his deposition may be taken); § 4625 (on the trial of a will's validity, the oath of a subscribing witness at probate is admissible if he "be deceased or cannot be found"); *Montana*: C. C. P. 1895, §§ 3342, 3361 (like Cal. C. C. P. §§ 2021, 2032); P. C. §§ 2490, 2491 (like Cal. P. C. §§ 1345, 1346); § 2513 (like ib. § 1382); § 1692 (deposition before a committing magistrate of a witness not giving an undertaking, admissible if the witness "be dead or absent from the State"); *Nebraska*: Comp. St. 1899, § 3277 (the mother's examination on a bastardy complaint before a magistrate, admissible on the trial); § 5946 (a deposition is usable "only in the following cases": first, when the witness does not reside in the county or is absent from it; second, "when, from age, infirmity, or imprisonment, the witness is unable to attend the court, or is dead"; third, on a motion or where oral examination is not required); § 5960 (deposition not to be read unless, for a cause specified in ib. § 5946, the "attendance of the witness cannot be procured"); *Nevada*: Gen. St. 1885, § 3429 (witness in the State; like Cal. C. C. P. § 2021, par. 1, 2, 3, 4, adding in the last: "or resides within the county but more than 50 miles from the place of trial"); § 3431 ("If the deposition be taken by reason of the absence or intended absence from the county of the witness, or because he is too infirm to attend, proof by affidavit or oral

established for this purpose at common law remain in force unless expressly changed by statute. The principles have nothing to do with the lack of

testimony shall be made at the trial that the witness continues absent or infirm, to the best of the deponent's knowledge or belief"; the witness' death also admits the deposition); § 3133 (witness out of the State; no conditions prescribed for using); § 3422 (deposition allowable for a witness imprisoned in jail); § 3910 (deposition of a witness for the People, taken conditionally, is admissible if it is "satisfactorily shown to the Court that he is dead or insane, or cannot, with due diligence, be found in the Territory"); § 4431 (defendant in a criminal case may take the deposition of a witness who "is about to leave the State, or resides out of the State, or has departed from the State and his or her place of abode is known, or is so sick or infirm as to afford reasonable grounds for apprehending that he or she will be unable to attend the trial"); § 4450 (such a deposition is usable "upon it being shown that the witness is unable to attend from any cause whatever"); *New Hampshire*: Pub. St. 1891, c. 225, § 1 (any deposition may be used in a civil cause unless the adverse party procures the witness' attendance); § 13 (depositions for the accused in criminal cases may be used in the Court's discretion when necessary for justice); *New Jersey*: Gen. St. 1896, Evidence, § 42 (a deposition is usable if the witness "resides or is out of the State, or is dead, or by reason of age, sickness, or bodily infirmity is unable to attend"; see also *Justices' Courts*, § 116); § 64 (deposition of a party is not to be taken in his own behalf, except by consent or by judicial order); § 67 (deposition of a party residing out of the State may be taken like that of any witness); St. 1900, c. 150, § 51 (re-enacts St. Evidence, § 42, *supra*); *New Mexico*: Comp. L. 1897, § 3036 (civil cases; a deposition may be taken (1) "when by reason of age, infirmity, sickness, or official duty, it is probable that the witness will be unable to attend the court"; (2) when he "resides within the Territory or the county in which the suit is pending"; (3) when he "has left or is about to leave" the Territory or county, "and will probably not be present at the trial"); § 3048 (it may be read in evidence; no conditions named); § 220 (at the original probate of a will, the deposition of a witness may be taken when he is "not a resident of the county in which such will is offered for probate, and also whenever any witness is incapacitated from sickness or age from attending upon such court"; the deposition when filed to have the same effect as if the witness testified in person); *New York*: C. C. P. 1877, § 836 (a physician or surgeon attached to hospital, etc., may testify before a referee to the condition of a patient in an action for personal injury, the judge having discretion to order his examination in court); § 882 (a deposition, except one of an adverse party or one taken by stipulation, is not to be used unless the witness is dead, or "unable personally to attend by reason of his insanity, sickness, or other infirmity," or is imprisoned, or is

absent from the State so that attendance "could not with reasonable diligence be compelled by subpoena"; see also § 910); C. Cr. P. 1881, § 8 (depositions are admissible against the accused, if the witness is dead, insane, or cannot with due diligence be found in the State); §§ 219, 631 (a deposition taken on either side in a criminal case may be used if witness is "unable to attend, by reason of his death, insanity, sickness, or infirmity, or of his continued absence from the State"); *North Carolina*: Code 1883, § 1358 (depositions are admissible if the witness (1) is dead or has become insane, (2) is a resident of a foreign country or another State and is not present, (3) is confined in prison beyond the county, (4) is "so old, sick, or infirm as to be unable to attend court," (5) is the Federal president or head of a department, or Federal judge, district attorney, or clerk, and the trial occurs during term of his court, (6) is the State Governor or head of a department or president of the university or other incorporated college, (7) is a State Supreme Court judge, or a judge, presiding officer, clerk, or solicitor of a court of record, and the trial occurs during the court's term, (8) is a member of Congress or the General Assembly, and the trial occurs during a session, (9) if the witness, being summoned, is out of the State or more than 75 miles distant by usual mode of travel, without the offeror's procurement or consent); St. 1891, c. 522 (depositions taken by the accused may be read on above conditions); *North Dakota*: Rev. C. 1895, §§ 5671, 5685 (like Okl. Stats. §§ 4236, 4250); §§ 8383, 8384, 8396 (criminal cases; like Cal. P. C. §§ 1345, 1346, 1362); *Ohio*: Rev. St. §§ 5265, 5281 (a deposition is usable when the witness (1) "does not reside in or is absent from" the county; (2) "is dead, or from age, infirmity, or imprisonment, is unable to attend court"; it is also usable on motions or "where the oral examination of the witness is not required"; § 5946 (in probating a lost or destroyed will, the deposition may be taken of a witness residing out of the jurisdiction, or infirm and unable to attend court); § 5928 (same, for ordinary probate); § 7293 (in criminal cases, the defendant may have a deposition taken of a witness who (1) resides out of the State; (2) is sick or infirm, (3) is about to leave the State, or (4) is confined in any prison of the State; nothing said as to admissibility); *Oklahoma*: Stats. 1893, § 4236 (a deposition is usable only (1) when the witness does not reside in the county of trial or is absent from it; (2) when "from age, infirmity, or imprisonment, the witness is unable to attend court, or is dead"; (2) when the case is one in which oral testimony is not required); § 4250 (on offering a deposition, it must appear that for "any cause specified" in the above section "the attendance of the witness cannot be procured"); § 5287 (on a hearing for mitigation or aggravation of sentence, depositions may be used if the witness is "so sick or infirm as to be unable to attend")]

judicial power to initiate the taking of a deposition. It would be unfortunate if the patchwork legislation of the statutes on this subject should be thought to alter the already well-established principles of the common law.

§ 5349 (in criminal cases the deposition of a material witness may be taken for defendant if the witness is "about to leave the Territory, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial"); § 5357 (such a deposition is usable "upon its appearing that the witness is unable to attend by reason of his death, insanity, sickness, or infirmity, or of his continual absence from the Territory"); §§ 5359, 5371 (the deposition of a material witness for defendant residing out of the Territory may be read "upon it being shown that the witness is unable to attend from any cause whatever"); § 5358 (the deposition of a material witness for defendant may be taken if the witness is prisoner in a Territorial prison or in a jail of a county other than that of trial); *Oregon*: C. C. P. 1892, § 814 (a deposition in the State may be taken when the witness (1) is a party, (2) is privileged from attendance under *ib.* § 795 by reason of distance, (3) is "about to leave the county and go more than 20 miles beyond the place of trial," (4) "though otherwise liable to attend the trial, is nevertheless too infirm to attend"; and (5) on a motion or otherwise where oral examination is not required); § 828 (when taken under (2), (3), or (4) of *ib.* § 814, not usable unless proof is made "that the witness did reside beyond the service of a subpoena, or that he still continues absent or infirm, as the case may be"); *Rhode Island*: Gen. L. 1896, c. 244, §§ 20, 27 (apparently no restrictions whatever as to accounting for witness' absence; but by § 36 any Court "may order the oral examination of witnesses in open court"); § 38 (*viu voce* testimony required in divorce cases, unless in case of physical disability to attend, residence and presence out of the State, or a deponent before a master in chancery); *South Carolina*: Rev. St. 1893, §§ 2332, 2334, 2335, Code 1902, §§ 2568, 2870, 2871 (a deposition may be taken under commission, if the witness (1) resides out of the State or county, (2) or resides more than 100 miles from court, (3) or is about to remove from the State before trial expected, (4) or cannot personally be procured "by reason of indispensable attendance on some public official duty or professional duty as an attorney at such time," or (5) "by reason of such sickness or infirmity as incapacitates such witness or witnesses from traveling in order to appear and testify"; nothing is said as to conditions of admissibility; except that by § 2334 personal attendance may be compelled of any deponent residing within the county or not more than 30 miles from court house; and by § 2335 the attendance of an officer of a lunatic asylum in a civil cause is to be required only when "justice cannot be done" without it); R. S. § 2341, C. § 2877 (a commission shall issue for "persons unable to leave home by reason of age, infirmity, sickness, or bodily hurt"); R. S. § 2342, C. § 2878 (any

party's or witness' deposition may be taken in civil causes before the clerk of court, subject to either party's right to require personal attendance); R. S. § 2345, C. § 2881 (depositions may be taken *de bene* before a judge, clerk, notary, etc., if the witness (1) lives without the county, (2) lives more than 100 miles away, (3) is bound to sea, (4) is about to leave the State or the county or to go 100 miles away, or (5) is aged or infirm; but by § 2347 such depositions are to be used only if it appears that the deponent is dead or out of the county or State or 100 miles away, or is by reason of age, sickness, bodily infirmity, or imprisonment, unable to travel and appear; for justices' courts, see *ib.* § 891); *South Dakota*: Stats. 1899, §§ 6514, 6527 (like N. D. Rev. C. §§ 5071, 5085); §§ 8818, 8832 (criminal cases; like Cal. P. C. §§ 1345, 1362); *Tennessee*: Code 1896, § 5624 (deposition in a civil action may be taken if the witness (1) "from age, bodily infirmity, or other cause," is incapable of attending; (2) resides out of the State; (3) resides out of the county; (4) is obliged to leave the State before issue; (5) is about to leave the county and "will probably not return until after the trial"; (6) is "the only witness to a material fact"; (7) is "an officer of the United States, an officer of this State or of any county in this State," clerk of another court of record, member of the General Assembly in session or a clerk or officer thereof, a practising physician or attorney, or a jailer or prison-keeper of another county; (8) is a notary public; (9) when the suit is brought *in forma pauperis*); § 5625 (a female witness may testify by deposition, unless sufficient cause be shown for compelling her attendance); § 5626 (the deposition of any person in the county may be taken, but the opponent may summon him to attend); § 5631 (the opponent may compel attendance in the above cases, except where the witness is by law privileged not to attend); § 7356 (rules for civil cases, applicable to defendant's depositions in criminal cases); §§ 7574-7576 (a convict not being removable for a civil case, his deposition may be used; defendant in a criminal case may also use it); *Texas*: Rev. Civ. Stats. 1895, § 2273 (depositions may be taken in all civil suits; "provided, the failure to secure the deposition of a male witness residing in the county in which the suit is pending shall not be regarded as want of diligence where diligence has been used to secure his personal attendance by the service of subpoena or attachment, under the rules of law, unless by reason of age, infirmity, or sickness or official duty, the witness will be unable to attend the court, or unless he is about to leave or has left the State or county in which the suit is pending, and will not probably be present at the trial"); § 2290 (depositions may be read; no conditions prescribed); § 1900 (at the probate of a will, "if all the [subscribing] witnesses are non-residents of the county, or those resident of

§ 1412. Same: Statutes affecting Depositions in Perpetuum Memoriam. It has been customary, in statutory enactments, to deal separately with

the county are unable to attend court," their depositions may be used; where the subscribing witnesses are dead, the witnesses to handwriting may testify "by deposition"; C. Cr. P. 1895, § 797 (the accused may take the deposition of any witness, not to be used except on giving consent to use by the State; and also of a witness who resides out of the State or is aged or infirm); § 812 (such depositions "shall not be read, unless oath be made that the witness resides out of the State, or that since his deposition was taken the witness has died; or that he has removed beyond the limits of the State; or that he has been prevented from attending the court through the act or agency of the defendant, or by the act or agency of any person whose object was to deprive the defendant of the benefit of the testimony; or that by reason of "age or bodily infirmity such witness cannot attend"); § 813 (the foregoing oath "may be made by the district or county attorney or any other credible person" for the State; for the defendant "the oath shall be made by him in person"); *United States: Rev. St. 1878, § 861* ("The mode of proof in trials of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided"); § 863 (in civil cause in a district or circuit court a deposition may be taken "when the witness lives at a greater distance from the place of trial than 100 miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than 100 miles from the place of trial, before the time of trial, or when he is ancient and infirm"); § 865 ("Unless it appears to the satisfaction of the Court that the witness is then dead, or gone out of the United States, or to a greater distance than 100 miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause"); § 866 ("In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; . . . and the provisions of sections 863, 864, and 865, shall not apply to any deposition to be taken under the authority of this section"); for the construction of the foregoing provisions, see particularly *post*, § 1417, *ante*, § 1381; *Utah: Rev. St. 1898, § 3454* (the deposition of "a witness out of the State" is usable, without conditions specified); § 3455 (witness in the State: like Cal. C. C. P. § 2021, par. 1 to 5, omitting the second clause of par. 1); § 3457 (like Cal. C. C. P. § 2032); § 4513 (criminal cases; like Cal. P. C. § 886); § 3429 (like Cal. C. C. P. § 1997); § 4917 (mitigation or aggravation of sentence; like Cal. P. C. § 1204); §§ 5037, 5051 (like Cal. P. C. §§ 1345, 1362); *St. 1899, c. 57* (a deposition taken *de bene* in a criminal case may be used if the witness "is

either dead or out of the State"); *Vermont: Stats. 1894, § 1257* (a deposition may be taken of a person (1) residing more than 30 miles distant, (2) about to leave the State, not to return before trial, (3) incapable of traveling and appearing, through "age, sickness, or other bodily infirmity," (4) residing out of the State, (5) confined in jail, (6) being a judge of the Supreme Court, going out of his residence-county on official duty, not to return before trial; no provision as to the conditions of using such depositions); § 2343 (in probate proceedings, a deposition may be taken where the person resides out of the probate district, or is unable to attend through age or bodily infirmity); *Virginia: Code 1887, § 3305* (a deposition is usable if the witness is "dead, or out of this State, or one of its judges, or a superintendent of a lunatic asylum distant more than 30 miles from the place of trial, or in any public office or service the duties of which prevent his attending the court, or be unable to attend it from sickness or other infirmity, or be more than 100 miles from the place of trial"; but in the last instance the Court may require attendance); § 2537 (if a will-witness is "unable from sickness, age, or other infirmity to attend," or in case of his confinement in another county or corporation in the State under legal process, his deposition may be taken); § 2546 (testimony on a motion to probate a will, or depositions taken thereunder, of witnesses who "cannot be produced at a trial afterwards before a jury," are admissible); § 413 (deposition of certain officers, not compellable to leave the office to testify in State bond-compen suits, admissible); *Washington: C. & Stats. 1897, § 6017* (a deposition may be taken when the witness (1) "resides out of the county and more than 20 miles from the place of trial," (2) "is about to leave the county and go more than 20 miles from the place of trial, and there is a probability that he will continue absent when the testimony is required," (3) "is sick, infirm, or aged, so as to make it probable that he will not be able to attend at the trial," (4) "resides out of the State"); § 6028 ("If it appear at the trial that the reason for taking the deposition no longer exists, the deposition shall not be read in evidence, unless the party offering it shows that another of the causes specified by § 6017 then exists, or that the witness is dead, or cannot safely attend at the trial on account of sickness, age, or other bodily infirmity"); § 6101 (the deposition of an attesting witness to a will may be taken when he is "prevented by sickness from attending at the time when any will may be produced for probate, or resides out of the State or more than 30 miles from the place"); § 6708 (a witness for the prosecution, released on recognizance; his deposition taken by a magistrate may be read on the trial "if the witness is not present when required to testify in the case"); § 6749 (before a justice of the peace, a deposition cannot be used unless the witness "1, is dead, or resides more

depositions *in perpetuum memoriam* in specifying the conditions of necessity allowing their use.¹ There is, however, no need for a separate treat-

than 20 miles from the place of trial; or, 2, is unable, or cannot safely attend before the justice on account of sickness, age, or other bodily infirmity; 3, that he has gone more than 20 miles from the place of trial without the consent or collusion of the party offering the deposition"; § 6925 (on a criminal trial, confrontation is necessary, but wherever witnesses whose depositions have been lawfully taken by a committing magistrate "are absent, and cannot be found when required to testify in such case, so much of such deposition" as is competent is admissible); § 6003 (the deposition of one confined in jail may be taken); *West Virginia*: Code 1891, c. 130, § 30 (a deposition is usable if the witness be "dead, or out of this State, or one of its judges, or in any public office or service the duties of which prevent his attending the court, or be unable to attend it from sickness or other infirmity, or be out of the county"; but in the last case attendance may for good cause be required); c. 50, § 111 (before a justice of peace, it is usable if the witness is absent from county, sick, or otherwise unable to attend); c. 159, § 1 ("every deposition" in a criminal case, taken by the accused, may be read by him; it may be taken of one non-resident or absent from the State, or aged and infirm so as to be unable to attend); c. 77, § 27 (subscribing witness to a will; the deposition may be taken and used if he is out of the State, confined under legal process in another county, or unable to attend from sickness, age, or other infirmity); *Wisconsin*: Stats. 1893, § 1093 ("In all criminal or quasi-criminal cases in courts of record," the defendant may obtain leave to take the deposition of "any material witness within the State who is in imminent danger of death or who is without the State") § 39 ("No deposition shall be used if it shall appear that the reason for taking it no longer exists, unless the party producing it shall show other sufficient cause then existing for its use"); § 4095 (the deposition of a party may be taken for himself for the same causes as that of any witness); § 4101 (the deposition of a witness within the State may be taken when the witness (1) lives more than 30 miles distant or beyond the reach of subpoena, (2) is about to "go out of the State, not intending to return in time for the trial or hearing," (3) "is so sick, infirm, or aged as to make it probable that he will not be able to attend," (4) is a member of the Legislature and his House or a committee is in session, (5) "when his testimony is material to any motion or other similar proceeding pending in any court of record, and he shall have refused voluntarily to make his affidavit"); § 4110 (the deposition of any witness without the State may be taken); § 4113 (a deposition by commission for a witness without the State may be taken (1) after issue of fact joined, (2) after no answer or demurrer filed in due time, (3) before issue of fact joined, "when the witness is so sick, infirm, or aged as to afford reasonable ground to apprehend

that he may die or become unable to give his testimony, or when he is about to remove so that his testimony cannot conveniently be taken, or for any other cause which shall be deemed sufficient by the Court"; (1) "when required for use on any trial or hearing or upon any motion or proceeding before or after judgment"; *Wyoming*: Rev. St. 1887, §§ 2613, 2629 (like *Oh. Rev. St. §§ 5265, 5281*); § 3293 (like *Id.* § 7293; for depositions before justices of the peace, see §§ 3457-3460).

² With the following, compare the statutes cited *ante*, § 1383, for notice and cross-examination as required for such depositions: *Alabama*: Code 1897, §§ 1867, 1871 (usable "upon proof of the death or insanity of the witness," or his non-residence in the State); §§ 1872, 1874 (depositions perpetuated by heirs or distributees to prove kinship with a decedent, may be taken "when the witness is over 60 years of age, or is infirm, or resides out of the State, or is about to go beyond the United States, or when the claim of such person depends exclusively on the testimony of such witness or witnesses," and are apparently usable unconditionally); *Alaska*: C. C. P. 1900, § 690 (like *Or. Annat. C. 1892, § 863*); *Arizona*: Rev. St. 1887, § 1339 (usable "in like manner as" other depositions); *Ark. Stats.* 1894, § 3022 (usable "where the witness is dead or insane, or, if alive and of sound mind, where his attendance for oral examination cannot be required"); *Cal. C. C. P.* 1872, § 2088 (usable "upon proof of the death, or insanity of the witness, or that they cannot be found, or are unable by reason of age or other infirmity to give their testimony"); *Colo. C. C. P.* 1891, § 370 (admissible "upon proof of the death or insanity of the witness or witnesses, or of his or their inability to attend the trial by reason of age, sickness, settled infirmity, or for any other cause"); *Del. Rev. St.* 1893, c. 56, § 2 (deposition to perpetuate in boundary cases, admissible "in case of the death of the witnesses or inability to procure their attendance"); *D. C. Comp. St.* 1894, c. 20, § 8 (usable if the witness "die before such arbitration or trial, or cannot be had to attend the same, of which satisfactory proof shall be made"); § 14 (any U. S. court may in discretion admit any deposition *in perpetuum*); *Fla. Rev. St.* 1892, § 1141 (usable on the same conditions as if taken *pro lite*); *Ga. Code* 1895, § 3966 (usable "*de bene esse*, if, at the time the litigation arises, no more satisfactory examination of the witness may be had"); § 3961 (they "shall be afterward used only from the necessity of the case"); *Ill. Civil Laws* 1897, § 1392 (receivable "where the witness or witnesses are insane or dead, or their attendance for oral examination cannot be required or obtained"); *Ida. St.* 1899, Feb. 10, § 28 (usable "upon the proof of death, insanity, or absence from the State of such witness, or distant more than 30 miles from the place of trial, or inability by reason of age or infirmity to attend"); *Ill. Rev. St. c.* 51, § 46 (admissible

ment; whatever causes are sufficient for the one suffice equally for the other class. The common-law principles applicable to depositions *in perpetuum memoriam* never reached a full development (§ 1417, *post*); but it would be proper, where the statute was silent, to apply the principles dealt with in the foregoing sections.

§ 1413. *San. Statutes affecting Testimony at a Former Trial.* Statutes dealing with this class of evidence are comparatively few in number.¹ It is

as if originally taken in the suit); *Ind. Rev. St.* 1897, § 455 (usable upon "the death, insanity, or absence from the State of such witness, or inability by reason of age or infirmity to attend"); §§ 1272, 1280 (testimony before a recorder, etc., to perpetuate a lost deed, record, etc., usable apparently unconditionally); *La. Code* 1897, § 4723 (usable "where the witnesses are dead or insane, or where their attendance for oral examination cannot be had as required"); *Kan. Gen. St.* 1897, c. 95, § 397 (usable "where the witnesses are dead or insane, or where attendance for oral examination cannot be had or required"); *Ky. C. C. P.* 1895, § 613 (depositions usable on the conditions provided for *de bene* depositions); *La. C. P.* 1894, § 410 (usable "should the witness examined be dead or absent"); *Mass. Pub. St.* 1832, c. 189, §§ 50, 61, *Rev. L.* 1902, c. 175, §§ 52, 64 (admissible on the same conditions "as if it had originally been taken" for the suit); *Mich. Comp. L.* 1897, § 10140 (the testimony "may be used in case it cannot again be obtained at the time of trial"); *Miss. Gen. St.* 1891, §§ 5697, 5701 (usable on the same conditions as if originally taken for the action); *Miss. Annot. Code*, 1892, § 1775 (admissible in case of "death, insanity, subsequent incompetency, or departure to some place unknown"); *Mo. Rev. St.* 1899, § 4540 (admissible, "first, if the deponent is dead, second, if he be unable to give testimony, by reason of insanity or imbecility of mind; third, if he be rendered incompetent, by judgment of law; fourth, if he be removed, so that his testimony cannot be obtained"); § 4557 (depositions taken to establish land-corners, admissible; no conditions specified); *Mont. C. C. P.* 1895, § 3125 (like *Cal. C. C. P.* § 2088); *Nebr. Comp. St.* 1899, § 6000 (usable "where the witnesses are dead, or insane, or where their attendance for oral examination cannot be obtained or required"); *Nev. Gen. St.* 1895, § 3444 (usable "upon proof of the death or insanity of the witness, or of his inability to attend the trial by reason of age, sickness, or settled infirmity"); *N. M. Comp. L.* 1897, § 3064 (admissible if the deponent is dead, or "unable to give testimony by reason of insanity or of imbecility of mind," or "rendered incompetent by judgment of law," or "removed out of the Territory so that his testimony cannot be obtained"); *N. D. Rev. C.* 1895, § 5711 (like *Cal. C. C. P.* § 2088); *Oh. Rev. St.* 1898, § 5878 (receivable if the witness is dead or insane or his "attendance for oral examination cannot be required or obtained"); § 1191 (deposition taken by a county surveyor in proof of old marks, etc., admissible only if the witness

is dead or without the jurisdiction); *Okl. Stats.* 1893, § 4284 (admissible "where the witnesses are dead or insane, or where attendance for oral examination cannot be obtained or required"); *Or. C. C. P.* 1892, § 863 (admissible on proof "of the death or insanity of the witness, or that he is beyond the State and his residence unknown, or of his inability to attend the trial by reason of age, sickness, or settled infirmity"; but in equity this proof is unnecessary; see *Hill's Codes* for different provisions in an unenacted statute of 1870); *R. I. Gen. L.* 1896, c. 244, § 32 (usable in case of death, unsound mind, absence from the State, or inability to attend); *S. D. Stats.* 1899, § 6552 (like *Okl. Stats.* § 4281); *Tenn. Code* 1896, § 5678 (admissible on the witness' "death, insanity, or departure to some place unknown"); §§ 5624, 5652 (in case of a notary, admissible if he should "die or remove out of the State"); *T. S. Rev. St.* 1878, § 867 (quoted *ante*, § 1387); § 866 (provisions as to depositions *de bene* do not here apply); *Utah Rev. St.* 1898, § 3471 (like *Cal. C. C. P.* § 2088); *Wash. C. & Stats.* 1897, § 6038 (usable "upon proof of the death or insanity of the witness, or his inability to attend the trial by reason of age, sickness, or settled infirmity"); *Wis. Stats.* 1898, §§ 4121, 4129, 4134 (usable on "the same conditions" as depositions taken pending action); *Wyo. Rev. St.* 1897, § 3071 (admissible "when the witnesses are dead or insane or when their attendance for oral examination cannot be required or obtained").

¹ With the following, compare the statutes just cited in § 1411, for the word "deposition" is sometimes used to signify the magistrate's report of testimony; compare also the citations *ante*, § 1388, for identity of issues and parties; for statutes affecting probate and bastardy proceedings, see the interpreting decisions cited *post*, § 1417; *Eng.* 1849, St. 11 & 12 Vict. c. 42, § 17 (testimony before a committing magistrate, taken in writing, on a charge of an indictable offence may be used if the deponent "is dead, or so ill as not to be able to travel"); *Can. N. Br. Consol. St.* 1877, c. 46, § 30 (former testimony admissible, if the witness "is dead, or out of the Province, or from sickness or infirmity is unable to attend"); *Ala. Code* 1897, § 4300 (testimony of subscribing witnesses at a will-probate is admissible on a contest in chancery); *Ariz. St.* 1893, Mar. 6, No. 4 (official report of testimony of witness at a former criminal trial of the same cause, admissible for either party, if the witness "shall die or be beyond the jurisdiction of the Court in which the cause is pending"); *St.* 1903, No. 25, amending *Rev. St.*

here even clearer than in the case of depositions (*ante*, § 1411) that the statutory enumeration of conditions of admissibility is not to be taken as exclusive.

1901, P. C. § 765 (testimony at the preliminary hearing before a magistrate is admissible if the witness "is dead, or insane, or when such witness is shown by the return of the sheriff on a subpoena duly issued for his appearance to be out of the jurisdiction of the court"); *Cal. C. C. P.* 1872, § 1870, par. 8 ("testimony of a witness deceased, or out of the jurisdiction, or unable to testify," is admissible); § 1316 (testimony at a will-probate is admissible in subsequent contests, "if the witness be dead, or has permanently removed from the State"); Commissioners' amendment of 1901 (quoted *ante*, § 1310, under the rule for attesting witnesses; it re-enacts C. C. P. § 1316 as § 1308, and substitutes a new section); P. C. 1872, § 686 (see the quotation *ante*, § 1411; for the decision denying the application of this to former testimony at a regular trial, see *ante*, § 1398); *Conn. St.* 1895, May 7, c. 116 (testimony of a witness who "is beyond the reach of the process of the courts of this State or cannot be found," is admissible in civil causes "on a subsequent trial of said case," by a sworn certified copy of court stenographer's notes); *Del. Rev. St.* 1893, c. 33, § 4 (deposition before a coroner, admissible, if the witness is dead); c. 97, § 13 (testimony before a committing magistrate, admissible, if the witness is dead); *D. C. Code* 1901, § 1065 (if a party "shall die or become insane or otherwise incapable of testifying," his testimony at a former trial is admissible); *Ga. Code* 1895, § 5136, Cr. C. § 1091 (admissible if the witness is "deceased, or disqualified, or inaccessible for any cause"); *Ill. Rev. St.* 1887, § 5312 (testimony at the probate of a will; like *Cal. C. C. P.* § 1316); *Ill. Rev. St.* 1874, c. 148, § 7 (after probate of a will in the county court, and on trial by jury in the circuit court, "the certificate of the oath of the witnesses at the time of the first probate shall be admitted as evidence"; compare the cases cited *ante*, § 1303, *post*, § 1417); *Ind. Rev. St.* 1897, § 1004 (the written examination of the complainant in bastardy, usable "to sustain or impeach the testimony of such witness"); § 1008 (on the death of the complainant in bastardy, her written examination before the justice "may be read in evidence"); § 2831 (recorded testimony at the probate of a will, admissible in a controversy about lands devised, if the witnesses "are dead, out of the State, or have become incompetent" since probate); *Kan. Gen. St.* 1897, c. 110, § 22 (testimony before a probate court, admissible on the trial of a contest in the district court, if the witness is out of the jurisdiction, or dead, or has become incompetent since probate); *Ky. Stats.* 1899, § 4613 (official report is usable in the trial Court's discretion "where the testimony of such witness or witnesses cannot be procured"); *La. Rev. L.* 1897, § 1439 (testimony at a fire inquest, admissible, apparently unconditionally); *C. Pr.* 1894, § 586 ("All the testimony taken in writing in the parish court shall be used as

evidence in the district court [on a trial *de novo* on appeal]"); § 599 (same provision; testimony usable "without being obliged to produce the witnesses in person"); the two foregoing sections are annotated by the editor as "inoperative," without citing authority; § 1042 (testimony in writing before a probate court "may be read on the appeal"); § 943 (depositions of witnesses at the time of probating a will are admissible "in case the will is subsequently attacked, although such witness be dead or removed permanently from the State"); *Me. Pub. St.* 1883, c. 82, § 114 (former testimony of a subscribing witness, in certain actions, admissible on his death); *Mass. Pub. St.* 1882, c. 212, § 41, Rev. L. 1902, c. 217, § 49 (a witness' deposition before a magistrate may be read "if he is unable to attend at the time of the trial, by reason of his death, insanity, or any infirmity, or if he is absent from the State so that he cannot be compelled to attend by subpoena or attachment"); *Miss. Annot. Code* 1892, § 253 (testimony of the deceased mother before a justice on a bastardy complaint, admissible on the trial); *Mont. C. C. P.* 1895, § 2314 (like *Cal. C. C. P.* § 1316); § 3146, par. 8 (like *ib.* § 1870, par. 8); *Nev. Gen. St.* 1885, § 2889 (testimony at the probate of a will is admissible "in any subsequent contests concerning the validity of the will, or of the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this Territory"); § 4036 (testimony on examination before a committing magistrate may be used on the trial "when the witness is sick, out of the State, dead, or when his personal attendance cannot be had in court"); § 3910 (testimony before a committing magistrate, reduced to writing and subscribed, is admissible if it is "satisfactorily shown to the Court that he is dead or insane, or cannot, with due diligence, be found in the Territory"); *N. J. Gen. St.* 1896, *Bastards*, § 19 (the mother's examination in a bastardy case, admissible, if she is dead, or insane, or has left the State); *N. M. Coop. L.* 1897, § 1982 (the testimony of a will-witness, reduced to writing, is admissible in future contests, "if the attendance of the witnesses cannot be procured"); *N. Y. C. C. P.* 1877, § 830 ("where a party or witness has died or become insane since the trial of an action or the hearing upon the merits of a special proceeding, the testimony of the decedent or insane person, or of any person who is rendered incompetent by the provisions of the last section," as quoted *ante*, § 488, may be read at a subsequent trial); § 2653 *a* (the testimony of a will-witness at the probate is admissible at the contest in the Supreme Court if he is dead, out of the jurisdiction, or incompetent since testifying; see also § 2651); *St.* 1897, c. 104 (on appeal from the surrogate, the testimony of witnesses who are now "out of the jurisdiction, dead, or have become incompetent," is admissible); *C. Cr. P.* 1881, § 8 (testimony at a

§ 1414. **Proof of Unavailability of Witness.** The proponent of the former testimony or the deposition is of course ordinarily the party to prove the necessity of resorting thereto in consequence of the witness' unavailability in person. Where former testimony is offered, no difficulty arises in applying this principle. But where a deposition is offered, it is usually the case that the proponent, in applying for authority to take the deposition, has already had occasion to make proof of the same cause as that now alleged by him to prevent the witness' non-attendance. In such cases — chiefly, illness, absence from the jurisdiction, and residence beyond a certain distance — must the proponent show at the trial that the cause upon which the taking was authorized still continues as a reason for non-attendance? On principle, he must, for the admissibility of the deposition depends on the existence of that cause and the question is for the first time before the trial Court for determination.¹ Nevertheless, it is practically desirable and proper, where the cause for taking was a probably permanent one — for example, residence without the limits — to presume that it continues, and to leave it to the opponent to show (if such is the case) that the cause has ceased.²

commitment is admissible against the accused, in case the witness is dead, insane, or cannot with due diligence be found in the State); § 864 (bastardy; the mother's testimony on examination before the magistrate is admissible if she is dead or insane); *N. C. Code*, 1883, § 1157 (examinations taken by a committing magistrate are admissible if the deponent is "dead, or so ill as not to be able to travel, or by procurement or connivance of the defendant hath removed from the State, or is of unsound mind"); *Ok. Rev. St.* 1898, § 5242 *a* (former testimony is admissible if the witness is dead, beyond the jurisdiction of the Court, insane, unable "through any physical or mental infirmity" to testify, or "has been ammonished but appears to have been kept away by the adverse party," or "cannot be found after diligent search"); § 5628 (in bastardy proceedings, the testimony of the deceased mother before the magistrate is admissible); § 5863 (the testimony of a witness at a will-probate is receivable on the trial if the witness is dead or out of the jurisdiction or has become incompetent); *Okl. Stats.* 1893, § 1194 (testimony at a will-probate is admissible "in any subsequent contests or trials concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this Territory"); *Or. C. C. P.* 1892, § 706, par. 8 (like *Cal. C. C. P.* § 1870, par. 8); *St.* 1889, Feb. 25, § 5 (official reporter's transcript of testimony, admissible as a witness' deposition "in the cases mentioned in § 829 of the C. C. P."); *Pa. St.* 1887, Pub. L. 158, § 3, P. & L. Dig., Witnesses, § 8 (testimony in criminal proceeding is admissible if the witness "die, or be out of the jurisdiction so that he cannot be effectively served with a subpoena, or if he cannot be found, or if he become incompetent to testify for any legally sufficient reason"); *S. D. Stats.* 1899, § 6904 (testimony at a will-probate; like

Okl. Stats. § 1194); *Tex. Rev. Civ. Stats.* 1895, § 1903 (testimony at a will-probate is usable "on the trial of the same matter in any other court when taken there by appeal or otherwise"); *C. Cr. P.* 1895, § 814 (depositions before an examining court or jury of inquest are admissible on the same conditions as depositions *de bene*, set forth *ante*, § 1411); *Utah Rev. St.* 1898, §§ 3475, 5013 (official stenographer's report may be read when the witness "shall die or be beyond the jurisdiction of the court"); § 4513 (committing magistrate; like *Cal. P. C.* § 686); § 3793 (probate testimony; like *Cal. C. C. P.* § 1316); *Wash. C. & Stats.* 1897, § 6113 ("In all trials respecting the validity of a will, if any subscribing witness be deceased, or cannot be found, the oath of such witness, examined at the time of probate, may be admitted as evidence"); *Wyo. Rev. St.* 1887, § 3062 (on the contest of a will in the District court, the testimony at the probate of witnesses who "are out of the jurisdiction of the court, dead, or have become incompetent since the probate," is admissible); *St.* 1891, c. 70, ch. 111, § 4 (in probate trials, the former testimony of an attesting witness is receivable if he "be dead, has permanently removed from the State, or is otherwise incompetent"); *St.* 1895, c. 96, § 5 (a deposition taken in a criminal case may be read, "should the witness fail to appear at the hearing or trial").

¹ 1839, *Weguelin v. Weguelin*, 2 *Curt. Eccl.* 263 (deposition of one in danger of death; new affidavit of illness required at trial); 1825, *Reed v. Bertram*, 4 *Wash. C. C.* 559 (similar).

² 1859, *Nevan v. Roup*, 8 *la.* 207 (the deponent had stated that he was a non-resident but intended to be present if alive and well; held, admissible, "unless it is shown that the witness is present in court"); 1878, *Cook v. Blair*, 50 *id.* 128 (deposition taken on the ground of expected absence at the time set for trial, that

§ 1415. *If Witness is Available for Testifying, Deposition is not Usable*
 No one has ever doubted that the former testimony of a witness cannot be used if the witness is still available for the purpose of testifying at the present trial. But, in the case of a deposition, authorized as it is by statute to be taken for subsequent use in the trial, a notion has sometimes been formed that the authorized taking involves an absolute authority to use the deposition, unconditionally and without showing the witness' unavailability at the trial. Such a notion is entirely opposite to the orthodox principle of the common law. A deposition was taken *de bene esse*, *i. e.* conditionally. The fundamental notion was that it was taken as a provision against the loss of the evidence at the trial, so that if the witness was after all at the time of the trial available for testifying, the deposition was not needed and was not admissible. But for this principle, all the inquiries, above examined, as to the sufficiency of death, illness, insanity, and the like, would have been meaningless :

1839, *Dr. Lushington*, in *Weguelin v. Weguelin*, 2 Curt. Eccl. 263 (affidavit of continuing illness required) : "The very meaning of the phrase *de bene esse* implied that it was conditional, and that the witness must be re-examined if capable."

1863, *Campbell, J.*, in *Dunn v. Dunn*, 11 Mich. 292 (appeal in Chancery from a decree dismissing a divorce-bill, based on the verdict in an issue framed for a jury) : "The deposition of E. L. was allowed to be read when she was present in Court. This was also illegal. It is very well settled that the order usually made [in Chancery for trying an issue by jury] that the depositions may be [there] read, is only designed to remove legal objections which might exist by reason of the trial at law being technically a separate proceeding, which, until our Courts were entrusted with jurisdiction both at law and in equity, was in another tribunal. But trials before a jury of issues from Chancery are governed by rules of courts of law, which do not permit depositions to be read when the witness is present."

1892, *Maxwell, C. J.*, in *Everett v. Tidball*, 34 Nebr. 803, 806, 52 N. W. 816 : "It is the right of the adverse party to have the witness produced in court, unless for some of the causes mentioned above he cannot be present. The appearance of the witness, his manner of testifying, his apparent fairness or interest or bias in the case, are facts for the consideration of the jury in judging of the credibility of the witness. In addition to these, in case the witness testifies to a wilful falsehood, he may more readily be prosecuted for perjury where the parties reside and the facts are known than at some distant point, perhaps in another State."

It is clear, therefore, that if the witness is *present in the court-room* at the time when his deposition is offered, the deposition is inadmissible, because there is no necessity for resorting to it.¹ So also if the witness is *within reach*

time having afterwards been postponed; admitted, "unless the witness was in court"); 1887, *Sax v. Davis*, 71 Ia. 406, 32 N. W. 403 (deposition of one temporarily disabled a year before, the trial having been postponed nearly a year; the proponent required to show the witness' inability to attend); 1887, *Sells v. Haggard*, 21 Nebr. 357, 32 N. W. 66 (non-residence of deponent presumed to continue to the time of trial); 1897, *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16; 1831, *Patapsco Co. v. Southgate*, 5 Pet. 616 (absence 100 miles away);

1894, *Hennessy v. Ins. Co.*, 8 Wash. 91, 93, 35 Pac. 585. *Contra*: 1876, *Bowie v. Flindly*, 55 Ga. 604 (after dismissal of the original case, the cause for the deponent's non-attendance must be shown anew); 1894, *Atkinson v. Nash*, 56 Minn. 472, 58 N. W. 39 (because the taking officer was not authorized to certify to the cause).

For the *time of making objections* to a deposition, see *ante*, §§ 18, 486.

¹ To the express statutory provisions, *ante*, § 1411, add the following: 1877, *Mobile L. Ins. Co. v. Walker*, 58 Ala. 290; 1883, *Humes v.*

of the court-process and is not shown to be unavailable by reason of illness or the like, the deposition is inadmissible.² Where the witness, at some time since trial begun and prior to the moment when his deposition is offered, has been within reach of process, but is *not at the precise moment*, the deposition's admissibility would seem to depend on whether the witness' absence is due in any respect to bad faith on the proponent's part; but here the rulings are not harmonious.³ The opponent's *waiver* of cross-examination by failure to attend (*ante*, §§ 1371, 1378) would not be a waiver of the right to require the witness to be shown unavailable.⁴

A few Courts, ignoring the above principle, take the extraordinary attitude of nullifying the conditional nature of a deposition, by admitting it even when the witness is in the court-room.⁵

O'Bryan, 74 Id. 77; 1896, Neilson v. R. Co., 67 Conn. 466, 34 Atl. 820; 1863, Dunn v. Dunn, 11 Mich. 292 (see quotation *supra*); 1893, Schmitz v. R. Co., 119 Mo. 256, 271, 24 S. W. 472; 1896, Benjamin v. R. Co., 133 id. 274, 34 S. W. 590 (but his arrival in court after the deposition is read does not require it to be struck out); 1896, Barber Co. v. Ullman, 137 id. 543, 38 S. W. 458; 1871, Gerhanser v. Ins. Co., 7 Nev. 189; 1821, State v. McLeod, 1 Hawka 344; 1901, Salley v. R. Co., 62 S. C. 127, 40 S. E. 111; 1901, Texas & P. R. Co. v. Watson, 50 C. C. A. 230, 112 Fed. 402; 1801, Doe v. Adams, 1 Tyl. 197.

² 1702, Anon., 2 Salk. 691 (prior examination, on a rule of Court, of a witness going to sea; if he has not gone when the trial comes on, "he must appear; for the rule was made on supposal of his absence"); 1847, Blagrove v. Blagrove, 1 De G. & Sm. 252, 259 (the deponent must be shown unavailable; distinguishing Loudon v. Perkins, 1734, 3 Bro. P. C. 602, where the ground of decision is obscure); 1885, Baldwin v. R. Co., 68 Ia. 37, 25 N. W. 918 (a statute making shorthand notes admissible, held not to take away the necessity of "showing an excuse for not producing the witness in court"); 1895, Frankhouser v. Neally, 54 Kan. 744, 39 Pac. 700; 1894, Munro v. Callahan, 41 Nebr. 849, 60 N. W. 97; 1859, Morgan v. Halverson, 9 Wis. 271.

³ 1864, Spear v. Coon, 32 Conn. 292 (admitted, where a non-resident deponent was merely "a short time before the trial in the place" of taker's residence); 1849, Hammock v. McBride, 6 Ga. 178 (excluded, where the witness "has resided within the county a sufficient time previous to the trial for his personal attendance to be coerced by process of subpoena," provided the taker had notice thereof); 1887, White v. Teeters, 36 Kan. 604, 14 Pac. 146 (deponent residing in another county and therefore not compellable to attend; his temporary presence in the county on the morning of trial, without further showing as to the proponent's ability to secure him, not sufficient to exclude the deposition); 1893, Ehy v. Winters, 51 id. 777, 33 Pac. 471 (non-resident deponent, present at the trial; deposition admitted, neither the

proponent nor the Court being shown aware of his presence until after the deposition was read, and the deponent being afterwards placed on the stand); 1894, McFarland v. Accid. Ass'n, 124 Mo. 204, 221, 27 S. W. 436 (the witness was present during plaintiff's testimony in chief, then went home; the deposition was offered in rebuttal, though properly testimony in chief; admitted, no collusion being shown); 1896, Benjamin v. R. Co., 133 Mo. 274, 34 S. W. 590 (mere presence in the jurisdiction, at the time of trial, of one whose deposition was taken without it, does not exclude); 1891, Everett v. Tidball, 34 Nebr. 803, 805, 52 N. W. 816 (witness temporarily absent, but for some time before the trial present in the county; excluded); 1843, Starksboro v. Hinesburgh, 15 Vt. 200 (witness present at the time first set for trial, but not available at the adjourned date when his testimony was called for; admitted); 1869, Johnson v. Sargent, 42 id. 195 (same).

⁴ 1829, Carrington v. Cornock, 2 Sim. 567.

That a stipulation expressly *waiving attendance is constitutional*, see *post*, § 2591.

⁵ 1894, Western & A. R. Co. v. Bussey, 95 Ga. 584, 23 S. E. 207 (a deposition taken under Code § 3893, admitted without regard to personal inability to attend; the witness here was present in court); 1856, Bradley v. Geiselman, 17 Ill. 571; Friuk v. Potter, *ih.* 408 (but these seem inconsistent with Cook v. Stout, 47 id. 531, cited *ante*, § 1408, note 6; the statutory wording in this State is likely to mislead); 1898, Edmonson v. R. Co., — Ky. —, 46 S. W. 679; 1899, Louisville v. Muldoon, — *id.* —, 49 S. W. 791; 1835, Phenix v. Baldwin, 14 Wend. 62, *semble*; 1850, Ford v. Ford, 11 Humph. 89, 90 (the opponent's statutory right to summon deponents out of the county does not prevent the deposition being received, subject to cross-examination, when the witness is present); 1903, Sherrod v. Hughes, — Tenn. —, 75 S. W. 717 (under Code, § 5626, the deposition may be read by the taker, even though the opponent has produced the witness in court; settling the prior conflict of rulings in this State); 1861, Thayer v. Gallup, 13 Wis. 539, 541 (left to the trial Court's discretion).

§ 1416. **Same:** Rule not applicable (1) to Deposition of Party-Opponent or (2) to Deposition containing Self-Contradiction, but applicable (3) to Deposition of Opponent's Witness; and (4) to Former Testimony in Malicious Prosecution. (1) The general principle that the witness must be shown unavailable for testifying in court does not apply to a party's use of his *party-opponent's deposition* (taken, as is usual, under statutes allowing in common-law courts a process similar to a bill for discovery),—for the simple reason that every statement of an opponent may be used against him as an admission without calling him (*ante*, § 1049); the opponent's sworn statement, though called a deposition, is no less an admission than any other statement of his:

1888, *Brace, J.*, in *Bogie v. Nolan*, 96 Mo. 85, 91, 9 S. W. 14: The Legislature . . . did not intend to narrow the scope of inquiry . . . by abrogating that ancient, well-recognized, and hitherto unquestioned rule of evidence that the declarations of a party to the suit may be given in evidence against him. . . . There can be no difference in the character of the evidence whether the declarations are made in the deposition of a party taken in his own case then on trial, his deposition taken in another case to which he was a party, or taken as a witness in a case in which he was not a party and had no direct interest. They are admissible in each case for the same reason, not as the deposition of a witness under the statute, but as the declaration of a party to the suit."¹

But this allowance of the use of a party's deposition as an admission presupposes that it is the party-opponent's; a party's statements offered in his own favor are of course not admissions, and hence there is no reason why a party should be allowed to put in his *own deposition* instead of taking the stand.²

(2) So also the use of a deposition to show in it a *contrary statement of the deponent*, who has already testified on the stand, is allowable even though the witness be present and available; for the deposition is here used not as substantive testimony (*ante*, § 1018), but only as containing a statement inconsistent with the same witness' testimony already given.³

(3) But the use of the deposition of an *opponent's witness*—*i. e.* a deposition taken by the opponent but not used by him—, which, as already noted, is in other respects allowable (*ante*, § 1389), is not the use of an opponent's admission. It is offered as the substantive testimony of that witness, whose testimony has not as yet been heard. There is therefore no reason why one

¹ *Accord*: 1887, *Newell v. Desmond*, 74 Cal. 46, 15 Pac. 369 (under §§ 2021, 2032, plaintiff's deposition taken by defendant may be read, though plaintiff be present); 1897, *Adams v. Weaver*, 117 id. 421, 48 Pac. 972; 1880, *Moore v. Brown*, 23 Kan. 269; 1855, *Kritzer v. Smith*, 21 Mo. 296; 1858, *Charleston v. Hunt*, 27 id. 34; 1882, *Pomeroy v. Benton*, 77 id. 64, 82; 1885, *Priest v. Way*, 87 id. 16, 28 (*contra*); 1888, *Bogie v. Nolan*, 96 id. 85, 9 S. W. 14 (overruling the preceding case; see quotation *supra*); 1903, *Profile & F. H. Co. v. Bickford*, — N. H. —, 54 Atl. 699; 1885, *Schnieck v. Noel* 64 Tex. 406, 408; 1891, *Lee v. Hill*, 87

Va. 497, 504, 12 S. E. 1052, *semble* (testimony of a now disqualified opponent at a former trial); 1894, *Denny v. Sayward*, 10 Wash. 422, 428, 39 Pac. 119.

² 1895, *State v. Oliver*, 55 Kan. 711, 41 Pac. 954 (former testimony); 1896, *Moore v. Palmer*, 14 Wash. 134, 44 Pac. 142 (even though originally taken by opponent; but *semble*, if the party had died or become incompetent, the deposition of course would be admissible). *Contra*, but erroneous: 1890, *Johnson v. McDuffee*, 83 Cal. 30, 23 Pac. 214.

³ 1896, *People v. Hawley*, 111 Cal. 78, 43 Pac. 404.

party rather than the other should be allowed to resort to a deposition without showing the deponent unavailable in person; and this the non-taker, as well as the taker, must do before using it:

1822, *Tughman, C. J.*, in *Gordon v. Little*, 8 S. & R. 532, 548: "The defendants say that it was the business of the plaintiff [who took the deposition] to subpoena his own witness, and therefore they did not do it. But in this they were wrong. The plaintiff might not like the evidence, and, if he did not, he was under no obligation to summon the witness. If the defendant thought this testimony favorable to himself, it was his business to secure it, by taking out a subpoena for the witness and endeavoring to procure his personal attendance."

1854, *Watkins, C. J.*, in *Sexton v. Brock*, 13 Ark. 345, 349: "It is argued that this [filig for security] was also designed to make them common property, so as to entitle either party to use them at pleasure. . . . But all depositions in common-law cases are taken *de bene esse*, and can only be read as if the witnesses 'were present and examined in open court,'—as, if it be shown the witness is dead, sick, or infirm, or residing without the county, and the like, so as to excuse his personal attendance; . . . [they are] but a substitute, and an imperfect one, for the personal attendance of the witness when that is impossible or inconvenient to be obtained. . . . Depositions are not in the first instance original evidence, though a substitute for it; the party taking it upon due notice may be entitled, upon showing the death, infirmity, or absence of the witness from the county, to read it. There is no reason, from the necessity of the case, why the opposite party, if he desired the testimony, could not have procured it by deposition or enforced the attendance of the witness. . . . [In this case, the plaintiff was wrongly allowed to read a deposition, filed by the opponent,] without showing any compliance with the conditions prescribed by statute or any effort to procure the attendance of the witnesses by subpoena."

Distinguish, however, from the above principle, use of a deposition or affidavit of an opponent's witness *used and adopted* by the opponent on a former occasion. So far as the opponent has thus by adoption made it his own statement, it may be used as the opponent's admission (on the principle examined *ante*, § 1075), and the deponent therefore need not be shown unavailable.

(4) Where in *malicious prosecution* the former testimony of a witness on the original prosecution is offered, the present principle is no less applicable than in other cases, and the witness must be shown to be deceased or otherwise unavailable.⁴ The apparent exception, early established, that the *now defendant's own former testimony* could be used,⁵ serves merely to "prove

⁴ 1876, *Fitch v. Murray*, Wood Men. 74, 89 (admissible, if the witness is absent); 1865, *Chapman v. Dodd*, 10 Minn. 350, 357 (malicious prosecution; magistrate's report of the testimony before him, excluded, the witnesses not being shown unavailable; good opinion, by McMillen, J.); 1830, *Burt v. Place*, 4 Wend. 591 (cited *infra*); 1827, *Richard v. Foulke*, 3 Oh. 52 (the testimony of other witnesses than the defendant, at the former trial, excluded, as being merely "secondary evidence").

The objection of difference of parties and issues (*ante*, § 1387) might also be raised; but the difference does not seem to be substantial.

⁵ 1705, *Johnson v. Browning*, 6 Mod. 218

(L. C. J. Holt admitted the testimony of the now defendant's wife, given at the former trial, she being now disqualified; "for otherwise, one that should be robbed, etc., would be under an intolerable mischief; for if he prosecuted for such robbery, etc., and the party should at any rate be acquitted, the prosecutor would be liable to an action for malicious prosecution, without the possibility of making a good defence"); 1767, *Buller, Trials at Nisi Prius*, 19; 1810, *Swift, Evidence* (Conn.) 131; 1830, *Burt v. Place*, 4 Wend. 591, 596, 601 (the witnesses not being deceased, the defendant was not allowed to prove the testimony delivered for him at the prior trial, as evidence of probable cause; but

the rule"; for at common law the now defendant would have been disqualified as a witness in the second trial, and thus he would be unavailable as a witness (on the principle of § 1409, *ante*). It has, however, sometimes been thought that the former testimony might be used (without accounting for the witnesses) not as testimony of the facts recited in it, but as evidence of the *grounds of belief* of the then prosecutor, now the defendant (on the principle of § 258, *ante*).⁶ It is true, in some varieties of the action for malicious prosecution, that this use would be correct.⁷ But ordinarily the theory of it is not applicable, because testimony delivered after prosecution begun cannot be said to have served as probable ground for a belief which must have existed before prosecution begun.⁸

§ 1417. **Same: Exceptions to the Rule for (1) Chancery and analogous Proceedings, (2) Commissions by *Dedimus Potestatem*, (3) Depositions in *Perpetuam Memoriam*; (4) *Will-Probate*; (5) *Bastardy Complaints*.** (1) According to the traditional *chancery practice*, all evidence was taken and presented to the Court of Chancery in the form of written depositions; there was no requirement of *viva voce* testimony on the trial. The chancery practice is not within the present purview. But in a few jurisdictions such a practice appears to have been introduced by statute, in certain cases, for common-law trials.¹ So far as such a procedure has been expressly sanctioned by statute, it is clear that the trial may proceed upon written depositions without showing the deponent unavailable in person. But certainly this effect should not be judicially attributed to a statute by mere implication. The fragmentary introduction of such chancery practice into a common-law trial is an unfortunate measure. The impropriety of the unfair discrimination and of the

"where the prosecution alleged to have been malicious was for a crime, and the defendant was a witness," he would be allowed to "show what was his testimony"; 1798, *Moody v. Pender*, 2 Hayw. N. C. 29 ("defendant's former testimony admitted, on the ground of necessity; otherwise, perhaps, "had any other witness sworn to the same facts and circumstances"); 1813, *Scott v. Wilson*, Cooke Tenn. 315 (the testimony of the now defendant, given at the former trial, may be admitted, even concerning facts not "alone confined to his knowledge," on the ground of necessity). Presumably this exception would no longer be law, the defendant being now a qualified witness.

⁶ 1903, *Kansas & T. Coal Co. v. Galloway*, — Ark. —, 74 S. W. 521 (malicious prosecution by arresting for contempt of an injunction; testimony of E. in the contempt proceedings allowed to be proved without calling E.; good opinion by Bunn, C. J.); 1849, *Bacon v. Towne*, 4 Cush. 217, 238 (malicious prosecution before magistrate; testimony before the magistrate admitted, because "the knowledge that he would so testify might have been one of the grounds on which the defendants made their complaint").

⁷ 1814, *Burley v. Bethune*, 5 Taunt. 580 (in an action against a magistrate for malicious con-

viction without probable cause, the testimony before the magistrate, being material, may be proved; whether without producing the witnesses, not decided).

⁸ 1844, *Newton v. Rowe*, 1 C. & K. 616 (libel in charging the plaintiff with falsely and maliciously accusing R.; plea, truth; testimony before the magistrates, held not material for the defendant to show the plaintiff's malice); 1865, *McMillan, J.*, in *Chapman v. Dodd*, 10 Minn. 350, 358 ("The testimony delivered upon the hearing could not have influenced the action of the prosecution in commencing the proceedings, for at that time it had no existence"); 1827, *Richards v. Foulke*, 3 Oh. 52 (the question to be decided being that of probable cause, "thia the jury were required to decide, not upon the evidence given before the justice, but upon the facts of the case and the defendant's knowledge of these facts"); 1834, *Huidekoper v. Cotton*, 3 Watts 56, 58.

No doubt, when sometimes it has been said that the "evidence" in the first trial is also admissible in the second one, it was merely meant that the *facts to be proved* would be the same in the latter; *e. g.* 1902, *Perkins v. Spanning*, 182 Mass. 218, 65 N. E. 72.

¹ *Ante*, § 1415, note.

underlying policy of the typical statutes of this class has already been noticed (*ante*, § 1407).

(2) Under the *Federal statutes*² a deposition taken *de bene esse* cannot be used unless the witness is shown to be unavailable in one of the specified ways.³ Even under the Act of 1892 (*ante*, § 1381) empowering Federal Courts to order the taking of depositions "in the mode prescribed by the laws of the States in which the courts are held,"⁴ it is ruled that, even in a State in which depositions may be used without showing the witness unavailable, such a showing must still be made according to the Federal statute.⁵ But the depositions under the *dedimus potestatem* clause⁶ stand upon a different footing. These are taken under a commission, supposed to be grantable wherever it is necessary to prevent a failure or delay of justice; and, when once allowed to be taken, are unconditionally admissible; so that there is no need at the trial to account for the witness as unavailable.⁷ It does not appear that this anomalous theory is applied in other jurisdictions to *dedimus potestatem* depositions.

(3) Depositions *in perpetuam memoriam* ought to stand on precisely the same footing as other depositions, *i. e.* they are taken conditionally, to be used at the trial only in case the witness is not available.⁸ Yet the contrary view has occasionally been hinted at judicially,⁹ or sanctioned by statute.¹⁰

(4) In some States the statutes providing for a jury trial or chancery hearing, on appeal from the preliminary *probate of a will* in the probate court, are so worded that the formal (and usually *ex parte*) testimony of the subscribing witnesses delivered and reduced to writing at the preliminary probate, is receivable absolutely at the later trial, *i. e.* without accounting for the witnesses' absence.¹¹ But this is anomalous and accidental.

² U. S. Rev. St. 1878, § 865; quoted *ante*, § 1411.

³ 1831, *Patapsco Co. v. Southgate*, 5 Pet. 616; and the cases in note 5.

⁴ St. 1892, c. 14, Mar. 9, 27 Stat. 7 ("in addition to the mode of taking the depositions of witnesses in cases pending at law or equity in the district and circuit courts of the United States, it shall be lawful to take depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held").

⁵ 1895, *Mulcahey v. R. Co.*, 69 Fed. 172; 1899, *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. 953 (depositions taken in a State Court cannot be used on removal in a Federal Court unless the witness is unavailable under § 865, in spite of St. March 9, 1892). Compare the ruling cited in § 1381, *ante*.

⁶ U. S. Rev. St. 1878, § 866, quoted *ante*, § 1411.

⁷ 1819, *Sergeant v. Biddle*, 4 Wheat. 511; 1875, *Jones v. R. Co.*, 3 Sawyer 527, *Deady, J.* Compare *Rhoades v. Selim*, 4 Wash. C. C. 724 (1827), under a rule of Court.

⁸ 1618-19, *Order in Chancery*, No. 73, Bacon, L. C. ("No benefit shall be taken of the deposition of such witnesses in case they may be

brought *viva voce* upon the trial, but only to be used in case of death before the trial, or age or impotence [preventing attendance], or absence out of the realm at the trial"); 1720, *Dorset v. Girdler*, Finch Prec. Ch. 532 ("these depositions cannot be made use of so long as the witnesses are living and may be had to be examined before a jury"); 1732, *Benson v. Olive*, 2 Stra. 919; 1817, *Morrison v. Arnold*, 19 Ves. Jr. 672; 1856, *Booker v. Booker*, 20 Ga. 777, 780.

⁹ 1766, *Apthorp v. Eyres*, 1 Quincy 229 (by three judges to two; but chiefly because it was treated as an affidavit and the issue was not to a jury).

¹⁰ *E. g.* in Michigan, cited *ante*, § 1412.

¹¹ The statutes are placed *ante*, §§ 1411, 1413; some of the rulings applying them are as follows: 1851, *Rigg v. Wilton*, 13 Ill. 15, 18; 1897, *Harp v. Parr*, 168 id. 459, 48 N. E. 113 (the statute applied; but here one subscribing witness was called at the contest in chancery); 1899, *Entwistle v. Meikle*, 180 id. 9, 54 N. E. 217; 1903, *Baker v. Baker*, 202 id. 595, 67 N. E. 410 (at the chancery contest, the "certificate of the oath" of witnesses at the first probate may be either in affidavit form or in the form of questions and answers).

(5) Similarly, the mother's testimony before the magistrate in a *bastardy complaint* is sometimes by statute made absolutely receivable at the later and regular trial;¹³ though most statutes expressly condition this on the mother's disease or insanity.

§ 1418. *Anomalous Jurisdictions in which No Necessity suffices to admit.* There may be jurisdictions in which no cause whatever of unavailability will suffice to admit a deposition or former testimony. The reasons for this have already been noted, but may here be summarized. (1) So far as the constitutional provision securing the right of confrontation to an accused person is held, as it erroneously is in some jurisdictions (*ante*, § 1398), to preclude the use of depositions or former testimony by the prosecution, it is obvious that no cause, even the witness' death, will suffice to admit them. (2) So far as the statute has not empowered the Court to order the taking of depositions in a given class of cases, a deposition taken in such a case is unlawfully taken and has therefore no legal existence (*ante*, § 1401); such a deposition therefore is inadmissible.¹

¹³ 1841, *Walker v. State*, 6 Blackf. 1, 4; 1874, *Hoff v. Fisher*, 26 Oh. St. 8; and cases and statutes cited *ante*, § 1413.

Compare the rule about *accusations in travail* (*ante*, § 1141).

¹ 1899, *State v. Potter*, — Ida. —, 57 Pac. 431 (depositions taken on preliminary examination by the State, not to be used at all at the

trial, because not expressly authorized by statute; the opinion ignores the common-law practice, *ante*, § 1375; this is in truth not a deposition at all, but testimony at a former trial); 1886, *Kaelin v. Com.*, 84 Ky. 354, 367, 1 S. W. 594 (deposition, taken by the accused, of a person abroad, not authorized by statute; excluded).

SUB-TITLE II: EXCEPTIONS TO THE HEARSAY RULE.

INTRODUCTORY.

CHAPTER XLVI.

§ 1420. Principle of the Exceptions to the Hearsay Rule.

§ 1421. First Principle: Necessity.

§ 1422. Second Principle: Circumstantial Guarantee of Trustworthiness.

§ 1423. Incomplete Application of the Two Principles.

§ 1424. Witness-Qualifications, and other Rules, also to be applied to Statements admitted under these Exceptions.

§ 1425. Outline of Topics for each Exception.

§ 1426. Order of the Exceptions.

§ 1420. Principle of the Exceptions to the Hearsay Rule. The purpose and reason of the Hearsay rule is the key to the exceptions to it. The theory of the Hearsay rule (*ante*, § 1362) is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment — for example, by reason of the death of the declarant —, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. These two considerations — a Circumstantial Guarantee of Trustworthiness, and a Necessity for the evidence — may be examined more closely, taking first the latter.

(1) Where the test of cross-examination is *impossible of application*, by reason of the declarant's death or some other cause rendering him now unavailable as a witness on the stand, we are faced with the alternatives of receiving his statements without that test, or of leaving his knowledge altogether unutilized; and the question arises whether the interests of truth would suffer more by adopting the latter or the former alternative. Whatever might be thought of the general policy of choosing the former alternative without any further requirement, it is clear at any rate that, so far as in a given instance some substitute for cross-examination is found to have been present, there is ground for making an exception. The mere necessity alone of taking the untested statement, instead of none at all, might not suffice; but if, to this necessity, there is added a situation in which some degree of trustworthiness more than the ordinary can be predicated of the statement, there is reason for admitting it as not merely the best that can be got from that witness, but better than could ordinarily be expected without the test of cross-examination. We thus come to consider the second essential element.

(2) There are many situations in which it can be easily seen that such a required test would add little as a security, because its purposes had been already substantially accomplished. If a statement has been made under such circumstances that even a sceptical caution would look upon it as trustworthy (in the ordinary instance), in a high degree of probability, it would be pedantic to insist on a test whose chief object is already secured. Supposing that such a situation exists, the statement could properly be received, especially if no other evidence from that person was now available. The law of evidence properly assumes that such situations can and do exist, and the exceptions to the Hearsay rule are concerned with defining them.

A perception of these two principles and their combined value has been responsible for most of the Hearsay exceptions. Each exception, to be sure, has come into existence and been maintained independently and amid considerations peculiar to itself alone. There has been no comprehensive carrying-out of a system of principles. Yet the results may be co-ordinated under those two heads. There has rarely been any judicial summing-up of the principles; yet their existence has been fully perceived and often judicially stated. The following utterances illustrate this recognition:

1876, *Jessel*, M. R., in *Sugden v. St. Leonards*, L. R. 1 P. D. 154: "So inconvenient was the law upon this subject, so frequently has it shut out the only obtainable evidence, so frequently would it have caused a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule. . . . Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which it is difficult to obtain other evidence; for no doubt the ground for admitting the exceptions was that very difficulty. In the next place, the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favor of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favor. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases.¹ Now all these reasons exist in testifying both as to matters of public and general interest, and as to matters of pedigree, and some, if not all of them, exist in the other cases to which I have referred."

1810, *Swift*, C. J., *Evidence*, 121: "The law has therefore very wisely rejected all such evidence, excepting where it is impossible in the nature of things to obtain any other, and where this is sufficient to establish the matter in question."

1811, *Tughman*, C. J., in *Garwood v. Dennis*, 4 Binney 328: "It is objected that, however impressive the declaration of a man of character may be, yet the law admits the word of no one in evidence without oath. The general rule certainly is so; but subject to relaxation in cases of necessity or extreme inconvenience."

1826, *Ewing*, C. J., in *Westfield v. Warren*, 8 N. J. L. 251; "The general rule of evidence excludes all hearsay. From necessity and from the impracticability, in some instances, of other proof, exceptions to this rule have been made."

1852, *Johnson*, C. J., in *Cornelius v. State*, 12 Ark. 804 (stating that hearsay lacks the securities of oath and cross-examination): "Where, however, the particular circumstances of the case are such as to afford a presumption that the hearsay evidence is true, it is then admissible."

¹ The learned judge, in this fourth element, is referring merely to the requirement that the hearsay witness must possess the ordinary knowledge-qualifications of every witness. This is therefore not peculiar to the Hearsay exceptions (*post*, § 1424).

1881, *Loomis, J., in Southwest School District 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."²

§ 1421. **First Principle: Necessity.** The scope of the first principle may be briefly indicated by terming it the Necessity principle. It implies that since we shall lose the benefit of the evidence entirely unless we accept it untested, there is thus a greater or less necessity for receiving it. The reason why we shall otherwise lose it may be one of two. (1) The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing. This is the commoner and more palpable reason. It is found in the exception for Dying Declarations and in the five ensuing ones. The principle is not always fully and consistently carried out in the rules; but the general notion is clear and unmistakable, and it is acknowledged in these exceptions with more or less directness and strictness. (2) The assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources. This appears more or less fully in the exception for Spontaneous Declarations, for Reputation, and in part elsewhere. Here we are not threatened (as in the first case) with the entire loss of a person's evidence, but merely of some valuable source of evidence. The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.

§ 1422. **Second Principle: Circumstantial Guarantee of Trustworthiness.** The second principle, which, combined with the first, satisfies us to accept the evidence untested, is in the nature of a practicable substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial guarantee of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name. There is no comprehensive attempt to secure uniformity in the degree of trustworthiness which these circumstances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation.

May we, however, generalize any further among the different exceptions and find any more detailed principles involving the reasons why these circumstances suffice as substitutes? Though no judicial generalizations have been made, there is ample authority in judicial utterances for naming the following different classes of reasons underlying the exceptions:

² Mr. Starkie (*Evidence*, I, 45), in 1824, was the first writer to state plainly the philosophy of the Exceptions.

a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;

b. Where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force;

c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

As to these, it may be said, *first*, it is not always that an exception is founded merely on a single one of these considerations. Often it rests on the operation, in different degrees, of two of them. For example, the exceptions for Declarations of Mental Condition, Spontaneous Declarations, and Declarations against Interest rest entirely on Reason *a*; while the exception for Declarations about Family History (Pedigree) rests largely upon Reason *a*, though partly also on Reason *c*. The exception for Dying Declarations rests entirely on Reason *b* (the fear of divine punishment). The exception for Regular Entries rests chiefly on Reason *b*, though partly also on Reasons *a* and *c*. The exception for Official Statements rests chiefly on Reasons *b* and *c*, though *a* also enters. Mixed considerations have thus often prevailed. *Secondly*, the exceptions have been established casually in the light of practical good sense, and with little or no effort (except in modern times) at generalization or comprehensive planning. The Courts have had in mind merely to sanction certain situations as a sufficient guarantee of trustworthiness. As elsewhere in the development of Anglo-American law generally, they have not (until recently) looked ahead, or behind, or about, to make comparisons and obtain unity of theory. Nevertheless, in analyzing the notions on which the exceptions have proceeded, we may distinguish clearly the three separate types of reason above set forth. This is no more than saying that the exceptions are and were to that extent rational; for wherever a reason is given for a result, it is possible to analyze and classify the results according to the nature of the reason.¹

§ 1423. **Incomplete Application of the Two Principles** These two principles — Necessity and Trustworthiness — are only imperfectly carried out in the detailed rules under the exceptions. It would be strange if it were otherwise, in a legal system formed as ours is, partly on precedent and partly on principle, at the hands of judges of varying disposition and training. The two principles are not applied with equal strictness in every exception; sometimes one, sometimes the other, has been chiefly in mind. In one or two instances one of them is practically lacking. Nevertheless they play a fundamental part. It is impossible without them to understand the exceptions. In these principles is contained whatever of reason underlies the exceptions. What does not present itself as an application of them is the result of mere precedent, or tradition, or arbitrariness. It is the proper office of an expounder of the law of evidence to note this element of living prin-

¹ The judicial utterances illustrating the above reasons will be found under the several exceptions.

ciple, and to distinguish its applications from rulings which are merely arbitrary. It is through the failure to do this strictly that a general appearance of unreason and unpracticalness has been given to the Hearsay rule and its exceptions. In the following expositions of the exceptions, the mode of treatment will consist in clearly separating that which can be directly placed to the credit of these two leading principles from that which remains as mere precedent and tradition. It may be affirmed that this residuum is on the whole decidedly a minor portion.

In making this separation, regard must strictly be had to the judicial utterances. There should be no forcing, no infusion of that which cannot be found in the authorities. The office of the commentator is to expound rules of law as he finds them declared and enforced; and, where he finds a rule without a principle, to note this with equal fidelity. But this fidelity is wanting where he neglects to distinguish between rules which rest on principle and rules which do not. What the judges supply is the rule and its principle if any. What the commentator is usually left to supply is a systematic analysis and a comprehensive grouping; and this must not merely be forgiven to him,—it must be demanded of him.¹

§ 1424. **Witness-Qualifications, and other Rules, also to be applied to Statements admitted under the Exceptions.** The Hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible. The admission of hearsay statements, by way of exception to the rule, therefore presupposes that the assertor possessed the qualifications of a witness (*ante*, §§ 483-721) in regard to knowledge and the like. These qualifications are fundamental as rules of relevancy, and can never be dispensed with.¹ Thus these extrajudicial statements may be inadmissible because of their failure to fulfil the ordinary rules about qualifications, even though they meet the requirements of a hearsay exception. For example, in the Pedigree Exception there are rules about membership in the family which rest solely on the necessity of knowledge in the person whose statement is offered,—*i. e.* a rule of Testimonial Qualifications. However, in applying these principles to hearsay exceptions, special situations arise, and the rules that depend upon merely the usual testimonial qualifications for witnesses on the stand come naturally in practice to be bound up with the rules about hearsay exceptions as special details of those exceptions. In the following chapters, for clear-

¹ How little the judges can be expected to supply this element is seen in the present instance by the fact that until the Master of the Rolls, Sir George Jessel, uttered his memorable generalization, in 1876 (*ante*, § 1420), nothing of the same sort had been given us by a judge. Some dozen distinct exceptions are expounded in the following chapters; but upon even such an elementary point as the number of the exceptions there has been a total absence of correct judicial appreciation. The following enumerations have been made: Mansfield, C. J., in 4 Camp. 401 (1811), *two*; Best, C. J., in 2 Moo. & R. 25 (1828), *two*; Lord Campbell, in 11

Cl. & F. 85 (1844), *three*; Mellor, J., in L. R. 2 Q. B. 326 (1867), *two*; Lord Blackburn, in 5 App. Cas. 623 (1880), and Brett, M. R., in 13 Q. B. D. 818 (1884), *five*; Marshall, C. J., in 7 Cranch 295 (1813), *five*; Skiinner, J., in 17 Ill. 20 (1855) and McGowan, J., in 13 N. C. N. S. 162, *one* in criminal cases.

² 1881, Lord Blackburn, in *Dysart Peerage Case*, L. R. 6 App. Cas. 489, 504: "It is impossible to say that if a person said something, and could not himself if alive have been permitted to give testimony to prove it, he can by dying render that statement admissible. I think that is a self-evident proposition."

ness' sake and convenience of reference, these rules involving the application of ordinary testimonial qualifications will be examined at the same time, instead of being relegated to the general treatment of those principles. It must be understood, however, that the principles involved have in their nature nothing to do with the Hearsay rule.

For similar reasons, testimony received under a hearsay exception being none the less testimony, the opponent may desire to discredit or to corroborate the declarant in the ways appropriate to discrediting or corroborating an ordinary witness (*ante*, §§ 875-1144). The application of such principles to hearsay exceptions can most conveniently be dealt with under the different exceptions.

In the same way, the allowance of an exception to the Hearsay rule does not of itself dispense with the application of the other Auxiliary Rules of Policy (*ante*, § 1171), of which the Hearsay rule is only one. For example, when a written entry is offered under an exception to the Hearsay rule, the rule about Producing the Original of a Document (*ante*, § 1177) comes into application and must be observed; in offering a dying declaration, the rule of Completeness (*post*, § 2095) may come into play; and the rules of Testimonial Preference (*ante*, §§ 1286, 1325, 1335, 1345) are often invoked throughout the exceptions. These, with the rule of Authentication (*post*, §§ 2129-2169) and the rule of Integration or Parol Evidence (*post*, § 2400) are the auxiliary rules that find most frequent application to testimony admitted under hearsay exceptions. For purposes of practical convenience, their application here will be treated under the different exceptions, instead of under the heads of the respective auxiliary rules.

§ 1425. **Outline of Topics of each Exception.** Under each exception, then, the general order of topics will be as follows:

- a. The Necessity principle, and its applications in the Exception in hand;
- b. The principle of a Circumstantial Guarantee of Trustworthiness, and its applications in the Exception in hand;
- c. The rules based on the independent principles of Testimonial Qualifications, Primariness, Authentication, and the like, as applied to the class of statements admitted; and, finally,
- d. Arbitrary limitations and modifications not resting on any principle whatever.

This order of treatment must occasionally be slightly varied, but it serves as a general plan to be followed.

§ 1426. **Order of the Exceptions.** Owing to the mode of development of the Hearsay rule (*ante*, § 1364), it is scarcely possible to predicate a definite order of historical origin for the exceptions to the rule; we merely find that, after the time that the rule comes to be established (the early 1700s), certain classes of hearsay statements continued to be received as before. Recorded cases under some of these classes are found earlier in some instances than in others, but this, for the above reason, does not entitle us to say that such statements, as exceptions to the rule, are older in recognition than the

others. It can be said definitely that most of the exceptions were recognized during the 1700s, and that the few remaining ones were not recognized until the 1800s; but that is all.

A more profitable order of arrangement is one based upon the differing nature of the Necessity principle (*ante*, § 1421) as recognized in the different exceptions. In several of them, the notion of Necessity is satisfied only where the particular declarant is shown to be personally unavailable as a witness, by reason of death or the like. In the others, the resort to the hearsay statement is allowed without showing the personal unavailability of the declarant at all. A grouping based on this radical difference seems to be the only one in any way dictated by the nature of the exceptions; and within these two groups the further arrangement may be left to be determined merely by convenience of orderly exposition.

The arrangement, then, is as follows, the first six forming the first group above mentioned, and the seventh bridging the gap to the remaining seven, which fall into the second group:

1. Dying Declarations; 2. Statements against Interest; 3. Declarations about Family History; 4. Attestation of a Subscribing Witness; 5. Regular Entries in the Course of Business; 6. Sundry Statements of Deceased Persons; 7. Reputation; 8. Official Statements; 9. Learned Treatises; 10. Sundry Commercial Documents; 11. Affidavits; 12. Statements by a Voter; 13. Declarations of a Mental Condition; 14. Spontaneous Exclamations.

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE.

TOPIC I: DYING DECLARATIONS.

CHAPTER XLVII

§ 1430. History; Statutes.

1. The Necessity Principle.

§ 1431. Scope of the Principle.

§ 1432. Rule Applicable in certain Criminal Cases only.

§ 1433. Death in Question must be Declarant's.

§ 1434. Circumstances of the Death related.

§ 1435. Further Limitations rejected.

§ 1436. Forgoing Limitations Improper.

2. The Circumstantial Guarantee.

§ 1438. In general: Solemnity of the Situation.

§ 1439. Consciousness of the Approach of Death; Subsequent Confirmation.

§ 1440. Certainty of Death.

§ 1441. Speediness of Death.

§ 1442. Consciousness of Approaching Death how determined.

§ 1443. Revengeful Feelings; Theological Belief.

3. Testimonial Qualifications, and Other Independent Rules of Evidence.

§ 1445. Testimonial Qualifications (Infamy, Insanity, Interest, Recollection, Leading Questions, Written Declarations, etc.).

§ 1446. Testimonial Impeachment and Rehabilitation.

§ 1447. Rule against Opinion Evidence.

§ 1448. Rule of Completeness.

§ 1449. Rule of Producing Original of a Document.

§ 1450. Rule of Preferring Written Testimony.

§ 1451. Judge and Jury.

§ 1452. Declarations usable by Either Party.

§ 1430. *History*. This exception, as such, dates back as far as the first half of the 1700s, — the period when the hearsay rule was coming to be systematically and strictly enforced (*ante*, § 1364) and at the same time certain excepted cases were coming to be recognized and defined. The ruling of Lord Mansfield in *Wright v. Littler*, in 1761 (*post*, § 1431), is generally taken as the leading early case, though the notion that special trust may be imposed in deathbed statements was already long understood.¹

The exception has in some jurisdictions been recognized by statutes.²

¹ Compare Shakespeare's allusion, about 1595, quoted *post*, § 1438. The earliest reported passages in trials seem to be the following: 1603, Sir Walter Raleigh's Trial, *Jardine Crim. Tr.*, I, 435 (the accused argues, "Besides, a dying man is ever presumed to speak the truth"); s. c. 2 How. St. Tr. 18 (Serjt. Philipa: "Nemo moriturus presumitur mentiri"); 1678, Earl of Pembroke's Trial, 6 How. St. Tr. 1309, 1335 (murder; the deceased's statements after the assault though apparently not made in consciousness of approaching death, were received, the counsel premising that "the sayings of a dying man in such circumstances are remarkable"); 1691, Lord Mohun's Trial, 12 id. 967, 975, 987 (murder); 1722, *R. v. Reason*, 16 id. 24 ff.; 1760, Earl Ferrers' Trial, 19 id. 918, 936 (described by counsel as "the declarations of the deceased, while a dying man, and after the stroke is given"); 1765, Lord Byron's Trial, ib. 1191, 1197, 1201, 1205 (the dying explanations of Lord Byron's antagonist, Mr. Chaworth, in the

trial); 1791, *R. v. Dingler*, Leach Cr. C. 300, Gould, J.; 1793, *R. v. Callaghan*, McNally, Evidence 385; Downa, J.; 1793, *R. v. Trant*, ib. 335, Downa, J.; 1800, *R. v. Minton*, ib. 386.

² Cal. C. C. P. 1872, § 1870, par. 4 ("in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of death," is admissible); Ga. Cr. Code 1895, § 1000 ("made by any person in the article of death, who is conscious of his condition, as to the cause of his death and the person who killed him," admissible in evidence "in a prosecution for homicide"); Mont. C. C. P. 1895, § 3146, par. 4 (like Cal. C. C. P. § 1870); Or. C. C. P. 1892, § 706, par. 4 (like Cal. C. C. P. § 1870); Tex. C. Cr. P. 1895, § 788 ("The dying declarations of a deceased person may be offered in evidence, either for or against a defendant charged with the homicide of such deceased person, under the restrictions hereafter provided. To render the declarations of the deceased competent evidence, it must be satisfactorily proved:

These, however, were seldom intended to alter in substance the details of the common-law rule.³

1. The Necessity Principle.

§ 1431. **Scope of the Principle.** The requirements of this principle, as generally accepted in the beginning, were simple. The notion was that, since the witness had died, there was a necessity for taking his only available trustworthy statements,—his dying declarations. The necessity, then, lay simply in the death of the witness, and that was all that need be shown. Conceivably, there might still be a necessity if the witness, though supposed to be dying, had recovered and had since left the jurisdiction, but this case had never occurred, and the question never arose.

By the 1800s, however, another interpretation of the Necessity principle had arisen, and this came to prevail. It is artificial and inconsistent with precedent and with itself, and its rules are now in fact nothing more than arbitrary. Nevertheless, as they purport to be logical deductions from a supposed principle, they must be treated as rational rules, and not as merely arbitrary limitations.

1. First, then, the original, orthodox, and only legitimate limitation was that the witness whose declarations it was desired to use should be unavailable by death. This is amply shown by the cases up to the beginning of the 1800s,¹ as well as by the treatises of the same period.² In particular,

1, that at the time of making such declaration he was conscious of approaching death and believed there was no hope of recovery; 2, that such declaration was voluntarily made, and not through the persuasion of any person; 3, that such declaration was not made in answer to interrogatories calculated to lead the decedent to make any particular statement; 4, that he was of sane mind at the time of making the declaration").

³ For statutes altering specific details, see *post*, § 1432.

¹ 1761, *Wright v. Littler*, 3 Burr. 1244 (in an action of ejectment, the genuineness of a will being in issue, evidence was received by Mansfield, L. C. J., that one of the subscribing witnesses on his deathbed declared it a forgery, the other judges concurring); 1769, *Camden*, L. C., and Mansfield, L. C. J., in the *Douglas Peerage Case*, 2 Hargr. Collect. Jurid. 387, 389, 397 (receiving "dying declarations" of Lady Douglas as to the paternity of the claimant, apparently on a general principle; "Would she have died with a lie in her mouth and perjury in her right hand?"); 1784, *R. v. Drummond*, Leach Cr. L. 4th ed., 337 (on an indictment for robbery, the dying confession of another person, recently executed, that he was the true robber, was rejected solely because of the deceased's incompetence as a convict); *ante* 1805, *Anon.*, cited in 6 East 195, per *Ellenborough*, L. C. J., as occurring under *Heath*, J. (action on a bond; dying confession of forgery by a witness admitted); approved (1805) by *Ellenborough*, L. C. J., *ubi supra*, (1808) by the

same, in 1 Camp. 210; 1836, *Stobart v. Dryden*, 1 M. & W. 615 (Parke, B.: "Both then [*coram* Lord Mansfield] and at the time of the *Nisi Prius* trial before Mr. Justice Heath, an opinion prevailed (which is now properly exploded) that any declaration *in extremis* was admissible, on the ground that the solemnity of the occasion was equivalent to a declaration on oath").

² 1802, *McNally*, Evidence, 381, 386 ("In exception to the general rule that 'no evidence can be received against a prisoner but in his presence,' it has been repeatedly determined and is unquestionably law, that on a trial for murder the declarations of the deceased, after the mortal wound is given, conscious of approaching death, may be received in evidence against the prisoner, although such declaration was not made in his presence. . . . In civil cases the rule of receiving as evidence the dying declaration of a person *in extremis* hath also been adopted, and on the same principle as in criminal cases"); 1810, *Swift*, Evidence, 125 ("In civil cases the rule of receiving as evidence the dying declarations of a person *in extremis* has also been adopted, and on the same principle as in criminal cases"). The distinction had been suggested as early as 1743, by counsel in *Craig dem. Annesley v. Angless*, 17 How. St. Tr. 1161 (ejectment); but the absence of any settled distinction was in 1744 conceded by Mr. *Clute*, *arguendo* in *Onnichund v. Barker*, 1 Atk. 38 ("A man, as he is just leaving the world, may be supposed to have a greater regard to truth").

there is found no distinction between civil and criminal cases, or between different kinds of criminal cases.

2. But at this point (as has more than once happened), the misconstrued words of a treatise-writer, followed by a *nisi prius* decision or two, started a heresy which in the next generation obtained full sway, and must now be taken as orthodox. The language of Serjeant East seems to have been the unwitting source of the heresy:

1803, Serjeant East, Pleas of the Crown, I, 353: "Besides the usual evidence of guilt in general cases of felony, there is one kind of evidence more peculiar to the case of homicide, which is the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it is committed. Evidence of this sort is admissible in this case on the fullest necessity; for it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of."³

This language led to a change of practice in England, and its influence is clearly to be traced in subsequent American cases. Finally, in 1860, a note of Chief Justice Redfield, in his edition of Professor Greenleaf's treatise, gave it the widest credit and led to its general acceptance:

1857, *Ogden, J.*, in *Donnelly v. State*, 26 N. J. L. 617: "Such declarations are received as evidence from necessity, for furnishing the testimony which in certain cases is essential to prevent the manslayer from escaping punishment. When a death-wound is inflicted in secret, as was done in this case, no person can be expected to speak to the fact except the victim of the violence."

1800, *Redfield, C. J.*, in Greenleaf, Evidence, I, § 156, note: "It is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of the admission. . . . And although it is not indispensable that there should be no other evidence of the same facts, the rule is no doubt based upon the presumption that in the majority of cases there will be no other equally satisfactory proof of the same facts. This presumption and the consequent probability of the crime going unpunished is unquestionably the chief ground of this exception in the law of evidence."⁴

This orthodox heresy, with its narrow view of the necessity for such evidence, has been applied with some attempt at consistency, the result of which is the following limitations.

§ 1432. **Rule Applicable in Certain Criminal Cases only.** (1) The proceeding in which the statements are offered may *not* be a *civil case*.¹

¹ It was natural, in a chapter on Homicide, to call special attention to these considerations; but Mr. East did not and could not cite any authority for confining the evidence to such cases, and probably had no intention of making such an absolute statement.

² The same view of the Necessity principle is illustrated in the following cases: 1855, *State v. Ferguson*, 2 Hill S. C. 624; 1852, *Campbell v. State*, 11 Ga. 375; 1855, *Walston v. Com.*, 16 B. Monr. 34; 1868, *Marshall v. R. Co.*, 48 Ill. 476; 1869, *Morgan v. State*, 31 Ind. 198; 1872, *Schell v. Stephens*, 50 Mo. 374; 1881, *State v. Wood*, 53 Vt. 564; 1884, *Waldie v. R. Co.*,

95 N. Y. 274; 1885, *Bailing v. Com.*, 110 Pa. 105, 1 Atl. 314.

³ 1836, *Stobart v. Dryden*, 1 M. & W. 615; 1865, *Daily v. R. Co.*, 32 Conn. 357; 1869, *Wooten v. Wilkins*, 39 Ga. 228; 1886, *East Tenn. Valley & G. R. Co. v. Maloy*, 77 id. 237, 2 S. E. 941; 1869, *Duling v. Johnson*, 32 Ind. 155; 1896, *Thayer v. Lombard*, 165 Mass. 174, 42 N. E. 563; 1871, *Brownell v. R. Co.*, 47 Mo. 245; 1896, *Jackson v. Kniffen*, 2 John. 36; 1818, *Wilson v. Boerem*, 15 id. 286; 1854, *Barfield v. Britt*, 2 Jones L. 43 (overruling *McFarlane v. Shaw*, 2 N. C. Law Repos. 105).

The following cases are therefore practically

(2) It must be a public prosecution for the specific crime of *homicide*.²

(3) It must be a prosecution, not merely for an act which has resulted in fact in death, but for an offence *involving legally* the resulting death as a necessary element. This limitation is a refinement evolved from the earlier and simpler form of statement that "death must be the subject of the charge." When the evidence was offered in a prosecution for attempted abortion and like offences, where the woman's death resulted, the earlier form of statement became capable of opposite interpretations. Generally the narrower one has been adopted.³ Through this pedantic refinement much labor has been wasted, and justice has often been hampered and defeated, for it is obvious that the evidential need and value of the statement is precisely the same, whatever the determination reached. We see here that the strictly evidential question has been entirely lost sight of, and the exclusion or admission of the statements is made to depend arbitrarily on the terms of a particular criminal statute. In at least three jurisdictions the aid of the Legislature has been invoked to stop the further defiance of common sense by the Courts over such monstrous trivialities.⁴

§ 1433. *Death in question must be Declarant's.* Again, not any death may

outlawed: 1806, *Jackson v. Vredenburg*, 1 John. 159, 163 (wife's dying declarations as to her husband's will; left undecided, as to this present point); 1859, *People v. Blakely*, 4 Park. Cr. C. 184 (admitting a declaration that a note had been signed; "It is true this is said only in regard to criminal cases; but the rules of evidence in criminal cases are in most respects the same as in civil cases"; here the declaration was in any case admissible as against interest).

See § 1141, *ante* (Corroboration by Similar Statements) for the Delaware statute treating a *bastard's mother's* declaration in travail as a dying declaration.

² Excluded in the following cases: 1824, *R. v. Mead*, 2 B. & C. 605 (perjury); 1830, *R. v. Lloyd*, 4 C. & P. 233 (robbery); 1874, *Johnson v. State*, 50 Ala. 459 (rape); 1876, *State v. Barker*, 28 Oh. St. 583; 1866, *Hudson v. State*, 3 Coldw. 359 (robbery); 1871, *Crookham v. State*, 5 W. Va. 514 (assault with intent to kill).

In some of the statutes cited *ante*, § 1430, this scope is extended to "criminal actions" in general, though the subject of the declaration must be "the cause of death."

³ 1822, *R. v. Hutchinson*, 2 B. & C. 608, note, Bayley, J. (administration of drugs to a pregnant woman); 1860, *R. v. Hind*, 8 Cox Cr. 300, Pollock, C. B. (attempt to procure a miscarriage); 1891, *Com. v. Houser*, 153 Mass. 314, 23 N. E. 872; 1900, *State v. Meyer*, 64 N. J. L. 382, 45 Atl. 779 (excluded on a charge of abortion in which the woman's death was not of the essence of the crime, though it affected the punishment); 1874, *People v. Davis*, 56 N. Y. 95; 1878, *State v. Harper*, 35 Oh. St. 78; 1885, *Railing v. Com.*, 110 Pa. 103, 1 Atl. 314. *Contra*: 1881, *Montgomery v. State*, 80 Ind.

345 (*Elliott, C. J.*: "We conclude, where death results from the unlawful attempt to produce an abortion, that death is the subject of the enquiry and that dying declarations are competent. If we adopt any other view, we shall sacrifice principle to a mere form of words. . . . We regard the statute as clearly intending that death shall be deemed a controlling element of the offence, and in this respect it differs from the statutes of New York and Ohio, as construed by the courts of those states. . . . If in reality the offence is homicide and the subject of enquiry the manner of the deceased's death, the settled rules of evidence which prevail in such cases should be enforced"); 1903, *Seifart v. State*, 160 id. 464, 67 N. E. 100; 1900, *State v. Meyer*, 65 id. 237, 47 Atl. 486 (even where abortion is a crime, though the death did not result from that cause, the woman's dying declaration is admissible; approving *Montgomery v. State*); 1877, *State v. Dickinson*, 41 Wis. 308.

The following are distinguishable: 1901, *Worthington v. State*, 92 Md. 222, 48 Atl. 355 (causing abortion followed by mother's death; dying declaration admitted, because abortion consists in killing the unborn child); 1894, *State v. Pearce*, 56 Minn. 228, 233, 57 N. W. 652, 1065 (manslaughter by procuring abortion; admitted).

⁴ *Mass. St.* 1889, c. 100 (dying declarations of a woman dying from abortion, admissible in prosecutions for the offences alleging death); 1893, *Com. v. Thompson*, 159 Mass. 56, 59, 33 N. E. 1111 (statute applied); *N. Y. St.* 1875, c. 352 (similar); *Pa. St.* 1895, June 26, Pub. L. 387, § 1 (similar, with peculiar and lengthy wording; the prosecution must first show the declarant's "sound mind," and there must be corroboration of the declaration).

be the subject of the charge; the deceased declarant must be the person whose death is the subject of the charge:

1875, *Kingman*, C. J., in *State v. Bohan*, 15 Kan. 418: "Mr. Redfield states that evidence is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. . . . Its admission can be justified only on the ground of absolute necessity, growing out of the fact that the murderer, by putting the witness, and generally the sole witness of his crime, beyond the power of the Court by killing him, shall thereby escape the consequences of his crime. . . . Necessity, then, being the only ground on which such testimony can be admitted, it remains to be seen whether that necessity exists so generally, or to so great an extent, where the death of any one else than the declarant is the subject of the inquiry, as to justify the adoption of a rule admitting such testimony"; and in a trial for the murder of T. A., declarations were rejected of W. shot at the same time with T. A., but surviving him a few hours.¹

§ 1434. *Circumstances of Death related.* Finally, the declaration may not concern any and all topics. It must concern the facts leading up to or causing or attending the injurious act which has resulted in the declarant's death for it is only as to such facts that the supposed necessity for the statement can exist.¹ Here again there is prolific opportunity for quibbling.

¹ *Excluded*: 1893, *Mora v. People*, 19 Colo. 255, 262, 35 Pac. 179 (declarations by an accomplice resisting arrest); 1867, *State v. Fitzhugh*, 2 Or. 227, 232 (declarations of F., killed in the same affray); 1873, *Brown v. Com.*, 73 Pa. 329 (husband and wife murdered in different places about the same time; excluding at the trial for the killing of the former the latter's declarations); 1878, *Poteete v. State*, 9 Baxt. 270 (third person killed in the same affray); 1894, *Radford v. State*, 33 Tex. Cr. 520, 526, 27 S. W. 143 (husband and wife killed at the same time; on a charge of murder of the husband, the wife's declarations excluded).

Admitted: 1837, *R. v. Baker*, 2 Moo. & Rob. 53 (declarations of one poisoned at the same time as the person whose death was charged); 1871, *State v. Wilson*, 23 La. An. 559 (declarations of J. S., shot at the same time as W. D., for whose murder the accused was on trial); 1859, *State v. Terrell*, 12 Rich. L. 329 (declarations of one poisoned at the same time with him whose death was the subject of the charge).

¹ *Ala.*: 1849, *McLean v. State*, 16 Ala. 672, 676 ("whether he had forbade the prisoner walking the road that morning, immediately preceding the time that prisoner had shot him," admitted); 1860, *Mose v. State*, 35 id. 421; 1861, *Ben v. State*, 37 id. 105; 1881, *Reynolds v. State*, 68 id. 506; *Cal.*: 1883, *People v. Fong Ah Sing*, 54 Cal. 253; 1881, *People v. Taylor*, 59 id. 640, 648; 1897, *People v. Wong Chney*, 117 id. 624, 49 Pac. 833; *Fla.*: 1901, *Clemmona v. State*, 43 Fla. 200, 30 So. 699 (the scope of the declarations is the "res gesta"); *Ga.*: 1893, *Wilkerson v. State*, 91 Ga. 729, 739, 17 S. E. 990 (killing of a husband by the wife's paramour; the husband's declaration that he had found them in adultery, admitted); 1898, *Perry v. State*, 102 id. 365, 30 S. E. 903 (declarations as to the relations of deceased and defendant

some time before, excluded); 1899, *Bush v. State*, 109 id. 120, 84 S. E. 298 (declarations as to defendant's threats immediately preceding, admitted); *Ind.*: 1903, *Selfert v. State*, 160 Ind. 464, 67 N. E. 100 (death by abortion; deceased's declarations as to the defendant's incitement to the act and furnishing of an instrument, admitted); *La.*: 1903, *State v. McKnight*, 119 La. 79, 93 N. W. 63 (declaration as to prior assault on the defendant on the deceased; excluded); *Ka.*: 1899, *State v. O'Shea*, 60 Kan. 772, 57 Pac. (sundry statements as to prior relations of deceased and defendant, excluded); *Ky.*: 1881, *Lelber v. Com.*, 9 Bush 13; 1888, *Peoples v. Com.*, 87 Ky. 500, 9 S. W. 509, 810; 1899, *Redmond v. Com.*, — id. —, 51 S. W. 565 (that he had pistol, admitted); 1899, *Baker v. Com.*, — id. —, 50 S. W. 50 ("I want all you people swear the truth about this," excluded); *Mo.*: 1903, *State v. Parker*, 172 Mo. 191, 72 S. W. 650 ("I never made any threats against him or my life," "I never had a quarrel with him," excluded, though the defendant had introduced evidence of recent threats by the deceased; the ruling is absurd, and disfigures the law of evidence in Missouri, — the more emphatically because a new trial was ordered solely because of the admission of these parts of the declaration); *N. Y.*: 1902, *People v. Smith*, 172 N. Y. 264, 64 N. E. 814 (declaration as to an occurrence of three hours before the fatal injury, excluded; the ruling is unsound); *N. C.*: 1899, *State v. Jefferson*, 125 N. C. 712, 34 S. E. 648 (declarations about a precedent quarrel, etc., with defendant, whom deceased did not recognize at time of shooting, excluded); *Or.*: 1874, *State v. Grand*, 5 Or. 216, 219; *S. C.*: 1895, *State v. Petsch*, 43 S. C. 132, 20 S. E. 993 (circumstances of preceding dispute, beginning two weeks before, *semble*, admissible); *Wash.*: 1897, *State v. Moody*, 18 Wash. 165, 51 Pac. 356 (decla-

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§ 1435. **Further Limitations rejected.** The foregoing limitations, it will be observed, are logically required by the principle as introduced by Serjeant East (*ante*, § 1431). But two further and equally necessary results of it have never been accepted:

(1) If the killing was not secret, or if *other and adequate testimony* as to the circumstances of the death is at hand, nevertheless the dying declaration is admissible, even though in strictness it is not needed:

1898, *Williams, J.*, in *Com. v. Roddy*, 184 Pa. 274, 39 Atl. 211: "[The defendant] alleges that the Commonwealth was under no necessity to use the dying declarations, and therefore had no right to use them. This rests on a misapprehension of the rule relating to their admission. The 'necessity' to which the text-books and the cases refer is not the exigency of any particular case, but a public necessity, which civilized society feels the pressure of, for the protection of human life by the punishment of manslaughter. . . . [The evidence] is competent, not in a particular case, where the defendant could not otherwise be convicted, but in all cases, no matter how ample the evidence of identification through other sources may be."¹

This again shows the historical unsoundness of the spurious principle; for, had it originated in the reason given, the first and fundamental rule would have been to distinguish between cases in which other evidence was or was not attainable.

(2) Where the fact of the killing is *conceded*, the dying declaration, under the spurious principle, is by hypothesis unnecessary; nevertheless, this result is not recognized; the declaration is admitted, even where the killing is *conceded*.²

§ 1436. **Foregoing Limitations Improper.** All of the foregoing limitations, except the death of the declarant, are unsound; and for the following reasons:

(1) The orthodox policy of the Hearsay exceptions in general (*ante*, § 1421) is to interpret the "necessity" for the evidence as meaning, not the absence of other evidence from *any* source, but merely the absence of other evidence from the *same* source, *i. e.* the declarant. (2) The spurious principle, even so far as carried out, rests on wrong assumptions; for it is of as much consequence to the cause of justice that robberies and rapes be punished and torts and breaches of trust be redressed as that murders be detected. The notion that a crime is more worthy the attention of Courts than a civil wrong is a traditional relic of the days when civil justice was administered in the royal courts as a purchased favor, and criminal prosecutions in the king's name were zealously encouraged because of the fines which they added to the royal revenues. (3) The sanction of a dying declaration is equally efficacious whether it speaks of a murder or a robbery or a fraudulent will; and the necessity being the same, the admissibility should be the same. (4) The

tion as to a prior threat of defendant, excluded); 782; 1883, *Payne v. State*, 61 Miss. 163; 1857, *Wyo.*: 1903, *Foley v. State*, — Wyo. —, 72 *Donnelly v. State*, 26 N. J. L. 627.
Pac. 627 (statement as to quarrel within the
³ 1886, *State v. Saunders*, 14 Or. 305, 12
past two weeks, excluded). *Pac.* 441. *Contra*: 1895, *Saylor v. Com.*, 97
¹ *Accord*: 1881, *Reynolds v. State*, 68 Ala.
508; 1903, *Fuqua v. Com.*, — Ky. —, 73 S. W.
Ky. 184, 30 S. W. 390.

spurious principle is recognized as unworkable in logical strictness, and when fairly carried out, comes into conflict with convenience and good sense. (5) Its limitations are heresies of the present century, which have not even the sanction of antiquity. They should be wholly abolished by legislation.¹

2. The Circumstantial Guarantee.

§ 1438. **In general; Solemnity of the Situation.** All Courts have agreed with more or less difference of language, that the approach of death produces a state of mind in which the utterances of the dying person are to be taken as freed from all ordinary motives to mis-state. The great dramatist expressed the common feeling long before it was sanctioned by judicial opinion.¹ In the following passages will be found the now classical sentences of the earlier English judges, as well as later ones pointing out clearly how the situation supplies a circumstantial guarantee of accuracy equivalent to that of the tests of oath and cross-examination:

1789, *Eyre, C. B.*, in *Woodcock's Case*, Leach Cr. L., 4th ed., 500. "The general principle on which this species of evidence is admitted is 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 created by a positive oath administered in a court of justice."

1837, *Alderson, B.*, in *Ashton's Case*, 2 Lew. Cr. C. 147: "When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath, and his declarations as to the cause of his death are considered equal to an oath, but they are nevertheless open to observation. For though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination."

1858, *Voorhies, J.*, in *State v. Brunetto*, 13 La. An. 45: "The reason for the rejection of hearsay evidence is that the party against whom it militates has not had the benefit of a cross-examination, and because the declarant did not speak under the sanction of an oath. An exception to this rule obtains in cases of dying declarations, the sense of impending dissolution being considered as offering the necessary guarantees that the declaration is in accordance with the truth."

1890, *Mulkey, J.*, in *Tracy v. People*, 97 Ill. 106: "There are certain guarantees of the truth of dying declarations, growing out of the solemnity of the time and circumstances under which they are made, which in contemplation of law are supposed to compensate for the fact that they are not sanctioned by an oath and the party against whom they are used has had no opportunity to cross-examine."

1896, *Gray, J.*, in *People v. Craft*, 148 N. Y. 631, 43 N. E. 80 (the trial judge told the

¹ Courts have here and there expressed dissatisfaction with these limitations: 1813, Taylor, C. J., in *McFarland v. Shaw*, 2 N. Car. L. Repos. 105; 1861, Davies, J., in *Caujolle v. Ferrié*, 23 N. Y. 94; 1869, McCay, J., in *Wooten v. Wilkins*, 39 Ga. 223; 1873, Barrows, J., in *State v. Wagner*, 61 Me. 195.

² About 1595: *King John*, V, 41

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?"

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jury that a dying declaration "is given all the sanction which the law can give to evidence"): "Dying declarations are of the nature of hearsay, or second-hand, evidence. . . . It never has been, and it is not to be, supposed that they have all the guaranties which surround evidence given under oath in a court of justice. . . . It is, of course, true that such declarations are considered to be equal to an oath taken in a court of justice; but that is because of the circumstances surrounding them when made. It is assumed that, being made in extremity, when the party is at the point of death, and believes that all hope in this world is gone, they have some guaranty for their truth, in view of the solemnity of the occasion, or as much as an oath in court would have. But it is clear that their value as evidence rests upon an assumption; and hence it is that, while the law recognizes the necessity of admitting such proof on a par with an oath in a court of justice, it does not and cannot regard it as of the same value and weight as the evidence of a witness given in a court of justice, under all the tests and safeguards which are there afforded for discovering the truth, the object of judicial inquiry;² for there the accused has the opportunity of more fully investigating the truth of the evidence by the means of cross-examination, and the jury have the opportunity of observing the demeanor of the person whose testimony is relied upon. The power of cross-examination is quite as essential, in the process of eliciting the truth, as the obligation of an oath; and where the life or the liberty of the defendant is at stake the absence of the opportunity for cross-examination is a serious deprivation; which differentiates in nature and in degree the evidence of a dying declaration from that which is direct and given upon the witness stand. . . . Speaking in a strict sense, the sanction of an oath and the sanction of such declarations are deemed to be the same, when the state of mind of the person is considered; but, as it was said by Baron Alderson, in *Ashton's Case*, "though the sanction is the same, the opportunity of investigating the truth is very different, and therefore the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination."'³

Such being the nature of the guarantee, certain rules follow from the principle.

§ 1439. **Consciousness of the Approach of Death; Subsequent Confirmation.** As the guarantee consists in the subjective effect of the approach of death, it is essential that the declarant should appear to have had a consciousness of the approach of death:

1829, *Park, J.*, in *R. v. Pike*, 3 C. & P. 598: "We allow the declaration of persons in *articulo mortis* to be given in evidence, if it appear that the person making such declaration was then under the deep impression that he was soon to render an account to his Maker."

1869, *Ray, J.*, in *Morgan v. State*, 31 Ind. 199: "As this class of evidence forms an exception to the general rule; as there can be no cross-examination of the declarant; as the accused cannot often meet his accuser face to face; and as there must of necessity exist great danger of abuse; it must clearly appear that the statements offered in evidence have been made under a full realization that the solemn hour of death has come."

This consciousness must of course have been *at the time of making the*

² On this point, see also a good opinion in *Lambeth v. State*, 23 Miss. 322, 358 (1852).

³ Compare also: 1844, *Forrest v. Kissam*, 7 Hill N. Y. 474, *Forrest, Sen.*; 1852, *Campbell v. State*, 11 Ga. 374, *Lumpkin, J.*; 1855, *Starkey v. People*, 17 Ill. 20, 21, *Skinner, J.*; *Scates, C. J.*; 1858, *Godfrey v. State*, 31 Ala. 323, *Rice, C. J.*; 1859, *State v. Terrell*, 12 Rich.

L. 329, *O'Neill, J.*; 1864, *People v. Sanchez*, 24 Cal. 17, 24, *Sanderson, C. J.*; 1868, *Whitley v. State*, 38 Ga. 70, *Harris, J.*; 1871, *Hill v. State*, 41 Ga. 503, *Lochrane, C. J.*; 1871, *Com. v. Roberts*, 108 Mass. 301, *Chapman, C. J.*; 1872, *State v. Williams*, 67 N. C. 14, *Rodman, J.*; 1892, *Mattox v. U. S.*, 146 U. S. 152, 13 Sup. 50, *Feller, C. J.*

*declaration.*¹ It follows, on the one hand, that a *subsequent change* of the expectation of death, by the recurrence of a hope of life, does not render inadmissible a prior declaration made while the consciousness prevailed, although a repetition of the declaration during the subsequent inadequate state of mind would not be admissible;² and, on the other hand, that a declaration made during an inadequate state of mind may become admissible by a subsequent affirmation of it made when the realization of impending death had supervened.⁴

§ 1440. **Certainty of Death.** It follows, from the general principle, that the belief must be, not merely of the possibility of death, nor even of its probability, but of its *certainty*. A less stringent rule might with safety have been adopted;¹ but this is the accepted one. The tests have been variously phrased; there must be "no hope of recovery"; "a settled expectation of death"; "an undoubting belief." Their general effect is the same. The essential idea is that the belief should be a positive and absolute one, not limited by doubts or reserves; so that no room is left for the operation of worldly motives:

1851, *Pigot*, C. B., in *R. v. Mooney*, 5 Cox Cr. 318: "These declarations would not be evidence unless she was under a clear impression that she was in a dying state."

1860, *Willes*, J., in *R. v. Peel*, 2 F. & F. 22: "There must be a settled, hopeless expectation of death in the declarant."

1869, *R. v. Jenkins*, L. R. 1 Cr. C. R. 192; *Kelly*, C. B.: "The result of the cases is that there must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die." *Byles*, J.: "The authorities show that there must be a hope whatever."

1888, *Beasley*, C. J., in *Peak v. State*, 50 N. J. L. 222, 12 Atl. 701: "[The declarant] shall have a complete conviction that death is at hand. . . . Death, shortly to ensue, must be an absolute certainty, so far as the consciousness of the person making the declaration is concerned."³

¹ 1835, *R. v. Spillsbury*, 7 C. & P. 190; 1875, *Walker v. State*, 52 Ala. 195; 1876, *May v. State*, 55 Ala. 41; 1857, *Donnelly v. State*, 26 N. J. L. 618.

² 1881, *R. v. Hubbard*, 14 Cox Cr. 565; 1894, *State v. Reed*, 53 Kan. 767, 773, 37 Pac. 174; 1893, *State v. Shaffer*, 23 Or. 555, 560, 32 Pac. 545.

³ 1899, *State v. Sailer*, 51 La. An. 1397, 26 So. 390 (statements made the day after admissible statements; excluded, because consciousness of impending death was not shown to continue; an illiberal ruling); 1896, *Carver v. U. S.*, 160 U. S. 553, 16 Sup. 388.

⁴ 1872, *R. v. Steele*, 12 Cox Cr. 168, 170; 1894, *Johnson v. State*, 102 Ala. 1, 16 So. 99 (even though it is not read over to him); 1901, *Wilson v. Com.*, — Ky. —, 60 S. W. 400; 1902, *Smith v. Com.*, — id. —, 67 S. W. 32; 1894, *State v. Evans*, 124 Mo. 397, 409, 28 S. W. 8; 1901, *State v. Garth*, 164 Id. 553, 65 S. W. 275. *Contra*: 1901, *Harper v. State*, 79 Miss. 575, 31 So. 195 (no authority cited).

⁵ In the following cases a strong probability only was required: 1765, *Lord Byron's Trial*,

19 How. St. Tr. 1205, 1206, *semble*; 1840, *R. v. Perkins*, 9 C. & P. 395 (before thirteen judges).

⁶ Examples: *Eng.*: 1826, *R. v. Craven*, Law. Cr. C. 77 ("I am afraid, doctor, I shall never get better"; admitted); 1831, *R. v. Crockett*, 4 C. & P. 544; 1829, *R. v. Simpson*, 1 Law. Cr. C. 78 ("I fear I am in great danger"; admitted); 1837, *Ashton and Thornley's Case*, 2 Id. 147 ("I think I will not recover," after a similar statement by the surgeon; admitted); 1838, *Errington's Case*, lb. 149 ("I think myself in great danger"; excluded); 1881, *R. v. Osman*, 15 Cox Cr. 1, 3 ("a settled hopeless expectation of immediate death"); 1888, *R. v. Gloster*, 16 Id. 471, 476; *U. S.*: 1902, *Milton v. State*, 134 Ala. 42, 32 So. 653; 1880, *People v. Hodgdon*, 55 Cal. 77; 1881, *People v. Taylor*, 59 Id. 648; 1882, *People v. Gray*, 61 Id. 175; 1893, *Graves v. People*, 18 Colo. 170, 176, 32 Pac. 63 (inadmissible, if there is an expectation of recovery); 1870, *Dixon v. State*, 13 Fla. 640; 1896, *Lester v. State*, 37 Id. 382, 20 So. 232 ("no hope whatever," "entirely without hope"); 1901, *Green v. State*, 43 Id. 552, 30 So. 798; 1902, *Collina v. People*, 194

§ 1441. *Speediness of Death.* It follows, also, that the expectation must be of a *speedy* death. All men are mortal, and know it. An expectation of ultimate but distant death: is obviously, in experience, not calculated to produce that sincerity of statement which is desired. Nevertheless, no definition of time can be fixed; the determination must vary with each case, after all the circumstances are considered:

1820, *Hullock, B.*, in *R. v. Van Butchell*, 3 C. & P. 631: "A man may receive an injury from which he may think that he shall ultimately 'never recover'; but still that would not be sufficient to dispense with an oath."

1860, *Byles, J.*, in *R. v. Jenkins*, L. R. 1 Cr. C. R. 193: "In order to make a dying declaration admissible, there must be an expectation of impending and almost immediate death."¹

But the *actual period of survival* after making the declaration is immaterial. The necessary element is a subjective one,—the declarant's expectation; and the subsequent duration of life, whatever it may turn out to be, has no relation to his state of mind when speaking:

1857, *Pollock, C. B.*, in *R. v. Reaney*, 7 Cox Cr. 200, 212: "In truth, the question does not depend upon the length of interval between the death and the declaration, but on the state of the man's mind at the time of making the declaration and his belief that he is in a dying state."

Accordingly, there seems to be no case in which the time of survival was deemed to exclude the declaration; and various periods have been passed upon as not too long.²

§ 1442. *Consciousness of approaching Death; how determined.* In ascertaining this consciousness of approaching death, recourse should naturally be

111. 506, 62 N. E. 902; 1872, *State v. Medlicott*, 9 Kan. 288; 1901, *Worthington v. State*, 92 Md. 222, 48 Atl. 355; 1781, *Com. v. Roberts*, 108 Mass. 301; 1896, *People v. Beverly*, 109 Mich. 509, 66 N. W. 379; 1896, *People v. Weaver*, lb. 649, 66 N. W. 567 ("I make these statements in full view of my probable death"; admitted); 1901, *Harper v. State*, 79 Miss. 575, 31 So. 195; 1903, *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624; 1900, *State v. Jagers*, 58 S. C. 41, 36 S. E. 434; 1848, *Smith v. State*, 9 Humph. 17 ("fully conscious of that fact, not as a thing of surprise and conjecture or apprehension, but as a fixed and inevitable fact"); 1853, *Brakefield v. State*, 1 Sued 218. Asking for a physician does not necessarily show that there is no hope of recovery: 1844, *R. v. Howell*, 1 Denison Cr. C. 1; 1894, *McQueen v. State*, 103 Ala. 12, 15 So. 824; 1894, *State v. Evans*, 124 Mo. 397, 28 S. W. 8. *Contra*, but unsound: 1892, *Matherly v. Com.*, — Ky. —, 19 S. W. 977.

¹ 1881, *R. v. Osman*, 15 Cox Cr. 1, 3 ("immediate death"); 1888, *R. v. Gloster*, 16 id. 471, 477 (same); 1858, *McHugh v. State*, 31 Ala. 323 ("that despair which is naturally produced by an impression of almost immediate dissolution"); 1898, *Titus v. State*, 117 Md. 16, 23 So. 77 (that he "said he would die," insuffi-

cient; but "believed he would soon die," sufficient); 1896, *Lester v. State*, 37 Fla. 382, 20 So. 232 ("imminent and inevitable"); 1893, *U. S. v. Schneider*, 21 D. C. 381, 404 ("speedily"); 1895, *Saylor v. Com.*, 97 Ky. 184, 30 S. W. 390 ("I shall not get well"; excluded on the facts); 1898, *State v. Ashworth*, 50 La. An. 94, 23 So. 270 ("bound to die," "could not live much longer"; received); 1893, *State v. Welsor*, 117 Mo. 570, 579, 21 S. W. 443 ("immediate dissolution"); 1897, *State v. Dalton*, 20 R. I. 114, 37 Atl. 673 ("impending," not necessarily "immediate").

² 1834, *R. v. Bonner*, 6 C. & P. 386; 1869, *R. v. Bernadotti*, 11 Cox Cr. 316 (nearly three weeks' survival; admitted); 1893, *Boulden v. State*, 102 Ala. 78, 34, 15 So. 341 (two months' survival; admitted); 1880, *Jones v. State*, 71 Ind. 74; 1902, *Burton v. Com.*, — Ky. —, 70 S. W. 331 (death eleven days later; admitted); 1879, *State v. Daniel*, 31 La. An. 95; 1862, *Com. v. Cooper*, 5 All. 497; 1871, *Com. v. Roberts*, 108 Mass. 301; 1879, *Com. v. Haney*, 127 id. 457; 1897, *State v. Craine*, 120 N. C. 601, 27 S. E. 72 (five months before death, admitted); 1896, *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046 (five days before death; admitted); 1875, *Swisher's Case*, 26 Gratt. 971.

had to all the attending circumstances. It has been contended that only the statements of the declarant could be considered for this purpose; or, broadly, that the nature of the injury alone could not be sufficient, & c., effect, that the declarant must have shown in some way by conduct or language that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained. Such is the settled judicial attitude:

1780, *Eyre, C. B.*, in *Woodcock's Case*, Leach Cr. L., 4th ed., 500: "My judgment that inasmuch as she was mortally wounded and was in a condition which rendered almost immediate death inevitable; as she was thought by every person about her to be dying, though it was difficult to get from her particular explanations as to what she thought of herself and her situation; her declarations made under these circumstances ought to be considered by a jury as being made under the impression of her approaching dissolution; for, resigned as she appeared to be, she must have felt the hand of death and must have considered herself as a dying woman."

1790, *R. v. John*, 1 East's Cr. L. c. 8, § 124, p. 358; all the judges agreed that "if a dying person either declares that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence."

1850, *Dargan, C. J.*, in *Oliver v. State*, 17 Ala. 594: "The Court must look to all the circumstances under which they were made; and if they be sufficient to induce the belief that the deceased made them under the sense of impending death, the declarations are admissible."¹

It must be said, however, that in ascertaining generally the existence of a knowledge of approaching death, Courts are now and then found making

¹ Accord: 1873, *R. v. Smith*, 23 U. C. C. P. 316; 1849, *McLean v. State*, 16 Ala. 672, 674; 1841, *Dunn v. State*, 2 Ark. 247; 1900, *Newberry v. State*, 68 id. 355, 58 S. W. 351; 1897, *Wagoner v. Terr.*, — Ariz. —, 51 Pac. 145; 1882, *People v. Gray*, 61 Cal. 175; 1894, *State v. Cronin*, 64 Conn. 293, 302, 29 Atl. 536 ("Lord, have mercy"); 1896, *Lester v. State*, 37 Fla. 382, 20 So. 232; 1852, *Campbell v. State*, 11 Ga. 377; 1878, *Dunnas v. State*, 62 id. 58; 1902, *Young v. State*, 114 id. 819, 40 S. E. 1000; 1893, *Govt v. Hering*, 9 Haw. 181, 188; 1865, *Murphy v. People*, 37 Ill. 447, 456, *semble*; 1869, *Morgan v. State*, 31 Ind. 199; 1877, *State v. Elliott*, 45 Ia. 488; 1888, *Peoples v. Com.*, 87 Ky. 496, 9 S. W. 509, 810; 1889, *Com. v. Matthews*, 89 id. 292, 12 S. W. 333; 1857, *State v. Scott*, 12 La. An. 274; 1895, *State v. Jones*, 38 id. 792, 18 So. 515; 1871, *Com. v. Roberts*, 108 Mass. 301; 1882, *People v. Simpson*, 48 Mich. 477, 12 N. W. 662; 1895, *Bell v. State*, 72 Miss. 507, 17 So. 232; 1894, *State v. Evans*, 124 Mo. 397, 28 S. W. 8; 1893, *State v. Russell*, 13 Mont. 164, 168, 32 Pac. 854; 1895, *Collins v. State*, 46 Nebr. 37, 64 N. W. 432; 1857, *Donnelly v. State*, 26 N. J. L. 500, 618; 1855, *State v. Shelton*, 2 Jones L. 360; 1893, *State v. Fletcher*, 24 Or. 295, 297, 33 Pac. 675; 1858, *Kilpatrick v. Com.*, 31 Pa. 215;

1848, *Smith v. State*, 9 Humph. 20; 1892, *Mattox v. U. S.*, 146 U. S. 140, 151, 13 Sup. 50; 1897, *Carver v. U. S.*, 164 id. 694, 17 Sup. 228 (the administration of extreme unction by a priest, admitted to show that the deceased knew she was dying); 1898, *Re Orpen*, 86 Fed. 780, 761; 1831, *Vass' Case*, 3 Leigh 863. *Contra, semble*: 1875, *R. v. Morgan*, 14 Cox Cr. 337 (Denman, J., and Cockburn, C. J., thought that "there was no case in which the judge had admitted the statement entirely upon an inference drawn from the nature of the wound itself and from giving the deceased credit for ordinary intelligence as to its natural results," and offered to reserve the case, but the evidence was withdrawn; here the man's head was all but cut off, the windpipe and chief blood-vessels severed; being unable to speak, he motioned for paper and wrote on it; he died in ten minutes after writing; query, whether any but two lawyers could have doubted that the man was aware of his horrible plight?).

So, also, if the statement is taken in writing (post, § 1450), the writing need not contain a statement of the expectation of death: 1847, *R. v. Hunt*, 2 Cox Cr. 239; 1897, *People v. Yokum*, 118 Cal. 437, 50 Pac. 686, *semble*; 1897, *Austin v. Com.*, — Ky. —, 40 S. W. 905.

rulings at which common sense revolts. Moved either by a disinclination to allow the slightest flexibility of rule in applying principles to circumstances, or by a general repugnance to exceptions to the Hearsay rule, they have recorded decisions which can only be derided by laymen and repudiated by the profession.² It is the narrow and over-cautious spirit of such decisions which tends to stunt the free development and application of living principles, to hamper the administration of justice, and to undermine public confidence in legal procedure; and no opportunity ought to be omitted of censuring the manifestations of this spirit.

No rule can here be laid down. The circumstances of each case will show whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances.³

¹ 1851, *R. v. Mooney*, 5 Cox Cr. 318 (the evidence was that "the clergyman had warned her to prepare for death; she had not told any person that she knew she was dying; but she had been heard recommending her soul to God"; Pigot, C. B., held that the proof of her being aware that she was dying was not sufficient); 1852, *R. v. Nicolas*, 6 Cox Cr. 121 (testimony: "I believe he knew he was dying. I cannot recollect that he said anything about dying before he began his statement. As he finished it, he said, 'Oh, God! I am going fast; I am too far gone to say any more'"; Cresswell, J., "It being possible that this man did not discover the extent of his weakness till he had made the statement, and that it was only after he had made it he for the first time discovered that he was going fast, there is not, consequently, that clear ascertainment of his consciousness of his state, before he made it, to render it admissible"). See also the following: 1836, *R. v. Spilsbury*, 7 C. & P. 190; 1838, *Smith v. State*, 9 Humph. 22, 23; 1854, *St. v. Peltier*, 4 Low. Can. 22. For an example of liberal treatment, see *Peoples v. Com.*, 87 Ky. 495, 9 S. W. 509, 810 (1888).

² In the following cases various states of fact, useless as precedents, were passed upon; the profession should not have been burdened by a judicial opinion on them: *Eng.*: 1865, *R. v. Smith*, 10 Cox Cr. 82, 95; 1866, *R. v. Forester*, ib. 368; 1868, *R. v. Mackay*, 11 id. 148; 1887, *R. v. Smith*, 16 id. 170; *Can.*: 1897, *R. v. Woods*, 5 Br. C. 585, 589; 1903, *R. v. Louie*, 8 id. 1, 7; *Ala.*: 1892, *Justice v. State*, 99 Ala. 180, 182, 13 So. 658; 1895, *Cole v. State*, 105 id. 78, 16 So. 762; 1895, *Clark v. State*, ib. 91, 17 So. 37; 1895, *Fuller v. State*, 117 id. 86, 23 So. 688; 1899, *Dubose v. State*, 120 id. 300, 25 So. 185; 1900, *Gibson v. State*, 126 id. 59, 28 So. 678; 1903, *Smith v. State*, 136 id. 1, 34 So. 168; 1904, *Walker v. State*, — id. —, 35 So. 1011; *Ark.*: 1893, *Evans v. State*, 58 Ark. 47, 54, 22 S. W. 1026; *Cal.*: 1899, *People v. Fuhrig*, 127 Cal. 412, 59 Pac. 693; 1901, *People v. Lem Deo*, 132 id. 199, 64 Pac. 265; 1903, *People v. Dobbins*, 138 id. 694, 72 Pac. 339; *Fla.*: 1900, *Richard v. State*, 42 Fla. 528, 29 So. 413; *Ga.*: 1898, *Parks v. State*, 105 Ga. 242, 31 S. E. 580; 1900, *Wheeler v. State*, 112 id. 48, 37 S. E. 126; *Ill.*: 1894, *Simons v. People*,

150 Ill. 66, 73, 36 N. E. 1019; 1897, *Kirkman v. People*, 170 id. 9, 48 N. E. 465; 1901, *People v. People*, 188 id. 545, 59 N. E. 242; 1900, *Green v. State*, 154 Ind. 655, 57 N. E. 637; *Id.*: 1898, *State v. Young*, 104 Ia. 730, 74 N. W. 693; 1902, *State v. Phillips*, 118 id. 660, 92 N. W. 876; 1903, *State v. Dennis*, 119 id. 688, 94 N. W. 235; *Kan.*: 1902, *State v. Morrison*, 64 Kan. 669, 68 Pac. 48; *Ky.*: 1898, *Jones v. Com.*, — Ky. —, 46 S. W. 217; 1901, *Barnes v. Com.*, 110 id. 348, 61 S. W. 733; 1896, *State v. Smith*, 48 La. An. 533, 19 So. 452; 1899, *State v. Sadler*, 51 id. 1397, 26 So. 390; 1904, *State v. Brown*, 111 La. 696, 35 So. 818; *Mass.*: 1895, *Com. v. Brewer*, 164 Mass. 677, 42 N. E. 92; *Mich.*: 1899, *People v. Lonsdale*, 122 Mich. 386, 81 N. W. 277; *Miss.*: 1895, *Beil v. State*, 72 Miss. 507, 17 So. 232; 1893, *Lipscomb v. State*, 75 id. 559, 23 So. 210, 230; 1898, *Joslin v. State*, 75 id. 838, 23 So. 515; *Mo.*: 1893, *State v. Umbie*, 115 Mo. 452, 461, 22 S. W. 378; 1893, *State v. Johnson*, 118 id. 491, 508, 24 S. W. 229; 1894, *State v. Nottan*, 121 id. 537, 549, 26 S. W. 551; 1899, *State v. Garrison*, 147 id. 548, 49 S. W. 508; *Nebr.*: 1895, *Baase v. State*, 44 Nebr. 261, 63 N. W. 811; *N. C.*: 1893, *State v. Whitt*, 113 N. C. 716, 720, 18 S. E. 715; 1896, *State v. Finley*, 118 id. 1161, 24 S. E. 495; 1896, *State v. Mace*, ib. 1244, 24 S. E. 798; *Or.*: 1874, *State v. Garrard*, 5 Or. 216, 218; *Pa.*: 1894, *Com. v. Silcox*, 161 Pa. 484, 497, 29 Atl. 105; 1895, *Com. v. Mika*, 171 id. 273, 33 Atl. 65; *S. C.*: 1880, *State v. Belcher*, 13 S. C. 459, 463; 1898, *State v. Arnold*, 47 id. 9, 24 S. E. 926; 1900, *State v. Taylor*, 56 id. 300, 31 S. E. 939; *Tenn.*: 1896, *Iemons v. State*, 97 Tenn. 560, 37 S. W. 552; *Tex.*: 1894, *Meyers v. State*, 33 Tex. Cr. 204, 216, 26 S. W. 196; *Va.*: 1901, *O'Boyle v. Com.*, 100 Va. 785, 40 S. E. 121; *Wash.*: 1894, *State v. Eddon*, 8 Wash. 292, 298, 36 Pac. 139; 1901, *State v. Power*, 24 id. 34, 63 Pac. 1112; *Wis.*: 1901, *Hughes v. State*, 109 Wis. 397, 85 N. W. 333. In the following courts the determination of the trial judge is said to control: 1899, *Baker v. Com.*, — Ky. —, 50 S. W. 54; 1896, *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560; 1895, *Baase v. State*, 44 Nebr. 261, 63 Mo. 811.

§ 1443. *Revengeful Feelings; Theological Belief.* It remains to examine more closely the nature of the circumstantial guarantee of trustworthiness. It is separable (as may be seen from the judicial language already quoted) into three elements. (1) The declarant, being at the point of death, "must lose the use of all deceit," — in Shakspeare's phrase. There is no longer any temporal self-serving purpose to be furthered. (2) If a belief exists in a punishment soon to be inflicted by a Higher Power upon human ill-doing, the fear of this punishment will outweigh any possible motive for deception, and will even counterbalance the inclination to gratify a possible spirit of revenge. (3) Even without such a belief, there is a natural and instinctive awe at the approach of an unknown future, — a physical revulsion common to all men, irresistible, and independent of theological belief. In view of these three elements, what may be laid down as to the condition of the declarant's mind at this moment before dissolution?

First, the declarant may exhibit such strong feelings of hatred or revenge that the effect of all the above influences appears to be lacking. If he is in such a frame of mind, the supposed guarantee of trustworthiness fails, and the declaration should not be admitted:

1880, *Mulkey, J.*, in *Tracy v. People*, 97 Ill. 105: "The fact sought to be shown [profane language] was important in another point of view. It strikes at the very foundation of the reasons upon which dying declarations are admitted at all. There are certain guaranties of the truth of dying declarations, growing out of the solemnity of the time and circumstances under which they are made. . . . It was clearly the right of the accused to show . . . that the deceased in making the statement was not in that frame of mind which the law presupposes and requires in such cases, . . . that the deceased . . . was in a reckless, irreverent state of mind, and entertained feelings of ill-will and hostility towards the accused."

Secondly, if we suppose the second element to be essential, and not merely usual, then a theological belief of a particular sort — a belief in a punishment in a future state — must be required. Yet if (as seems better) the third element — the physical revulsion peculiar to the moment — is to be regarded as the essential element of the guarantee, then the theological belief is immaterial. This distinction has not been expressly passed upon by the Courts. The majority of the few cases hold that the theological belief is material.¹

¹ 1829, *R. v. Plke*, 3 C. & P. 598 (Park, J.: "As this child was but four years old, it is quite impossible that she, however precocious in her mind, could have had that idea of a future state which is necessary to make such a declaration admissible. . . . [Her remark] does not show that she had any idea of a future state; indeed, I think that from her age we must take it that she could not possibly have had any idea of that kind"); 1880, *Tracy v. People*, 97 Ill. 105 (Mulkey, J.: "The vital inquiry before the Court was as to the real condition of the mind of the deceased when making the statement under consideration. . . . The use of profane language immediately preceding the statement is

hardly to be reconciled with the assumption that he was at the time of sound mind and impressed with a sense of almost immediate death. . . . It is hard to realize how any sane man who believes in his accountability to God can be indulging in profanity when at the same time he really believes that in a few short hours at most he will be called upon to appear before Him to answer for the deeds done in the body"). *Accord*: 1840, *R. v. Perkus*, 9 C. & P. 395 (dying declaration of a child of ten received; here he said that he expected "to go to hell if he told a lie, and to heaven if he told the truth"); 1857, *Donnelly v. State*, 26 N. J. L. 507, 620; 1829, *Phillips, Evidence*, 7th Eng. ed., 236; 1843, *ib.*

But this question must be distinguished from that of the declarant's capacity to take an oath. If in the jurisdiction a witness is no longer affected by the common-law rule requiring an oath and the capacity to take an oath, *i. e.* the possession of a specific theological belief (*post*, § 1829), the declarant's belief is immaterial in determining his oath-capacity. But even where this common-law rule is abolished, his belief may still become material, with reference to the admissibility of this specific class declaration. In several cases, however, the Courts, ignoring this double aspect of the question, have been satisfied with pointing out the abolition of the common-law rule affecting capacity to take the oath, and have without further question admitted the declarations.² In a few cases it is said that the declarant's belief goes only to the weight of his statements; but the Courts here seem still to have had in mind only the question of common-law competency to take an oath.³

3. Testimonial Qualifications, and other Independent Rules of Evidence, as applied to this Exception.

There remain certain rules (*ante*, § 1424) which have nothing to do with the Hearsay exception as such, but are merely instances of general principles otherwise established.

§ 1445. **Testimonial Qualifications (Infancy, Insanity, Interest, Recollection, Leading Questions, Written Declarations, etc.).** In general, for testimonial qualifications, the rules to be applied are no more and no less than the ordinary ones, already examined (§§ 483-812), for the qualifications of other witnesses:

1857, *Ogden, J.*, in *Donnelly v. State*, 26 N. J. L. 620: "Whatever would disqualify a witness would make such [dying] declarations incompetent testimony."

1864, *Sanderon, C. J.*, in *People v. Sanchez*, 24 Cal. 26: "They stand upon the same footing as the testimony of a witness sworn in the case, and are governed by the same rules, except as to . . . leading questions."

1874, *Campbell, J.*, in *People v. Olmstead*, 30 Mich. 434: "They [the declarations] are substitutes for sworn testimony, and must be such narrative statements as a witness might properly give on the stand if living."

1885, *Elliott, C. J.*, in *Boyle v. State*, 97 Ind. 322; 105 Ind. 470: "Dying declarations are admissible in a case where the evidence would be competent if the declarant were on the witness stand. . . . The question here is . . . whether the declarant's statement was one that a witness on the stand would have been allowed to make."

(1) *Insanity, Infancy, Interest.* If the declarant would have been dis-

C. & H.'s Notes, No. 457, p. 611. *Contra*: 1871, *Nesbit v. State*, 43 Ga. 249 (Lochrane, C. J.): "If a man . . . [dies] without belief in God or in the divine revelation . . . his declarations would be admissible"; 1897, *Carver v. U. S.*, 164 U. S. 694, 17 Sup. 228, *semble* (disbelief in a future state of rewards and penalties does not exclude).

² 1872, *People v. Sanford*, 43 Cal. 34 (Wallace, C. J.): "The common-law rule in that respect [incompetence of a witness lacking a re-

ligious sense of accountability] has been abrogated. It mattered not, therefore, upon the point of the mere competency of the evidence, even had it appeared that the deceased had no religious belief"; 1877, *State v. Elliott*, 45 Ia. 489 (the declarant "believed in no God or future conscious state"); 1880, *State v. Ah Lee*, 8 Or. 218.

³ 1886, *Hill v. State*, 64 Miss. 440, 1 So. 494; 1861, *Goodall v. State*, 1 Or. 335.

qualified to take the stand, by reason of infancy,¹ insanity,² or interest,³ his extrajudicial declarations must also be inadmissible.

(2) *Knowledge*. The declarant must have had actual observation or opportunity for observation of the fact which he relates.⁴

(3) *Recollection*. The declarant's capacity of recollection, and his actual recollection, must have been sufficiently unimpaired to be trustworthy.⁵ The allowance of *leading questions* to stimulate recollection is sometimes here said to be by way of exception to the general rule against leading questions (*ante*, § 769). But in truth there seems to be no exception. The situation is not that of a presumably partisan witness offered in court, and questions leading in form will often have to be asked in order to obtain the information from a dying person unable to express himself except by a brief "yes" or "no." The mere fact, then, that questions leading in form are asked does not infringe the principle which forbids the supplying of a false memory (*ante*, § 778). There is thus no general rule here against leading questions.⁶ Nevertheless, where, in a particular case, the interrogators might seem to be really supplying a false memory, the answers should be excluded.⁷

(3) *Communication*. (a) Any adequate method of communication, whether by words or by signs or otherwise, will suffice, provided the indication is positive and definite, and seems to proceed from an intelligence of its meaning:

¹ 1784, *R. v. Drummond*, Leach Cr. L. 4th ed. 337; 1896, *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650; for the general rules, see *ante*, § 492.

² 1898, *Lipscomb v. State*, 75 Miss. 559, 23 So. 210, 330, 25 So. 153 ("not insane or delirious, but spoke with discernment, reason, and intelligence"); 1897, *State v. Reed*, 137 Mo. 125, 38 S. W. 574 (possession of proper mental faculties need not be shown in advance); Tex. Cr. P. 1895, § 788 (quoted *ante*, § 1430); for the general rules, see *ante*, § 519.

³ 1806, *Jackson v. Vredenburgh*, 1 John. 159, 163; for the general rules, see *ante*, § 576. For *oath-capacity*, see *ante*, § 1443.

⁴ 1882, *Walker v. State*, 39 Ark. 225; 1889, *Jones v. State*, 52 id. 347, 12 S. W. 704 (declarations rejected because it was impossible for the declarant to have seen who shot him, and he had therefore no adequate source of knowledge); 1901, *Jones v. State*, 79 Miss. 309, 30 So. 759 (declaration, by one shot in the back through a window at night, that J. shot her, because he had said that he was going to do so, held inadmissible because of lack of personal knowledge; yet the declaration as to J.'s threat should have been admitted, as concerning a part of the transaction); 1897, *State v. Reed*, 137 Mo. 125, 38 S. W. 574 (admissible as to whatever the deceased could testify to if on the stand); 1893, *Com. v. Rodly*, 184 Pa. 274, 39 Atl. 211 (dying identification of murderer; declarant held qualified on the facts). For the general rules, see *ante*, § 656. Compare the cases cited *post*, § 1447, some of which can be supported on the present principle.

⁵ 1880, *Mockabee v. Com.*, 78 Ky. 379 (the de-

clarant affirmed a paper previously written, and this was admitted on condition that his memory as to its contents was then clear); 1856, *Brown v. State*, 32 Miss. 448 (Smith, C. J.: "There are strong reasons for believing that the deceased did not fully understand the declarations as read to him, or that his faculties were so much impaired by the wounds under which he suffered that he was incapable of remembering with distinctness or stating with accuracy the facts and circumstances of the rencontre which resulted in his death"); 1831, *Vass' Case*, 3 Leigh 863, *semble*. For the general rules, see *ante*, § 725.

⁶ 1835, *R. v. Fagent*, 7 C. & P. 238; 1849, *McLean v. State*, 16 Ala. 672, 675; 1864, *People v. Sanchez*, 24 Cal. 26; 1898, *State v. Ashworth*, 50 La. An. 94, 23 So. 270 (mere asking of specific questions does not exclude); 1901, *Worthington v. State*, 92 Md. 222, 48 Atl. 355; 1892, *Mattox v. U. S.*, 146 U. S. 152, 13 Sup. 50; 1885, *People v. Callaghan*, 4 Utah 49, 6 Pac. 49. *Contra*: Tex. Cr. P. 1895, § 788 (see quotation *ante*, § 1436).

⁷ 1892, *R. v. Mitchell*, 17 Cox Cr. 503, 507 (lying declarations made in answer to uncorroborated questions, excluded, partly because the questions might have been leading); 1899, *People v. Fuhrig*, 127 Cal. 412, 59 Pac. 693 (long typewritten statement read over without stopping, and then assented to, excluded on the facts). *Contra, semble*: 1872, *People v. Knapp*, 26 Mich. 116 (Campbell, J.: "Where they are taken under auspicious circumstances, or drawn out by doubtful means, they are not excluded, but go to the jury for what they are worth").

1880, *Hines, J.*, in *Mockabee v. Com.*, 78 Ky. 382: "Dying declarations are not necessarily either written or spoken. Any method of communication between mind and mind may be adopted that will develop the thought, as the pressure of the hand, a nod of the head, or a glance of the eye."⁸

(b) When the declaration is in *writing*, the question may arise whether it is his narration at all (*ante*, § 799). If the declarant has written it, or has signed or otherwise approved it after reading it, or hearing it read aloud to him, it may be offered as his declaration.⁹ Otherwise it is not his declaration, but merely the written statement of the person taking the declaration; and it cannot in such a case be put in as being itself the dying person's declaration;¹⁰ though it may of course be used to refresh the writer's recollection, or may be put in as embodying the writer's recollection (under the principles of §§ 744-764, *ante*).¹¹ Whether this writing *must* be offered, instead of an auditor's testimony by recollection, is a different question (examined *post*, § 1450).

§ 1446. **Testimonial Impeachment or Rehabilitation.** The dying declaration being in effect a testimonial statement made out of court (*ante*, § 1424), the declarant is open to impeachment and discrediting in the same way as other witnesses (*ante*, § 885), so far as such a process is feasible. Thus, impeachment by bad testimonial *character* (*ante*, § 922) is allowable,¹ or by

⁸ 1872, *R. v. Steele*, 12 Cox Cr. 168 (the deceased had told Dr. Patchett his story; then, when dying, and being asked what happened, he said, "Tell him, Patchett"; and P. repeated the story in the declarant's presence; P.'s statement was admitted; Lush, J.: "It is equivalent to saying it himself"); 1903, *R. v. Louie*, 10 Br. C. 1, 3, 9 (nodding the head, held sufficient); 1858, *McHugh v. State*, 31 Ala. 323 (the attorney put questions, the attending friends made answers, and the deceased nodded his head to them; excluded, the Court not believing on the facts "that he either perfectly understood the language or was able to have detected the erroneous inference as to his meaning which his friends may honestly have drawn"); 1858, *Godfrey v. State*, 31 Id. 321 (the declarant merely nodded his head to questions by friends, his mind being also weak and lethargic at the time; rejected, because it did not appear that he understood their words or could know what they understood as his meaning); 1897, *Wagoner v. Terr.* — Ariz. —, 51 Pac. 145 (when asked why the defendant shot him, the deceased said, "You know why"; held admissible, when interpreted by the circumstances as applying to his wife's adultery with the defendant); 1853, *Com. v. Casey*, 11 Cush. 420 (pointing with a finger, so as to convey a meaning clearly, held sufficient). Compare *Luby v. Com.*, 12 Bush 6 (1876). For the general rules, see *ante*, §§ 789, 811.

It has been ruled that the expressions must be in form *assertive*, *i. e.* that mere exclamations are not to be admitted: 1874, *People v. Olmstead*, 30 Mich. 435. But this is without reason. If a definite assertive effect is conveyed the form is immaterial.

⁹ 1898, *Perry v. State*, 102 Ga. 365, 30 S. E. 903 (that it is reduced to writing by another and signed by the deceased, does not exclude); 1900, *Freeman v. State*, 112 Id. 48, 37 S. E. 172 (the deceased's signature is not necessary); 1896, *State v. Parham*, 48 La. An. 1309, 20 So. 727 (written by a physician, signed by the deceased, and authenticated by a magistrate, admitted); 1885, *People v. Callaghan*, 4 Utah 49, 6 Pac. 49 (like the next case); 1897, *State v. Carrington*, 15 Id. 480, 50 Pac. 526 (not signed, but assented to on hearing it read over; admitted); 1896, *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650 (the statement written down need not be in the deceased's exact language).

¹⁰ 1875, *State v. Fraumburg*, 40 Ia. 557 (a running memorandum of the statement written by a magistrate, and not read over or signed by the declarant, held not admissible); 1903, *Foley v. State*. — Wyo. —, 72 Pac. 627 (a memorandum not read over or signed by the deceased, and therefore usable only to refresh the writer's recollection, held not technically itself admissible).

¹¹ 1903, *Fuqua v. Com.*, — Ky. —, 73 S. W. 782 (writing not signed by the deceased, used to aid the writer's memory).

¹ 1896, *Lester v. State*, 37 Fla. 382, 20 So. 232; 1896, *Reid v. State*, 99 Ga. 210, 25 S. E. 268; 1898, *Perry v. State*, 102 Id. 365, 30 S. E. 903; 1897, *Carver v. U. S.*, 164 U. S. 694, 17 Sup. 228.

So also for other impeaching qualities (*ante*, § 933): 1847, *State v. Thawley*, 4 Harringt. 562 (admitting general evidence of his intemperate habits and of his low state of health at the time).

conduct showing a *vengeful or irreverent state of mind* at the time (*ante*, § 950),² or by *conviction of crime* (*ante*, § 980),³ or by prior or subsequent *inconsistent statements* (*ante*, § 1017).⁴ So also he may be corroborated by evidence of similar *consistent statements*, so far as this is allowable by the principles of that subject (*ante*, § 1122).⁵

§ 1447. **Rule against Opinion Evidence.** The Opinion rule has no application to dying declarations. The theory of that rule (*post*, § 1918) is that wherever the witness can state specifically the detailed facts observed by him, the inferences to be drawn from them can equally well be drawn by the jury, so that the witness' inferences become superfluous. Now, since the declarant is here deceased, it is no longer possible to obtain from him by questions any more detailed data than his statement may contain, and hence his inferences are not in this instance superfluous, but are indispensable. Nevertheless, Courts seem to accept the Opinion rule as applicable. Moreover, the rule is by some Courts applied here with more than the ordinary absurdity of results found in the use of that rule; some of the rulings, in their pedantic technicality, would be a scandal to any system of evidence supposed to be based on reason and common sense.¹

¹ 1899, *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970 (that the deceased "used profanity" just before his death, admitted); 1897, *Carver v. U. S.*, 164 U. S. 694, 17 Sup. 228 (that the deceased did not believe in future rewards and punishments, admitted). Compare § 1443, *ante*.

² 1896, *State v. Baldwin*, 15 Wash. 15, 46 Pac. 650. Compare § 1445, note 1, *ante*.

³ The authorities are collected *ante*, § 1033, where the special objection to this kind of evidence, that no prior question can be asked of the declarant, is discussed in detail.

So also impeachment by *contradiction* (*ante*, § 1000) may be allowable: 1900, *State v. Stuckey*, 56 S. C. 576, 35 S. E. 263 (whether irrelevant facts in the declaration could be disproved for impeachment, as an exception to § 1903, *ante*; not decided).

⁴ But the usual limitations seem to be not always strictly observed: 1858, *People v. Glenn*, 10 N. C. 32, 36 (even in chief, without any impeachment); 1879, *State v. Blackburn*, 80 id. 474, 478 (similar statements in support after impeachment by contradiction, admitted); 1897, *State v. Craine*, 120 id. 601, 27 S. E. 72 (an affidavit made on the same day, admitted).

⁵ It must be noted that so far as the declarant's "opinion" is construable as a mere guess, not based on personal observation, it is inadmissible on other principles (*ante*, §§ 1445, 658), and this may account for some of the following rulings; others also may be supported on the rule (*ante*, § 1434), that the declarations must relate to the circumstances connected with the death; *Ala.*: 1893, *Sullivan v. State*, 102 Ala. 135, 142, 15 So. 264 ("he cut me for nothing," admitted; "I pray God to forgive him," excluded); 1901, *Gerald v. State*, 128 id. 6, 29 So. 614 ("he killed me for nothing," admitted); *Ark.*: 1897, *Berry v. State*, 63 Ark. 382, 38 S. W.

1038 (that the whiskey which the defendant gave him was poisoned, excluded); *Ga.*: 1868, *Whitley v. State*, 38 Ga. 70; 1897, *White v. State*, 100 id. 659, 28 S. E. 423 ("he shot me down like a dog," received); 1897, *Kearney v. State*, 101 id. 803, 29 S. E. 127 (that the wound was accidentally inflicted by the defendant, excluded); *Ind.*: 1874, *Binna v. State*, 46 Ind. 311; 1885, *Boyle v. State*, 105 id. 469, 472 5 N. E. 203 (that there was no cause for the killing, allowable); 1898, *Lane v. State*, 151 id. 511 51 N. E. 1056 (that the deceased made no attempt to injure the defendant, admitted); 1900, *Shanahan v. State*, 154 id. 630, 57 N. E. 511 (that she was "poisoned by my mother-in-law," admitted); *Ia.*: 1866, *State v. Nettlebush*, 20 Ia. 257; 1900, *State v. Wright*, — id. —, 84 N. W. 541 (that the defendant did not intend to shoot him, and that the defendant was crazy, excluded); 1902, *State v. Sale*, 119 id. 1, 92 N. W. 680, 95 N. W. 193 (declaration of deceased that "he was to blame," excluded; this well shows the absurdity of applying the Opinion rule here); *Kan.*: 1899, *State v. O'Shea*, 60 Kan. 772, 57 Pac. 970 (that the deceased and the defendant were the "best of friends," etc., excluded); *Ky.*: 1876, *Collins v. Com.*, 12 Bush 272; 1889, *Com. v. Matthews*, 89 Ky. 293, 12 S. W. 333; 1898, *Jones v. Com.*, — id. —, 46 S. W. 217 (that the defendant had shot him "for nothing," excluded); 1903, *Henderson v. Com.*, — id. —, 72 S. W. 781 ("I know that one of the two shot me," admitted); *La.*: 1898, *State v. Ashworth*, 50 La. An. 94, 23 So. 270 ("that he was to blame with his own death," admitted, the accused offering them); *Miss.*: 1883, *Payne v. State*, 61 Miss. 163; 1897, *Powers v. State*, 74 id. 777, 21 So. 657 ("You have killed me without cause," admitted); 1898, *Lipcomb v. State*, 75 Miss. 559,

§ 1448. **Rule of Completeness.** The application of the doctrine of Completeness (*post*, § 2094) is here peculiar. The statement must not convey a part only of the whole affair as it exists in the declarant's recollection; it must be complete as far as it goes. But it is immaterial how much of the whole affair of the death is related, provided the statement includes all that the declarant wished or intended to include in it. Thus, if an interruption (by death or by an intruder) cuts short a statement which thus remains clearly less than that which the dying person wished to make, the fragmentary statement is not receivable, because the intended whole is not there, and the whole might be of a very different effect from that of the fragment; yet if the dying person finishes the statement he wishes to make, it is no objection that he has told only a portion of what he might have been able to tell:

1873, *Barrett, J.*, in *State v. Patterson*, 45 Vt. 303, 313: "What we understand is . . . not that the declarant must state every thing that constituted the *res geste* of the subject of his statement, but that his statement of any given fact should be a full expression of all that he intended to say as conveying his meaning as to such fact."¹

§ 1449. **Rule of Producing Original of a Document.** The rule that, where a writing is desired to be proved, the original must be produced or else

23 So. 210 ("(1) I am going to die; I have been dead; the good Lord has sent me back to tell you that (2) Dr. L. has killed me, has poisoned me with a capsule he gave me to-night, (3) that G. J. had insured his life, and had hired Dr. L. to kill him"; these words were uttered between convulsions; held, by a majority that (1) and (3) could be separated, and that (2) was admissible, not being opinion evidence, Magruder, J., diss.; the dissenting opinion is a pitiable instance of the barren quibbling to which this question leads; and the reprehensible practice of allowing a minority judge to write the chief opinion makes it difficult to nearneth the points decided); *N. Y.*: 1875, *People v. Shaw*, 63 N. Y. 40; 1878, *Brotherton v. People*, 75 Id. 159; *N. C.*: 1872, *State v. Williams*, 67 N. C. 12, 17 ("It was E. W. who shot me, though I did not see him," excluded); 1896, *State v. Mace*, 118 Id. 1244, 24 S. E. 798 ("They have murdered me," solemnly held not to be "an expression of opinion with respect to the degree of the homicide"); 1902, *State v. Dixon*, 131 Id. 808, 42 S. E. 944 (that the assailant looked like defendant, allowed); *Oh.*: 1870, *Wroe v. State*, 20 Oh. St. 469; *Or.*: 1886, *State v. Saunders*, 14 Or. 805, 12 Pac. 441 ("he shot me down like a dog," admitted); 1893, *State v. Foot You*, 24 Id. 61, 75, 32 Pac. 1081, 33 Pac. 537 (positive identification, admitted; opinion in general excluded); *S. C.*: 1900, *State v. Lee*, 58 S. C. 335, 36 S. E. 706 ("he shot me for nothing," admitted); *Utah*: 1897, *State v. Kessler*, 15 Utah 142, 49 Pac. 293 ("he shot me down like a rabbit," admitted); 1897, *State v. Carrington*, 15 Id. 480, 50 Pac. 526 (a statement as to the intent of a person performing an operation on the womb of a deceased, excluded on the principle of § 1964. *post*); *Wash.*: 1894, *State v. Olle*, 8 Wash. 12, 22, 35 Pac. 417 (that he was "hntchered," admitted); *W. Va.*: 1900,

State v. Burnett, 47 W. Va. 731, 35 S. E. 983 (a declaration that "I think C. B. did the shooting, because he has threatened to do it," excluded as opinion; here properly excluded, on the principle of § 658, *ante*).

¹ *Accord*: 1849, *McLean v. State*, 16 Ala. 672, 675 ("the declaration in this case was complete, and it is not shown that he intended or desired to connect it with any other fact or circumstance explanatory of it"; admitted); 1846, *Ward v. State*, 8 Blackf. 101, 102 (the substance suffices); 1866, *State v. Nettlebush*, 20 Ia. 260; 1898, *State v. Ashworth*, 50 La. An. 94, 23 So. 270 (the statement must be complete "to the extent that the deceased desired to make it"; but that it consists of several remarks between which other conversation took place is immaterial); 1901, 1902, *State v. Carter*, 106 La. 407, 30 So. 895, 107 Id. 792, 32 So. 183 ("a dying declaration must go in as a whole, and is not rendered inadmissible because some of its statements of themselves, and if standing alone, would be inadmissible"); 1850, *Nelms v. State*, 13 Sm. & M. 605 (the substance of his statement suffices); 1893, *State v. Johnson*, 118 Mo. 491, 504, 24 S. W. 229 (obscure statement); 1831, *Vass' Case*, 3 Leigh 864; 1870, *Jackson v. Com.*, 19 Gratt. 668. Compare the cases cited, *post*, §§ 2097, 2099.

If a part only is proved, the opponent may prove the remainder: 1892, *Mattox v. U. S.*, 146 U. S. 140, 152, 13 Sup. 50; compare the cases cited *post*, § 2115.

If the statement was given by answers to questions put, it is not indispensable that the questions should be offered also; 1903, *R. v. Louie*, 10 Br. C. 1, 8; 1900, *Com. v. Birriolo*, 197 Pa. 371, 47 Atl. 355 (a dying statement written down by another person may be used, though it contained the answers only and not the questions).

accounted for (*ante*, § 1179), applies here as everywhere, and is not disputed. It must be noted, however, that this rule applies even where the document is not regarded (under the principle of the following section) as the exclusive evidence of the declaration. That is, if in such a jurisdiction a bystander's oral account of the declaration is offered, the writing need not be produced; but if it is the substance of the writing which he purports to give, the absence of the writing must first be accounted for.¹

§ 1450. **Rule of Preferring Written Testimony.** The principles which determine whether a written report of another person's statement is to be preferred to oral testimony, and must therefore be produced, have already been examined in their general applications (*ante*, §§ 1326, 1332). It is, however, more convenient to consider here their application to dying declarations.

(a) Where an auditor of a dying declaration makes in written form a *note or report of the oral utterances*, this written statement of the auditor is not preferred evidence, and need not be produced; for there is not and never was any principle of evidence preferring a person's written memorandum of testimony to his or another's oral or recollection testimony.¹ Nor is the case different when the person thus making the written report was a *magistrate* having power to administer oaths or take testimony on a preliminary examination;² for such a person has no duty or authority by law to report dying declarations, and it would be solely by virtue of an express duty that a magistrate's report could be preferred to other witnesses (*ante*, § 1326).

(b) Where a written memorandum or report thus made is *read over* to the declarant and *signed or assented to* by him, the writing thus becomes a second and distinct declaration by him. The first oral statement is not merged in the later written one, because, since the transaction is not a contract or other legal act between two parties thereto, the rule of Integration, or Parol Evidence rule (*post*, § 2425), has no application. The first and oral declaration is therefore provable without producing the later written one.³ Nevertheless,

¹ Compare the general principle, *ante*, § 1231.

² To the following add the cases in note 3, *infra*, as also involving the same ruling: 1885, *Anderson v. State*, 79 Ala. 5, 8 (declaration reduced to writing, but not read over to deceased or signed; writing not preferred); 1903, *Jarvis v. State*, — id. —, 34 So. 1025 (similar); 1879, *State v. Sullivan*, 51 Ia. 142, 146, 50 N. W. 572 (declaration reduced to writing but not signed; writing not preferred); 1885, *State v. Holcomb*, 86 Mo. 371, 377 (written down by another; writing not preferred); 1881, *Allison v. Com.*, 99 Pa. 17, 33 (declaration reduced to writing, but not read over to the deceased nor signed; writing not preferred). *Contra*: 1880, *Epperson v. State*, 5 Lea 291, 297 (where there is but one declaration, and a bystander reduces it to writing, this is preferred; but perhaps not, in proving "an independent declaration at the same interview"). The question came up, but was avoided, in 1765, in *Lord Byron's Trial*, 19 How. St. Tr. 1222.

³ 1838, *Beets v. State*, Meigs 106, *semble*

(written notes of a dying declaration sworn to before a justice, not preferred). *Contra*: 1722, *R. v. Reason and Tranter*, 16 How. St. Tr. 33 (assumed by all the judges as law; quoted in note 5, *infra*). For the rule that the magistrate must be called to the stand, and not merely his writing used, see *post*, § 1667.

⁴ 1879, *Com. v. Haney*, 127 Mass. 455 (declarations reduced to writing and signed by deceased; the writer allowed to testify to oral declarations, using the writing to refresh his memory; *Amos, J.*: "The words used by the deceased were none the less primary evidence for having been taken down by a bystander in writing; they may be testified to by any one who heard and remembers them; the written statement was a contemporary memorandum of what he said"); 1892, *State v. Whitson*, 111 N. C. 695, 697, 16 S. E. 332 (declaration taken in writing by A, and used by A to refresh memory; writing not the preferred evidence, though signed and sworn to by deceased); 1838, *Beets v. State*, Meigs 106, *semble* (cited in note 2, *supra*).

the majority of Courts, accepting the superficial analogy of the Parol Evidence rule or of Depositions (*ante*, §§ 799, 802), require the writing to be used, excluding testimony to the oral statement.⁴ It may be noted that of course so far as the proponent is offering to prove the terms of the writing, not of the oral utterance, the writing must be produced (*ante*, § 1449).

(c) Where the declarant makes one oral statement, and afterwards at another time a second statement, the latter being in writing or reduced to writing, there are here two distinct statements, and either one may be offered without testifying to the other; for the principle of Completeness (*ante*, § 1448) requires only that the whole of a single utterance should be offered together, and in the present instance the declarant, though referring to the same occurrence, is nevertheless making distinct statements, each of which is independently admissible. It is thus clear (1) that separate oral utterances are admissible, even though the written one has been proved; (2) that, even before or without proving the written one, the separate oral ones are admissible, — though on the latter point the Courts are not always explicit.⁵

(d) That a magistrate's report of the declaration should be regarded as *conclusive*, so as to forbid a showing by other testimony of what was really

⁴ 1835, *R. v. Gay*, 7 C. & P. 230, Coleridge, J. (declaration taken down, then signed by the declarant; the writing preferred to the writer's oral testimony); 1893, *Boulden v. State*, 102 Ala. 78, 84, 15 So. 341 (declaration "reduced to writing" in an unspecified way, preferred, if available); 1858, *People v. Glenn*, 10 Cal. 32, 87 (declaration reduced to writing and signed, preferred to oral testimony; oral declarations at a different time also allowed, the written one being first proved); 1860, *State v. Tweedy*, 11 Ia. 350, 359 (declaration reduced to writing at the time and signed; the writing preferred; but oral statements at other times admissible); 1895, *Saylor v. Com.*, 97 Ky. 184, 30 S. W. 390; 1892, *King v. State*, 91 Tenn. 617, 650, 20 S. W. 169; 1876, *People v. Tracy*, 1 Utah 343, 346 (called "the best evidence"; here signed by the declarant).

⁵ 1722, *R. v. Reason and Tranter*, 16 How. St. Tr. 83 (Pratt, L. C. J.: "You know in the Court of Chancery, when the party is examined on his oath, he gives in a first answer, and on exceptions taken to it he gives in a second, and so a third; all these are taken but as one answer and entire confession of the party. . . . [Now in this case of alleged murder] this minister came to enquire of this [dying] gentleman about the circumstances of his death; after that, the same gentleman is present when the justices of the peace come; thereupon the justices of the peace desire him to take it in writing; he asks the same questions as he did before, and they are taken in writing; he takes it designing to make the first examination more authentic to charge the person that gives the examination. Now really, when all this is done, the examination of him before the justice, taken in writing by the same person that enquired of him before, and all this done in order to perfect and consum-

mate the examination, whether you will not take them both together as one entire account given by the deceased!"; Fortescue, J., thought differently: "I think we should allow what was said at other times to be given in evidence, because the first is no examination, because no justice of the peace then present, so that the examination stands distinctly by itself," and this opinion prevailed); 1859, *Collier v. State*, 20 Ark. 36, 44 (declarations made on three different occasions, on the last two being reduced to writing; the first statements received, without producing the others); 1858, *People v. Glenn*, 10 Cal. 32, 37 (see note 4, *supra*); 1868, *People v. Vernon*, 85 id. 49; 1900, *Morrison v. State*, 42 Fla. 149, 28 So. 97 (any one of separate written statements, admissible without the others); 1898, *Dunn v. People*, 172 Ill. 582, 50 N. E. 137 (statements at several times; reduction to writing on one occasion does not exclude oral testimony of the statements "on other occasions"); 1898, *Lane v. State*, 151 Ind. 511, 51 N. E. 1056 (other and oral statements not excluded); 1860, *State v. Tweedy*, 11 Ia. 350, 359 (see note 4, *supra*); 1903, *Hendrickson v. Com.*, — Ky. —, 73 S. W. 764 (other statements made "about or subsequent to the drafting" of the paper signed by the deceased, admitted); 1882, *People v. Simpson*, 48 Mich. 474, 478, 12 N. W. 602 (oral declarations at different times, admissible, *semble*); 1880, *Epperson v. State*, 5 Lea 291, 297, *semble* (see note 1, *supra*); 1897, *State v. Carrington*, 15 Utah 480, 50 Pac. 526 (oral declarations, afterwards reduced to writing and assented to; all admissible); 1902, *Herd v. State*, 43 Tex. Cr. 575, 87 S. W. 495 (other statements, made at the same time with one reduced to writing and signed, held admissible; *Henderson, J., diss.*).

said by the declarant, has already been noted as an unsound principle (*ante* § 1349). It seems not to have been applied to dying declarations.

§ 1451. *Judge and Jury.* (a) That the judge is to pass on the preliminary conditions necessary to the admissibility of evidence is unquestioned (*post* § 2550). It follows, as of course, that, since a consciousness of impending death is according to the foregoing principles legally essential to admissibility the judge must determine whether that condition exists before the declaration is admitted.¹

(b) After a dying declaration, or any other evidence, has been admitted the weight to be given to it is a matter exclusively for the jury. They may believe it or may not believe it; but, so far as they do or do not, their judgment is not controlled by rules of law. Therefore, though they themselves do not suppose the declarant to have been conscious of death, they may still believe the statement; conversely, though they do suppose him to have been thus conscious, they may still not believe the statement to be true. In other words, their canons of ultimate belief are not necessarily the same as the preliminary legal conditions of admissibility, whose purpose is an entirely different one (*ante*, § 29). It is therefore erroneous for the judge, after once admitting the declaration, to instruct the jury that they must reject the declaration, or exclude it from consideration, if the legal requirement as to consciousness of death does not in their opinion exist. No doubt they may reject it, on this ground or on any other;² but they are not to be expected to follow a definition of law intended only for the judge. Nevertheless, this heresy has obtained sanction in a few jurisdictions;³ it is analogous to that already discussed in reference to a jury's use of confessions (*ante*, § 861).

§ 1452. *Declarations usable by Either Party.* Owing to the present peculiar limitation of this evidence to public prosecutions for homicide, and

¹ A contrary ruling was made by L. C. B. Eyre, in 1790, *R. v. Woodcock*, Leach Cr. L., 3d ed., 563; but this was subsequently repudiated in England, and the principle as stated above does not seem to have been doubted: 1816, *R. v. Hucks*, 1 Stark. 521 (*Ellenborough*, L. C. J., said this was the "unanimous opinion" of the judges here, on a consultation from Ireland; "it might as well," Mr. Starkie adds, "be left to a jury to say whether a witness ought to be sworn, or whether he is not incapacitated by ignorance or infamy or any other cause from giving evidence upon oath"); 1896, *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560; 1887, *People v. Smith*, 104 N. Y. 491, 504, 10 N. E. 878 ("It cannot be left to the jury [in the first instance] to say whether the deceased thought he was dying or not, for that must be decided by the judge before he permits the declaration to be given in evidence").

So also for the opinion rule: 1901, *Jones v. State*, 79 Miss. 309, 30 So. 759 (whether a declaration is matter of opinion is for the Court to determine before submission to the jury; *State v. Williams*, N. C., *infra*, note 2, distinguished).
² 1899, *Bush v. State*, 109 Ga. 120, 34 S. E. 298 (the jury, "in passing upon the value and

weight of the evidence," are to consider whether declarant was at the point of death and conscious of it); 1902, *State v. Phillips*, 118 Ia. 660, 92 N. W. 876 (the jury are to reconsider it under all the circumstances); 1898, *State v. Sexton*, 147 Mo. 39, 48 S. W. 452 (the judge passes on admissibility, but the jury may be allowed to weigh the value); 1873, *State v. Williams*, 67 N. C. 12, 17 (the judge must pass on admissibility).

³ 1876, *Jackson v. State*, 56 Ga. 235 (instruction to the jury to decide whether the statement was made at the point of death, held proper); 1878, *Dumas v. State*, 62 Id. 58, 62 (same); 1899, *Smith v. State*, 110 Id. 255, 34 S. E. 204 (instruction that, if jury thought the declarant not at point of death nor conscious of it, they must not consider the declaration, held proper); 1903, *Anderson v. State*, 117 Id. 255, 43 S. E. 895; 1903, *Smith v. State*, 118 Id. 61, 44 S. E. 817; 1895, *Com. v. Brewer*, 164 Mass. 577, 42 N. E. 92 (an instruction "You are not to consider the statement . . . unless you are satisfied . . . that he believed that there was no hope of life," held proper); 1899, *Hopkins v. State*, — Tex. Cr. —, 53 S. W. 619 (the trial Court allowed to "submit the question to the jury").

the tenor of the declarations usually made by the dying person, it has sometimes been argued that the declarations cannot be used by the accused. But the argument has no foundation whatever, and has been generally repudiated.¹

¹ 1848, *Moore v. State*, 12 Ala. 767; 1898, *People v. Southern*, 120 Cal. 645, 53 Pac. 214; 1886, *State v. Saunders*, 14 Or. 304, 12 Pac. 441; 1892, *Mattox v. U. S.*, 146 U. S. 151, 13 Sup. 50. *Contra,semble*: 1836, *R. v. Scalfie*, 1 Moo. & Rob. 552, 2 Lew. Cr. C. 150 (a declaration was

after doubt received in favor of the prisoner, but as influencing the amount of punishment); 1872, *People v. McLaughlin*, 44 Cal. 435, per Wallace, C. J. (the declarations cannot be offered by the accused).

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SUB-TITLE II (continued): EXCEPTIONS TO THE HEARSAY RULE

TOPIC II: STATEMENTS OF FACTS AGAINST INTEREST.

CHAPTER XLVIII.

§ 1455. In general; Statutes.

1. The Necessity Principle.

§ 1456. Death, Absence, Insanity, etc., as making the Witness Unavailable; Receipts of a Third Person.

2. The Circumstantial Guarantee.

§ 1457. General Principle.

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§ 1460. Statements predicating a Fact against Pecuniary Interest; indorsements of Payment; Receipts.

§ 1461. Statements of Sundry Facts against Interest.

§ 1462. The Fact, not the Statement, to be against Interest.

§ 1463. Facts may or may not be against Interest according to Circumstances, or according to the Parties in dispute.

§ 1464. No Motive to Misrepresent; Preponderance of Interest; Credit and Debit Entries.

§ 1465. Statement admissible for All Facts Contained in it; Separate Entries.

§ 1466. Against Interest at the Time of Statement; Creditor's indorsement of Payment.

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3. Testimonial Qualifications and Other Independent Rules of Evidence and Substantive Law.

§ 1471. Testimonial Qualifications.

§ 1472. Authentication.

§ 1473. Tenant's Statements used against Landlord's Title.

§ 1474. Principal's Statements as against Surety.

§ 1475. Distinction between Statements against Interests, Admissions, and Confessions.

4. Arbitrary Limitations.

§ 1476. History of the Exception; Statement of Fact against Penal Interest excluded; Confessions of Crime by a Third Person.

§ 1477. Same: Policy of this Limitation.

§ 1455. In general; Statutes. This exception may be traced back as early as any of the others, namely, to the early 1700s. The historical development can be more particularly noted under certain details of the rule (*post*, §§ 1476). The exception presupposes, like most of the others, first, a Necessity for resorting to hearsay (*ante*, § 1421), *i. e.* the death of the declarant, or some other condition rendering him unavailable for testimony in court; and secondly, a Circumstantial Guarantee of Trustworthiness (*ante*, § 1422). In this instance, the circumstance that the fact stated, being against declarant's interest, is not likely to have been stated untruthfully. There is also to be considered (*ante*, § 1424) the bearing of other independent rules of evidence; and finally, there are certain arbitrary limitations resting on reason at all.

In a few jurisdictions there are *statutory enactments* purporting to deal with this exception.¹ They are, however, for the most part obstructive

¹ Cal. C. C. P. 1872, § 1946 ("The entries and other writings of a decedent, made at or near the time of the transaction and in a position to know the facts stated therein" are admissible

"1. When the entry was made against the interest of the person making it"; § 1853 ("A declaration, act, or omission of a decedent, showing sufficient knowledge of the subject, ag-

confusing rather than helpful, for they either merely restate, in a form too concise to be useful, the established common-law rule, or they mingle in inextricable confusion certain fragments of this and other exceptions. Their specific contributions to the details of the exception may be noted under the respective details.

There was a time when the present exception was by some supposed not to exist in this country at all;² but even at that time it had in fact received recognition in sundry rulings; and it is to-day everywhere fully accepted, except perhaps in the courts of Maine.³

1. The Necessity Principle.

§ 1456. *Death, Absence, Insanity, etc., as making Witness Unavailable.* The Necessity Principle (*ante*, § 1421), as here applied, signifies the impossibility of obtaining other evidence from the same source, the declarant being unavailable in person on the stand. Whenever the witness is practically unavailable, his statements should be received. *Death* is universally conceded to be sufficient:

1833, *Williams, J.*, in *Fitch v. Chapman*, 10 Conn. 11: "The cases where such evidence is admitted seem to proceed generally upon the principle that, by the decease of the person, better evidence cannot be had."¹

The principle of necessity is broad enough to assimilate other causes; but the rulings upon causes other than death are few. They are ill-judged, so far as they do not recognize the general principle of unavailability. *Illness*² and *insanity*³ should be equally sufficient to admit the statements; as well

his pecuniary interest, is also admissible as evidence to that extent against his successor in interest"; § 1870, par. 4 ("The act or declaration of a deceased person, done or made against his interest in respect to his real property" is admissible); Ga. Code 1895, § 5180 ("Declarations of a person in possession of property, in disparagement of his own title, are admissible in favor of any one, and against privies"); § 5181 ("The declarations and entries of a person, since deceased, against his interest, and not made with a view to pending litigation, are admissible in evidence in any case"); *Ida. Rev. St.* 1887, § 5996 (like Cal. C. C. P. § 1946); *la. Code* 1897, § 4622 (like Cal. C. C. P. § 1946); *Mont. C. C. P.* 1895, §§ 3129, 3146, par. 4, 3237 (like Cal. C. C. P. §§ 1853, 1870, par. 4, 1946); *Nebr. Comp. St.* 1899, § 5919 (like Cal. C. C. P. § 1946); *Or. C. C. P.* 1892, §§ 689, 706, par. 4 (like Cal. C. C. P. §§ 1853, 1870, par. 4); § 767 (like Cal. C. C. P. § 1946, inserting after "deceased" "or without the State," and after "writings," "of a like character"); *Utah Rev. St.* 1898, § 3406 (like Cal. C. C. P. § 1946).

¹ *Smith's Leading Cases, American notes*, 1st ed., II, 233 (1844), 8th ed., II, 381. It was also ignored, not repudiated, in a few early cases, such as *Longenecker v. Hyde*, 6 Binn. 1 (1813).

² 1886, *Libby v. Brown*, 78 Me. 492, 7 Atl. 114.

³ 1815, *Manby v. Curtis*, 1 Price 229; 1889, *Phillips v. Cole*, 10 A. & E. 106; 1925, *Barrows v. White*, 4 B. & C. 328; 1829, *Spargo v. Brown*, 9 id. 936, *semble*; 1855, *Paypedick v. Bridgwater*, 5 E. & B. 178; 1898, *Bertrand v. Heaman*, 11 Man. 205, 210; 1884, *Trammell v. Hudmon*, 78 Ala. 223; 1864, *Mahaska Co. v. Ingalls*, 16 Ia. 81; 1860, *Currier v. Gale*, 14 Gray 504; 1860, *Welster v. Paul*, 10 Oh. St. 536; 1846, *Lowry v. Moss*, 1 Strobl. 64; 1840, *Davis v. Fuller*, 12 Vt. 189. In two early *Nisi Prius* rulings, long outlawed by time and later cases, the statements of living witnesses were admitted: 1795, *Walker v. Broadstock*, 1 Esp. 458; 1803, *Doe v. Rickarby*, 5 id. 4.

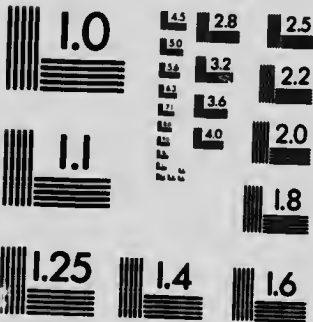
⁴ *Contra*, 1813, *Harrison v. Blades*, 3 Camp. 458 (the declarant had suffered an apoplectic fit and was by physicians said to be in *extremis*; *Ellenborough, L. C. J.*: "No case has gone so far [as to admit such evidence] and I am afraid to establish a precedent. It is difficult to determine when a patient is past all hope of cure. If such a relaxation of the rules of evidence were permitted, there would be very sudden indispositions and recoveries").

⁵ 1864, *Mahaska Co. v. Ingalls*, 16 Ia. 81, *semble*; 1881, *Jones v. Henry*, 84 N. C. 324.



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as absence from the jurisdiction.⁴ Supervening incompetency through interest stands on the same ground.⁵

The written receipt of a third person, acknowledging payment of money, is undoubtedly a statement of a fact against interest (*post*, § 1461); but it cannot be received, under the present principle, unless the receptor is deceased or otherwise unavailable.⁶

2. The Circumstantial Guarantee.

§ 1457. **In General Principle.** The basis of the exception is the principle of experience that a statement asserting a fact distinctly against one's interest is entirely unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently guaranteed, though oath and cross-examination are wanting:

1861, *Blackburn, J.*, in *Smith v. Blakey*, L. R. 2 Q. B. 326: "When the entries are against the pecuniary interest of the person making them, and never could be made available for the person himself, there is such a probability of their truth that such statements have been admitted after the death of the person making them."

1879, *Fitzgibbon, C. J.*, in *Lalor v. Lalor*, 4 L. R. Ire. 681: "The interest against which the statement appears to be made . . . [is required] in order to supply that sanction which, after the death of the party, is accepted as a substitute for an oath."

1832, *Rogers, J.*, in *Gibblehouse v. Stong*, 3 Rawle 437: "The principle is founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against his own interest."

1841, *Gibson, C. J.*, in *Addams v. Seitzinger*, 1 W. & S. 244: "[It rests on] the principle which allows entries or memorandums which were prejudicial to the interest of the writer to be evidence, . . . thus substituting for the sanction of a judicial oath the more powerful sanction of a sacrifice of self-interest."

1879, *Cofer, J.*, in *Mercer's Adm'r v. Mackin*, 14 Bush 441: "Experience has taught us that when one makes a declaration in disparagement of his own rights or interests it

⁴ 1826, *Shearman v. Atkins*, 4 Pick. 293; 1903, *Pound, C.*, in *South Omaha v. Wrzensinski*, — Nebr. —, 92 N. W. 1045 (in a concurring opinion; admitting the letter of a city clerk absent from the jurisdiction); *Doubling*: 1851, *Williams, J.*, in *Gerapulo v. Wieler*, 10 C. B. 690, 696. *Contra*: 1831, *Stephen v. Gwenap*, 1 Moo. & Rob. 120 (flight of a bankrupt under a criminal charge); 1864, *Mahaska Co. v. Ingalls*, 16 Ia. 81, *semble*.

⁵ 1841, *Pugh v. McKee*, 2 Ala. 394; 1831, *Dwight v. Brown*, 9 Conn. 93; 1833, *Fitch v. Chapman*, 10 id. 11; *Contra*: 1825, *Burton v. Scott*, 3 Rand. 409.

⁶ 1844, *Joplin v. Johnston*, 2 Kerr N. Br. 541 (mortgagee's receipt for rent); 1839, *Newell v. Roberts*, 13 Conn. 63, 72; 1826, *Shearman v. Atkins*, 4 Pick. 283, 293 (assumpsit by guardians against the ward's estate for money spent; receipts for the sums in question were admitted; the referee allowing this only for such persons as were not "alive and within the Commonwealth"); 1896, *Silverstein v. O'Brien*, 165 Mass. 512, 43 N. E. 496 (receipts for rent,

signed by tenants, to show that the offering party was owner, excluded); 1835, *Ferris v. Boxell*, 34 Minn. 262, 25 N. W. 592 (receipt of third person is not evidence; nor made so by a statute exempting it from authentication if properly recorded); 1818, *Cutbush v. Gilbert*, 4 S. & R. 551, 555 (receipts by third persons not called, excluded; "his oath is better"); 1825, *Morton v. M'Glaughlin*, 13 id. 107. *Contra*: 1796, *Alston v. Taylor*, 1 Hayw. N. C. 381, 395 (counsel's receipt for a bond taken to sue upon, admitted as given in "the course of business"); 1853, *Reed v. Rice*, 25 Vt. 171, 186, per *Redfield, C. J.* (misunderstanding *Gilson v. Gilson*, 16 id. 464, where the receipt was by an agent of the party). The following passage probably led to misunderstanding on this point: 1842, *Greenleaf, Evidence*, § 147, note 3: "In auditing the accounts of guardians, administrators, etc., the course is to admit receipts as *prima facie* sufficient vouchers"; but the authorities cited do not bear this out.

Of course, such receipts of a party-opponent would be receivable as admissions: *ante*, § 1049.

is generally true, and because it is so the law has deemed it safe to admit evidence of such declarations."¹

The specific applications of this broad principle to the different kinds of facts against interest come now to be considered.

§ 1458. **Statements predicating a Limited Interest in Property.** A statement predicating of oneself a *limited interest instead of a complete title to property* asserts a fact decidedly against one's interest, and has always been so regarded. In particular, assertions that one's estate is a leasehold, not a freehold, or that one's possession is not as owner, but merely as agent or as trustee for another, are admissible :

1861, *Blackburn, J.*, in *R. v. Birmingham*, 1 B. & S. 763 : " Is such a statement [cutting down an interest in realty] admissible to the same extent and for the same purposes as where the effect of the statement is to charge the person with the receipt of money? I neither find any distinction taken between them in any of the cases, nor can I in principle see any. The probability that a man would speak truth (which is the reason assigned for admitting the evidence) is equally great whether the tendency of the declaration is to establish liability for money or to deprive a man of real estate."¹

Such statements may be used in so far as they tend to prove the matter against interest, for example, that some other person is the owner of the higher estate. But they could not be received to prove the matter as to which they were not against interest,—for example, the ownership of the limited estate asserted.²

¹ So also *Blackburn, J.*, in *R. v. Birmingham*, 1 B. & S. 763; *Somerville, J.*, in *Humes v. O'Bryan*, 74 Ala. 79.

² *Accord: Eng.*: 1795, *Walker v. Broadstock*, 1 Esp. 458; 1803, *Doe v. Rickarby*, 5 id. 4; 1808, *Doe v. Jones*, 1 Camp. 367 (whether a locus was part of a copyhold of the defendant; a writing by the deceased former owner of the copyhold, then occupying the locus, that he did not own it but paid rent for it, was admitted for the plaintiff); 1811, *Peaceable v. Watson*, 4 Taunt. 16; 1835, *Carne v. Nicoll*, 1 Bing. N. C. 430; 1845, *Baron de Bode's Case*, 8 Q. B. 243; 1847, *Doe v. Langfield*, 16 M. & W. 513; 1865, *Smith v. Blakey*, L. R. 2 Q. B. 326; *Can.*: 1862, *Powell v. Wathen*, 5 All. N. Br. 258 (deceased's disclaimer of title, admissible for one charged as executor *de son tort* of the deceased); *U. S.*: 1873, *Turner v. Tyson*, 49 Ga. 165, 169 (admission by the heir, of the genuineness of an ancestor's divesting deed, received); 1892, *Lamar v. Pearre*, 90 id. 377, 17 S. E. 92 (declarations by a possessor in apparent ownership, that the land had been purchased with trust funds from the sale of other land, admitted); 1846, *Doe v. Evans*, 1 Blackf. 322 (by a possessor, that he was tenant only, admitted); 1867, *Robinson v. Robinson*, 22 Ia. 427, 433 (trust declarations, admitted); 1902, *Walsh v. Wheelwright*, 96 Me. 174, 52 Atl. 649 ("declarations of a deceased occupant of land, made while occupying, in the course of his occupation, as to the character of his occupation, and against his own pecuniary interest, are admissible"); 1860, *Carrier v. Gale*,

14 Gray 504 (statements as to land, admitted); 1843, *Pike v. Hayes*, 14 N. H. 20; 1845, *Rand v. Dodge*, 17 id. 359 (declarations indicating possession as agent or tenant merely, not owner, admitted); 1880, *Perkins v. Towle*, 59 id. 584; 1894, *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189 (conditions of delivery of a deed; the deceased grantor's declarations, while in possession, that he had made and delivered the deed on certain conditions, admitted); 1880, *Melvin v. Bullard*, 82 N. C. 37; 1895, *Swerferger v. Hopkins*, 67 Vt. 136, 31 Atl. 153 (as to land boundaries, admitted); 1890, *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974 (deceased possessor's declarations that he had only a life-estate and could not transfer a fee, admitted); 1901, *First National Bank v. Holland*, 99 Va. 495, 39 S. E. 126 (husband's declarations of a gift to wife, made when free from debt, admitted).

³ 1897, *Hollis v. Sales*, 103 Ga. 75, 29 S. E. 482 (declaration by a husband that he made a deed to his wife because he was in debt to her, excluded, as not against interest on the question whether the deed was for a valuable consideration).

In *Creuse v. Barrett*, 1 C. M. & R. 931 (1835), and *Pike v. Hayes*, 14 N. H. 20 (1843), a declaration as to the extent of one's land was said to differ from a declaration as to the limits of one's interest in it, and to be inadmissible. But both must stand on the same footing; the former should be admitted as indicating that neighboring estates extended at least up to the point named. *Accord*: 1795, *Walker v. Broad-*

§ 1459. **Same: Other Statements (Admissions, etc.), about Land, discriminated.** There has been in some jurisdictions much confusion through a failure to distinguish certain principles, distinct in themselves, but all finding an application to declarations about land-possession and having only that superficial feature in common.¹ (1) If the issue involves a prescriptive title and adverse possession, the nature of the possession alleged is important, and under the doctrine of *Verbal Acts* (*post*, §§ 1778, 1779) the statements and conduct of the possessor are admissible as giving character to the possession and indicating whether it is adverse or not. Here the statements are not taken as assertions, and the Hearsay rule is not applicable. Their chief limitation is that they must accompany the possession which they are supposed to characterize; but the declarant's decease is not a condition. (2) Under the principle of *Admissions*, the statements of a *party-opponent*, or his *predecessor in title*, acknowledging an inferior or different title, may be used (*ante*, § 1082). Here the main requirements are that the admittor must have had title at the time, and that the admission shall be used only against himself or his successors; but the admittor need not be deceased before the statement can be used. Here, too, no Hearsay exception is involved. (3) In statements offered under the present exception to the Hearsay rule, the declarant must be deceased. Moreover, there must have been an interest at the time to say the contrary, but the statements may be used in any controversy, without regard to the parties concerned. (4) Still dealing with Hearsay exceptions, there are, further, two American doctrines admitting declarations as to *boundaries* (treated *post*, §§ 1563-1570); by one of these, obtaining generally, the declarant must not have been an interested party (for example, an owner), and he need not have been in possession; but by the other, in vogue in a few Atlantic jurisdictions, he must have been an owner and must have been on the land at the time. A more detailed analysis of the discriminations between these and other superficially related statements about land is elsewhere made (*ante*, § 1087, *post*, § 1780), as well as of the distinction of theory between statements against interest, admissions, and confessions (*post*, § 1475). There is also to be distinguished the doctrine of substantive law forbidding a tenant to dispute his landlord's title (*post*, § 1473).

§ 1460. **Statements predicating a Fact against Pecuniary Interest; Indorsements of Payments; Receipts.** Statements of a fact against pecuniary interest furnish the greatest number of illustrations,¹ and of difficulties as well.

stock, 1 Esp. 458. A unique application of the principle is found in the following: 1855, *Allegheny v. Nelson*, 25 Pa. 334 ("It was against the interest of N. to expend his time and money in taking out a title for the land as an island, if it was not one. His application therefore was evidence that it was an island").

¹ *E. g.*: 1845, *Smith v. Martin*, 17 Conn. 401; 1855, *Plimpton v. Chamberlain*, 4 Gray 321; 1898, *Mutual Life Ins. Co. v. Logan*, 31 C. C. A. 172, 87 Fed. 637.

¹ The following are miscellaneous instances:

1900, *German Ins. Co. v. Bartlett*, 188 Ill. 165, 58 N. E. 1075 (creditors' suit for property conveyed to wife by deceased husband; declarations by him before the transfer, that he was indebted to her, admitted); 1898, *Keesling v. Powell*, 149 Ind. 372, 49 N. E. 265 (statements by a deputy-treasurer that taxes had been paid in, admitted); 1890, *Vogely v. Bloom*, 43 Minn. 163, 45 N. W. 10 (consideration for a note; entry of a deceased payee of another note, as to its discharge and the making of a new note, admitted); 1903, *Quinby v. Ayers*, — Nebr. — , 95 N. W.

Perhaps the oldest form was the account kept by a *steward or bailiff* of sums collected from tenants.² Another instance was the entry of receipt of a tithe-payment in a vicar's books.³ Money-receipts in general have always been conceded to fall under the rule.⁴ Another typical instance was the *indorsement, on a note, a bill, or a bond, of payments received*; ⁵ it would evidence the payment (under this rule), and the act of payment would serve as an acknowledgment of existing debt (or new promise) by the debtor, and this in turn would be sufficient to remove the bar of the statute of limitations.⁶ Other objections, however (noted *post*, § 1466), impose special restrictions on the use of this class of statements.

§ 1461. **Statements of Sundry Facts against Interest.** There are many facts which in their ultimate effect may be against proprietary or pecuniary interest, though in their immediate and narrow aspect there may be no such clear character. These facts, however, may nevertheless be facts so decidedly against interest that no one would be inclined falsely to concede their existence. If so, on the general principle (*ante*, § 1457) they should therefore be admitted. No more precise test can well be formulated, except in the suggestion that the interest injured or the burden imposed by the fact stated should be one so palpable and positive that it would naturally have been present in the declarant's mind.¹ It has by one Court been said that the

464 (deceased's statements that he was insolvent, admitted); 1874, *Livingston v. Armoux*, 56 N. Y. 519 (receipt by a sheriff admitted).

² See the citations *post*, § 1476.

³ 1810, *Perigal v. Nicholson*, 1 Wightw. 63.

⁴ See the cases cited *ante*, § 1456.

⁵ 1728-29, *Searle v. Lord Barrington*, 2 Stra. 826, 3 Bro. P. C. 593; 1900, *Cunningham v. Davie*, 175 Mees. 213, 56 N. E. 2 (mortgagee's indorsement on an original mortgage note, showing discharge, admitted). A credit in an account-book has been held not to have this effect: 1836, *Hancock v. Cook*, 18 Pick. 32; 1886, *Libbey v. Brown*, 78 Me. 792, 7 Atl. 114. Compare § 1466, *post*.

⁶ 1841, *Addams v. Seitzinger*, 1 W. & S. 244 (Gibson, C. J.: "It is impossible to conceive of a motive for fabricating such a memorandum while the right of action remains unimpaired. To suppose that a creditor would set about the commission of what is at least a moral forgery, to obviate the anticipated consequences of his own apprehended supineness, when he might by bringing immediate suit prevent the occurrence of those consequences altogether, is absurd. . . . It is not to be supposed that a creditor could so far mistake his interest as to sacrifice a part of his debt to save the residue when no part of it was in danger. It is possible that a weak man might do so; but it is inconsistent with the ordinary course of human action").

¹ The following are sundry rulings applying the principle: *Eng.*: 1861, *Smith v. Blakey*, L. R. 2 Q. B. 326 (a letter by a clerk, notifying the employer of the arrival of B.'s draft, "with three huge cases, at the office," and going on to state the terms of the contract with B., was re-

jected; *Blackburn, J.*: "It is no more than an admission that he has the care of the three cheques which have arrived at the office, and the possibility that this statement might make him liable in case of their being lost is an interest of too remote a nature to make the statement admissible in evidence"); 1877, *Sly v. Sly*, L. R. 2 P. D. 91 (declaration by one raising a loan that his estate was a life interest under a will, admitted to show the existence of the will); 1891, *Flood v. Russell*, 29 L. R. Ir. 96 (declarations by a wife as to the existence of a will of her husband by which she profited less than by his intestacy, admitted); *Can.*: 1902, *Yuill v. White*, 5 N. W. Terr. 275, 291 (the mere statement of the terms of a contract is not of a fact against interest); *U. S.*: 1899, *Georgia R. & B. Co. v. Fitzgerald*, 108 Ga. 507, 34 S. E. 316 (wife's action for husband's death; the husband's statement of his careless conduct, admitted); 1901, *State v. Alcorn*, 7 Ida. 599, 64 Pac. 1014 (declarations as to pregnancy, by one seeking an abortion, admitted, chiefly on this ground); 1876, *Ross v. McQuiston*, 45 Ia. 147 (a testator's declaration, when sane, that he had not been in his right mind for twenty years, admitted); 1898, *Moehn v. Moehn*, 105 id. 710, 75 N. W. 521 (declaration by an indorser of a note, that it was not paid and that it belonged to his wife, held not against interest); 1898, *Walker v. Brantner*, 59 Kan. 117, 52 Pac. 80 (action for the death of the plaintiff's husband, a railway engineer; declarations of the husband, after the injury, that he could have avoided it by keeping a lookout, admitted); 1889, *Horsford v. Rowe*, 41 Minn. 247, 42 N. W. 1018 (*Dickinson, J.*: "Declarations by a person to

liability involved in the fact stated must not be a mere *conditional* or *contingent one*.² But this limitation cannot be supported, and would, if consistently carried out, practically nullify the exception in this respect. The liability to pay conditionally is none the less a liability; moreover every contract is subject to some conditions imposed by implication of law. The incurring of a contract liability of any sort is on principle a fact against interest.³

§ 1462. **The Fact, not the Statement, to be against Interest.** It must be remembered that it is not merely the statement that must be against interest, but the fact stated. It is because the fact is against interest that the open and deliberate mention of it is likely to be true. Hence the question whether the *statement* of the fact could create a liability is beside the mark.¹

§ 1463. **Facts may or may not be against Interest according to Circumstances or according to the Parties in dispute.** A fact thus stated may or may not be against interest according to the circumstances. For example, a statement that one is *not* a partner in a certain firm states a fact which favors one's interest if the firm is insolvent (and a deficit is therefore to be made up), but disfavors one's interest if the firm is solvent (and profits are thus to be shared); while a statement that one *is* a partner in the firm is for and against interest in just the reverse situations.¹

Again, the same fact may or may not be against interest according to the parties' situation in the case in which it comes into dispute; it may be against interest in one aspect, but in favor of interest in another.²

show that he had executed a will, or that he had not executed a will, or that he had revoked his will, . . . are not to be regarded, in general, as declarations against interest, for the acts to which the declarations relate, and the consequences of such acts, are wholly within the control of the person whose declaration is in question"; 1902, *Halvorsen v. Moon & K. L. Co.*, 87 id. 18, 91 N. W. 28 (deceased employee's statement that a fire in a room in his charge had been caused by an act of negligence on his part, admitted; good opinion); 1894, *Farrell v. Weitz*, 160 Mass. 283, 35 N. E. 783 (admissions of paternity by a deceased person, not receivable for the defendant in bastardy); 1896, *Lucas v. U. S.*, 163 U. S. 612, 16 Sup. 1168 (a statement that the declarant did not belong to the Choctaw Nation, excluded; but the subject is confused with that of Admissions); 1881, *Tate v. Tate's Ex'r*, 75 Va. 532 (a memorandum of the receipt of bonds deposited with the writer as bailee without reward, held not sufficiently against interest).

¹ 1843, *R. v. Worth*, 4 Q. B. 134 (the entry was: "April 4th 1824, W. Worsell came [as farm-hand]; and to have for the half-year 40s." Lord Denman, C. J.: "The book here does not show any entry operating against the interest of the party. The memorandum could only fix upon him a liability on proof that the services had been performed.")

² 1850, *White v. Chontean*, 10 Barb. 209 (incurring an obligation to reimburse a surety); 1859, *People v. Blakeley*, 4 Park. Cr. C. 185

(executing a note); 1889, *Hosford v. Rowe*, 41 Minn. 247, 42 N. W. 1018 (a husband said that he had destroyed an antenuptial agreement reserving to himself power to will away from his wife more than the statute permitted).

¹ This has been misunderstood in the following case: 1869, *Western Maryland R. Co. v. Manro*, 32 Md. 280 (Brent, J., rejecting a statement by a collector that he had received money from X. in payment of stock-subscriptions: "How the declaration offered was against the interest of M. [the collector], we have been unable to discover. It did not create a debt or establish a liability on his part to pay a sum of money to any person or body corporate. It did not furnish any ground, or pretext even, upon which he might have been sued or proceeded against either in law or equity").

² 1857, *Raines' Adm'r v. Raines' Cred'rs*, 30 Ala. 428; 1883, *Humes v. O'Bryan*, 74 id. 79.

³ 1883, *Chisse v. Smith*, 5 Vt. 557 (the plaintiff sued for services rendered when a minor; the defendant offered an entry in his books crediting the plaintiff's services, but to his father, who owed the defendant money, and not to the plaintiff; it was rejected. Here the entry was against his interest so far as concerned the rendering of the services. But that was not disputed. As to whether the contract was with the plaintiff or his father, it was obviously the defendant's interest to attribute it to the father, against whom he had a set-off; hence on this point the entry was not against his interest).

§ 1464. **No Motive to Misrepresent; Preponderance of Interest; Credit and Debit Entries.** It has sometimes been said, loosely and in analogy to other Hearsay exceptions, that there must be no motive to misrepresent; this being put as an additional requirement.¹ But there is no such additional requirement. The real object of this mode of statement is to furnish a test for a not uncommon situation, — the situation in which, along with the disserving interest, there is also a more or less palpable interest to be served by the fact. The real question is: Shall we attempt to strike a balance between the two opposing interests and admit the statement only if on the whole the disserving interest preponderates in probable influence? Or shall we regard the disserving interest as sufficient to admit, and leave the other merely to affect the credit of the statement? The former alternative seems the proper one, and is generally followed.² It must be noted, however, that so great a judge as Sir George Jessel has said that the latter alternative is the proper one, *i. e.* the counter-interest should affect only the weight of the evidence.³

A common illustration of this question is the use of a merchant's *credit entry* of payment received (thus against his interest) which at the same stroke has included (thus in favor of his interest) the *debit entry* of his claim leading to the payment; and, conversely, an agent's debit and credit account in which the receipts creating liability are on the whole equalled or exceeded by the payments or credits in his favor. When, in the former case, the entry of payment received, or, in the latter case, of an item creating liability, is sought to be used, the argument has been made that since, taking both sides of the account together, the writer is not left with any liability and perhaps appears to have a claim for a balance, the matter cannot be said to be against his interest. This argument, accepted at *Nisi Prius* in *Doe v. Vowles*,⁴ has since been repudiated. The answer to it is that the entrant's interest in making

¹ 1833, *Gleadow v. Atkins*, 3 Tyrw. 301; 1837, *Marks v. Lahee*, 3 Bing. N. C. 408; *Venghan, J.*; 1864, *County of Mahaska v. Ingalls*, 16 Ia. 81; 1831, *Gilchrist v. Martin*, 1 Bailey's Eq. 503.

² 1821, *Short v. Lee*, 2 Jac. & W. 477, 489 (entries by one of a college of vicars, who was also proctor or collector, of dues for the college, were objected to; Sir T. Plumer, M. R.: "Though the proctors were members of the body of vicars, that does not affect the ground on which such entries are admitted; there being evidently a balance of interests, and the interest in making the entry the smallest. . . . If we look to the set-off of the opposite interests, the preponderance being against making false charges, reduces him to the situation of any other proctor or collector"). *Accord*: 1841, *Clark v. Wilmot*, 1 Y. & C. 54; 2 Y. & C. 259, *note*; 1862, *Ganton v. Size*, 22 U. C. Q. B. 483; 1886, *Confederation Life Ass. v. O'Donnell*, 13 Can. Sup. 225, 229; 1895, *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. 165. Compare *Massey v. Allen*, L. R. 13 Ch. D. 562 (1879).

³ 1876, *Taylor v. Witham*, L. R. 3 Ch. D. 605 (Jessel, M. R.: "It must be *prima facie* against his interest; that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it. Of course, if you can prove *aliunde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether; but the question of admissibility is not a question of value. The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration when you estimate the value of the testimony"). *Accord*: 1857, *Raines' Adm'r v. Raines' Cred'rs*, 30 Ala. 428.

⁴ 1833, *Doe v. Vowles*, 1 Moo. & R. 261 (a receipt for payment for work done was objected to because the single entry of the claim and the release could not be against interest, as "this left the writer just in the same situation as before;" this objection was sustained).

the favoring items does not really affect, as a counter-motive, his interest against the individual charging-items; the entries of the latter, taken by themselves, are to be trusted:

1828, *Rowe v. Brenton*, 3 M. & Ry. 266; It was objected by Mr. Brougham, against a toll-keeper's book, that "where in the same document in which the charge appears, a discharge also appears, which squares the account, or it may be leaves a balance in his favor, then taking the whole together—both sides of the account, the charge and the discharge,—the reason fails, because it no longer is a declaration of a party against his own interest; it may be a declaration for his own interest"; the argument was disapproved; *Littledale, J.*: "A man is not likely to charge himself for the purpose of getting a discharge"; *Tenterden, L. C. J.*: "Almost all the accounts that are produced are accounts on both sides. That objection would go to the very root of that sort of evidence."⁴

§ 1465. **Statement admissible for All Facts Contained in it; Separate Entries.** Since the principle is that the statement is made under circumstances fairly guaranteeing the declarant's sincerity and accuracy (*ante*, § 1457) it is obvious that the situation guarantees the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also as to every fact contained in the same statement.¹ As for the limits which it thus becomes necessary to set, these must be largely a matter of judgment in each case. For the phrasing of a rough general test, different language has been used by different judges:

1851, *Pollock, C. B.*, in *Percival v. Nanson*, 7 Exch. 1: "If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement."

1861, *Blackburn, J.*, in *Smith v. Blakey*, L. R. 2 Q. B. 326: "[It is] admissible as evidence not merely of the precise fact which is against interest, but of all matters involved in or knit up with the statement."

1869, *Hayes, J.*, in *R. v. Exeter*, L. R. 4 Q. B. 344: "The principle that a declaration against interest was evidence as to all that formed an essential part of it was long since settled"; here the entry "Paid Brook balance of a quarter's rent due on 24 June last, 3 l." was against proprietary interest, and was admitted to show the payment.²

It may be doubted, however, whether for really difficult cases any additional light is gained from such phrases as "all matters knit up with or involved

⁴ *Accord*: 1838, *Williams v. Greaves*, 8 C. & P. 592; 1843, *Coleridge, J.*, in *R. v. Worth*, 4 Q. B. 134 ("Accounts are evidence, though the writer upon the whole discharges himself"; here admitting an entry of payment after an entry of hiring and agreeing to pay); 1876, *Taylor v. Witham*, L. R. 3 Ch. D. 605, per *Jessel, M. R.* The language of *Gibbs, C. B.*, in *Bullen v. Michel*, 2 Price 413 (1816) is indecisive as to the general principle.

¹ The leading case is *Higham v. Ridgway*, 10 East 109 (1808); an entry of services rendered as man-midwife, followed by a note "pd. 25th Oct., 1768," was admitted to show the date of the child's birth; *Ellenborough, L. C. J.*: "It is idle to say that the word *paid* only shall be admitted in evidence without the context, which explains to what it refers; we must there-

fore look to the rest of the entry, to see what the demand was which he thereby admitted to be discharged. By the reference to the ledger, the entry there was virtually incorporated with and made a part of the other entry, of which it is explanatory."

² Further examples are as follows: 1792, *Steal v. Henton*, 4 T. R. 670 (the receipt was acknowledged, in a town account-book, of money paid by parties disputing a customary payment; a preceding entry on the same page, describing the apportionment of the customary dues, was admitted); 1824, *Doe v. Cartwright*, Ry. & M. 62; 1840, *Davies v. Humphreys*, 6 M. & W. 153; 1861, *R. v. Birmingham*, 1 B. & S. 763 (to prove the amount of rent, a declaration that the declarant was a tenant at the rent of £20 per year was admitted).

in the statement," or "all that forms an essential part of it." These tests give more or less arbitrary results. Going back to the living principle, a more useful test appears to be this: All parts of the speech or entry may be admitted which appear to have been made while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest. This being the fundamental principle, any reference to collateral records which amounts to a repetition or an incorporation of them would make them a part of the admissible statement.³

In any case, the line of distinction clearly excludes entries made at a *subsequent and separate* occasion, when the original entry was complete, even though the subsequent entry was made in the same place:

1819, *Coltman, J.*, in *Doe v. Bevis*, 7 C. B. 501 (the account-roll of a bailiff was offered; the entries charging himself were admitted; the entries discharging himself by payments were rejected): "The reeve has no interest in speaking falsely when he is charging himself; but it is obviously his interest to falsify the account *quoad* the discharging part of it. . . . Where the charging part of the account refers to the discharging part, it may be necessary to read the whole. So where the latter contains anything explanatory of the former, that may render the whole account admissible. But that is not the case here"; *Maule, J.*: "It may be that a person, in charging himself, makes a declaration which is not intelligible without looking at the other side of the account; and in that case recourse must necessarily be had to both sides. . . . But the items of discharge in the accounts in question which were not referred to in, or necessary to explain, the items of charge which were admitted and read were properly rejected. The presumption that these entries are false is at least as strong as the presumption that the others are true"; *Cresswell, J.*: "If the discharging part of the account be necessarily resorted to for the purpose of explaining the charging part, it may be evidence."⁴

§ 1466. **Against Interest at the Time of the Statement; Creditor's Indorsement of Payment.** The fact stated must of course have been against interest *at the time of the statement*; else the influence for correctness would not operate.¹ The chief application of this corollary is to indorsements of payment on bonds or notes (*ante*, § 1460). Here it is obviously of the highest interest to the creditor to have the debt revived after the statutory period of limitation or the time of presuming payment has elapsed; thus a partial payment after that time is on the whole in his interest; and therefore the indorsement of payment must appear to have been made before the period ended:

1809, *Ellenborough, L. C. J.*, in *Rose v. Bryant*, 2 Camp. 322: "I think you must prove that these indorsements were on the bond at or recently after the times when they bore date, before you are entitled to read them. Although it may seem at first sight against

³ As was said by Coleridge, *J.*, in *Doe v. Wittcomb*, 15 Jur. 778 (1851): "It was a short mode of re-entering it, exactly the same as if it had all been written over again."

⁴ *Accord*: 1830, *Doe v. Tyler*, 4 Moo. & P. 381 (a steward rendered an account showing a balance due his employer; at the foot was a further and subsequent entry of the payment of the balance by him; held, per Tindal, C. J., that the former part could not bring in the last

entry, which was the evidential one desired); 1840, *Knight v. Waterford*, 4 Y. & C. 294 (a steward made a debit-entry of rent received and afterwards on the opposite page a credit-entry of a sum paid the tenant as poor-rates; the latter entry was rejected).

¹ *Eng.*: 1829, *Middleton v. Melton*, 10 B. & C. 317; 1851, *Percival v. Nanson*, 7 Ex. 1, per Parke, B.; 1879, *Lalor v. Lalor*, 4 L. R. Ire. 681, per Fitzgibbon, L. J.

the interest of the obligee to admit part payment, he may thereby in many cases set up the bond for the residue of the sum secured. . . . I am of opinion they cannot be properly admitted unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest."²

But in some jurisdictions the possibility of the abuse, by creditors, of the present sort of evidence has led to its prohibition by the Legislature. This prohibition, however, does not imply a repudiation of the principle; it means rather that, since the effect of the indorsement, to be against interest at the time, depends on whether it was made before the statutory period expired, and since the opportunity for antedating is so likely to be abused without possibility of exposure, the whole practice is dangerous:

1882, *Berry, J.*, in *Young v. Perkins*, 20 Minn. 173, 176, 12 N. W. 515: "The holder of a note, or any person interested in it, can manufacture false evidence of part payment as well after as before the statute of limitations has in fact run against the note, and in this way he can make out a case for himself to which the maker or his representatives must yield, unless he or they can overcome it by opposing evidence. This seems to us to be giving the holder an advantage to which he is not entitled, either in reason or in sound policy or by any analogy of the law of evidence."

Such statutes therefore prohibit the use of indorsements in the creditor's hand.³ The indorsement may, under these statutes, usually be employed if

² Cases cited *ante*, § 1460, and the following: 1739-40, *Turner v. Crisp*, 2 Str. 827; 1750, *Glynn v. Bank of England*, 2 Ven. 43; 1821, *Short v. Lee*, 2 Jac. & W. 488; 1833, *Gleadon v. Atkins*, 3 Tyrwh. 301; *U. S.*: 1903, *Small v. Rose*, 97 Me. 286, 54 Atl. 726 (deceased payee's entry of part payment in a cash account, dated after the statute had begun to run, excluded under Pub. St. 1883, c. 81, § 100, *infra*); 1819, *Roseboom v. Billington*, 17 John. 185 (excluded, because not shown to have been made before the time of limitation); 1871, *Bland v. Warren*, 65 N. C. 373; 1841, *Addams v. Seitzinger*, 1 W. & S. 244 (quoted *ante*, § 1460); 1855, *Allegheny v. Nelson*, 25 Pa. 334; 1823, *Gibson v. Peebles*, 2 McCord 419. The cases in Missouri are not in accord; 1869, *Carter v. Carter*, 44 Mo. 195 (admitted; mode of authenticating the actual time of indorsement, considered); *Contra*: 1873, *Phillips v. Mahan*, 52 id. 197 (excluded, not citing *Carter v. Carter*, *supra*, and misunderstanding *Roseboom v. Billington*, N. Y.).

Distinguish the following: 1892, *Arbuckle v. Templeton*, 65 Vt. 205, 208, 25 Atl. 1095 (action on a note, by T. and M.; indorsement by the plaintiff before statutory bar, of \$50 received from T., excluded, because not made on personal knowledge).

Where the obligee is not deceased, the indorsement can of course not be put in, by reason of the principle of § 1456, *ante*; this was the case in *Gupton v. Hawkins* (1900), 126 N. C. 81, 35 S. E. 229. But this decision exhibits the fallacy of ignoring the principle of this section; for the Court declares the indorsement of a deceased obligee admissible when offered by the obligor as being "a declaration against in-

terest," and yet inadmissible for the obligee because a "declaration in his favor." Now the time to be considered is the time of making, and if it is then a declaration against interest (as it is when the statute has not run), it is always admissible. Admissibility does not here depend on whether the obligor or the obligee happens afterwards to be the offering party. The obligee cannot offer it if he is living, for the reason of § 1456, *ante*; but if he is deceased his representative may do so; and if that had not been the case, many of the foregoing precedents on this subject would not be in existence.

³ *Eng.*: 1828, St. 9 Geo. IV, c. 14, § 3 ("No indorsement or memorandum of any payment written or made [hereafter] . . . upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment is made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of said statutes [of limitation]"); *B. C. Rev. St.* 1897, c. 123, § 14 (similar); *Newf. Consol. St.* 1892, c. 85, § 5 (similar); *N. Sc. Rev. St.* 1900, c. 167, § 8 (similar); *Ont. Rev. St.* 1897, c. 146, § 4 (similar); *Me. Pub. St.* 1893, c. 81, § 100 (like the English statute, with the words "or purports to be made" inserted after the words "payment is made"); this statute began as *Rev. St.* 1841, c. 146, § 23, and changed the rule as laid down in 1835, in *Coffin v. Bucknam*, 12 Me. 471; compare § 1460, *ante*; *Mass. Pub. St.* 1882, c. 197, § 16, *Rev. L.* 1902, c. 202, § 13 (substantially like the Maine statute); this statute began as *St.* 1834, c. 182, § 3, and changed the rule as recognized in 1836, in *Hancock v. Cook*, 18 Pick. 32 (where the rule was not directly involved, and the entry was

the debtor assented to it; but in that case it is dealt with directly as an acknowledgment by the debtor himself, and not as the creditor's entry against interest.⁴

§ 1467. **Statement to be made Ante Litem Motam.** It is sometimes said that the statements (as in other hearsay exceptions) must have been made before litigation began.¹ But this is only saying that the declarant's partisan attitude during litigation must be regarded as counterbalancing the interest prejudiced by the fact stated (*ante*, § 1464). This, however, might not be so in a given instance, and each case should be judged on its merits.

§ 1468. **Disserving Interest to be shown by Independent Evidence.** The fact that the matter stated was against interest must be shown by independent evidence,¹ -- like every fact preliminary to the introduction of testimony.

§ 1469. **Statement may be Oral as well as Written.** An oral statement of fact against interest is admissible.¹ It was early held in Massachusetts that the statements must be written, not oral, and furthermore must be in the form of account entries or formal documents, not mere letters.² But this distinction is wholly devoid of support in either principle or precedent, and no attempt has elsewhere been made to introduce the distinction. Moreover, oral declarations against proprietary interest are freely admitted in the same jurisdiction of Massachusetts.³

dated in 1816); *Vt. St.* 1894, § 1216 (the indorsement must be in payor's hand; applicable to all writings).

The same object has been attained, in one State, by the judicial construction of a permissive statute: *Minn. Gen. St.* 1894, § 5752 ("An indorsement of money received, on any promissory note, which appears to have been made when it was against the interest of the holder to make it, is *prima facie* evidence of the facts therein contained"); 1882, *Young v. Perkins*, 29 *Minn.* 173, 12 *N. W.* 515 (under the above statute, there must be other evidence than the mere purport of the indorsement that it was actually made at the time when it was against interest; quoted *supra*).

Note that these statutes merely forbid the use of the indorsement as showing an acknowledgment sufficient to take the debt out of the statute of limitations. Its use to indicate a part-payment which relents the presumption of payment after a certain lapse of time (*post*, § 2517) seems still to remain.

⁴ There are also statutes, generally in vogue, which forbid the limitation to be removed except by an *express acknowledgment or new promise in writing by the debtor*; the effect is to cut off the use of the implied acknowledgment found in a payment by the debtor, and thus indirectly to result equally in the exclusion of the creditor's entry; the following is an example: *Conn. Gen. St.* 1887, § 1094 (in actions against deceased persons, the acknowledgment or new promise must be in writing made or signed by the party to be charged); *Ill. Rev. St.* 1874, c. 83, § 16 (the new promise or the payment must be "made in writing"). But in some jurisdictions the statute which thus requires writing for an

express acknowledgment or promise makes special provision for the survival of the common-law rule as to *implying* an acknowledgment or promise from a *payment*; and it is thus that the creditor's entry still becomes available; for example: *S. C. C. C. P.* 1893, § 131 (the acknowledgment or new promise must be in writing; but "payment of any part of principal or interest is equivalent to a promise in writing"). Then, of these statutes, a few make the additional restriction on creditors' entries, already noticed above, in note 3; thus: *Mass. Pub. St.* 1882, c. 197, §§ 15, 16; *Rev. L.* 1902, c. 202, §§ 12, 13 (the acknowledgment or promise must be "in some writing signed by the party chargeable"; yet this shall not "alter the effect of a payment of principal or interest"; but "no indorsement . . . by the party to whom such payment has been made . . . shall be deemed sufficient proof of the payment").

¹ *Ga. Code*, 1895, § 5181 (quoted *ante*, § 1455); 1864, *Mahaska Co. v. Ingalla*, 16 *Ia.* 81.

² 1831, *Davies v. Morgan*, 1 *C. & J.* 501.

³ 1861, *R. v. Birmingham*, 1 *B. & S.* 768.

⁴ 1824, *Frammingham Mfg. Co. v. Barnard*, 2 *Pick.* 532 (Parker, C. J.: "The case of verbal declarations or of letters is totally different [from book-entries], the first being easily misapprehended and misrepresented, and the second being so easily fabricated, to make them safe sources of evidence"); 1840, *Lawrence v. Kimball*, 1 *Metc.* 527. See, also, *Phillips on Evidence*, *Cow. & H.'s Notes*, 260 (1843). The doubt on this point in the English case of *Furdon v. Clogg* (1842), 10 *M. & W.* 572, never had any foundation.

⁵ 1851, *Marcy v. Stone*, 8 *Cush.* 9; 1852,

3. Testimonial Qualifications, and Other Independent Rules of Evidence and Substantive Law.

§ 1471. **Testimonial Qualifications.** (a) The qualifications of the declarant (*ante*, § 1424) with reference to Testimonial Knowledge of the fact stated are those of the ordinary witness; the phrases of different judges vary.¹ It has once or twice been loosely said that the declarant must have "peculiar knowledge;" but so far as this may mean a knowledge better than that ordinarily required of witnesses, *i. e.* the usual knowledge by personal observation (*ante*, § 656), it is not law. (b) The statement must also, conformably with the principles of Testimonial Narration (*ante*, §§ 766, 789, 811), distinctly import the fact of which it is offered as an assertion.²

§ 1472. **Authentication.** The principles of Authentication (*post*, §§ 2129-2169) must appear to have been satisfied. In particular, (a) a written entry must be clearly shown to have been executed by the person alleged to be the declarant.¹ Either the signature or the body of the entry must be in the declarant's handwriting; but not necessarily both.² (b) Documents thirty years old may be assumed, under the usual conditions (*post*, § 2137), to be authentic.³ (c) So, too, the rule about producing originals (*ante*, § 1179), and all other rules applicable to proof of writings, may be invoked.

§ 1473. **Tenant's Statements used against Landlord's Title.** The rule of substantive law, that a tenant may not dispute by plea or by claim the superior right of his landlord, has occasionally been erroneously applied in the

Stearns v. Hendersass, 9 Id. 502; 1860, *Currier v. Gale*, 14 Gray 504.

¹ 1812, *Ellenborough*, L. C. J., in *Doe v. Robson*, 15 East 34 ("a competency in them to know it"); 1821, *Plummer*, M. R., in *Short v. Lee*, 2 Jac. & W. 488 ("persons having a competent knowledge, or whose duty it was to know"); 1828, *Eldon*, L. C., in *Barker v. Ray*, 2 Russ. 76 ("persons who have a complete knowledge of the subject"); 1829, *Parke*, J., in *Middletou v. Melton*, 10 B. & C. 317 ("a party cognizant of a fact"); 1833, *Gleadon v. Atkins*, 3 Tyrw. 302 (*Bayley*, B., "a person having peculiar means of knowledge"; *Vaughan*, B., "having peculiar knowledge of the fact at the time," "with perfect cognizance of the fact"); 1837, *Marks v. Lahee*, 3 Bing. N. C. 420 (*Park*, J., "means of knowledge"; *Vaughan*, J., "full knowledge of the transaction"); 1851, *Parke*, B., in *Perceval v. Nanson*, 7 Ex. 1 ("peculiar means of knowing a fact"); 1864, *Dillon*, J., in *Mahaska Co. v. Ingalls*, 16 Ia. 81 ("a matter concerning which the declarant was immediately and personally cognizable [*sic* ?]"). In *Bird v. Hueston*, 10 Oh. St. 423 (1859), the declarations were rejected of one who was H.'s son, attorney, and business agent, because the statements concerned services rendered H. as manager of a farm and distillery; the ruling is far-fetched.

² 1810, *Haddow v. Parry*, 3 Taunt. 303 (a bill of lading signed "contents unknown" was rejected as being in effect no declaration of what the chests contained); 1829, *Plaxton v. Darz*, 10 B. & C. 19 (payment indicated by crosses

placed against names); 1847, *Doe v. Langfield*, 16 M. & W. 514 (the assertion of an estate "by life-interest" only was regarded as ambiguous and inadmissible). In *Doe v. Burton*, 9 C. & P. 254 (1840), an entry of payment from B. for building a cottage was held not receivable to prove that B. built the cottage.

³ 1821, *Short v. Lee*, 2 Jac. & W. 467 (*Plummer*, M. R.: "In all these cases [of books by bailiffs, etc.], the first point is to prove the character of the individual who wrote them; if you fail in this they cannot be evidence. . . . In all the private relations of life you do not presume the existence of the particular character, nor does a person's acting in that character prove that he possessed it. . . . It would let in a dangerous latitude if the Court were once to dispense with that which is an essential preliminary before any writing, not verified on oath, can be made evidence, and which must be established *aliunde*." In general, *add*: 1808, *Doe v. Lord Thynne*, 10 East 209; 1815, *Manby v. Curtis*, 1 Price 228; 1816, *Bullen v. Michel*, 2 Price 427; 1835, *Baron de Rutzen v. Farr*, 4 A. & E. 56; 1849, *Doe v. Bevis*, 7 C. B. 486. Compare the cases cited *post*, § 2144.

⁴ 1792, *Barry v. Bubbington*, 4 T. R. 514 (*Kenyon*, L. C. J.: "If the entry be not in the handwriting of the steward, undoubtedly it must be signed by him; but here all these entries were written by the steward himself"). *Accord*: 1833, *Doe v. Stacey*, 6 C. & P. 139; 1831, *Dwight v. Brown*, 9 Conn. 93.

⁵ 1821, *Wynne v. Tyrwhitt*, 4 B. & Ald. 376.

domain of Evidence, and has been supposed to forbid, as a rule of evidence, the use of a tenant's declarations against his proprietary interest, so far as they tend to cut down the landlord's right.¹ It is difficult to see how such an application can be invoked. The inexpediency of allowing tenants to litigate against titles which they have, by implication, agreed to accept as good, has nothing to do with the desirability of using the evidence of a deceased tenant, in a litigation to which he is not a party and on a matter as to which he has knowledge and has made a trustworthy statement.²

§ 1474. **Principal's Statements used against Surety.** It was once ruled that the statements of a deceased principal debtor against his interest could not be used against the surety.¹ This came from a confusion of the rule concerning Admissions, which may be used only against parties or privies in interest, with the present Hearsay exception, which has in fact nothing to do with such restrictions. But the error has been corrected by the repudiation of the earlier ruling.²

§ 1475. **Distinction between Statements against Interest, Admissions, and Confessions.** (1) A statement of a fact against interest is receivable on the ground that such a statement is one which would not be made unless truth compelled it, and that it is therefore as trustworthy as if made on the stand under cross-examination (*ante*, § 1457).

(2) But is not a statement by a party-opponent credited for substantially the same reason? Such certainly is the fact, in most instances of the sort (*ante*, §§ 1048, 1049). Why, then, is not a party's admission merely one sort of the statements against interest receivable under the Hearsay exception? Such is the notion often found judicially advanced, especially in the earlier rulings, when the principle of the present exception was not fully established. But there are two decisive answers which demonstrate its fallacy. (a) In the first place, under modern law, the party-opponent in a civil case may be summoned as a witness; if, then, the Hearsay exception be invoked, the opponent's extrajudicial statements are inadmissible, unless he is shown to be deceased or otherwise unavailable, — as every other declarant must be, in order that his statements against interest may be received (*ante*, § 1456). But this is never required as preliminary to using an opponent's admissions (*ante*, § 1049); hence, it is clear, they enter independently of the present Hearsay exception. (b) Secondly, an opponent's admission is receivable even though the fact as stated by him was then not against his interest, *i. e.* even though he was then making a claim in his favor. This principle (*ante*, § 1048) shows clearly that opponents' admissions, though they are usually of facts then against their interest, need not be; and thus, again, their use rests on a principle distinct from that of the present exception to the Hearsay rule.

¹ 1855, *Papendick v. Bridgwater*, 5 E. & B. 176.

¹ 1821, *Goss v. Watlington*, 4 B. & B. 138.

² 1829, *Middleton v. Melton*, 10 B. & C. 317;

² 1894, *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189 (*Papendick v. Bridgwater* commented on).

1864, *Mahaska Co. v. Ingalls*, 16 Ia. 81; 1833, *Hinkley v. Davis*, 6 N. H. 210; 1811, *Assignees of S. v. Boucher*, 2 Wash. C. C. 473.

(3) The statements of an accused in a criminal case may be either confessions, in the narrow sense, or admissions, in the broader sense; the distinction has already been examined (*ante*, §§ 816, 1650). So far as they are admissions (*i. e.* of facts not necessarily against interest, but merely inconsistent with his present defence), they enter like the admissions of a civil opponent; the first distinction above (*a*) does not apply, because the accused cannot be called to the stand by the prosecution; but the second distinction (*b*) does apply, for exculpatory statements of facts not at the time against his interest are nevertheless admissible (*ante*, § 821). But so far as his statements are direct confessions of crime, they fulfil both the main requirements of the present exception; the declarant is not available as a witness for the prosecution, and the fact of the crime as confessed is directly against his interest. Thus, the direct confessions of an accused person are receivable, not only as included in the general principle of Admissions (*ante*, § 1048) but also as covered by the doctrine of the present exception to the Hearsay rule. This particular aspect of them, as the chief source of their credit, has been dwelt upon by many judges and jurists.¹ It is worth emphasizing here, because it shows the fallacy of the supposed exclusion (*post*, § 1476), under the present exception, of statements of facts against penal interest.

4. Arbitrary Limitations.

§ 1476. **History of the Exception; Statement of Fact against Penal Interest, excluded; Confessions of Crime by a Third Person.** It is to-day commonly said, and has within two generations been expressly laid down by many judges, that the interest prejudiced by the facts stated must be *either a pecuniary or a proprietary interest*, and not a *penal interest*. What ground in authority there is for this limitation may be found by examining the history of the Exception at large.

The Exception appears to have taken its rise chiefly in two separate rivulets of rulings, starting independently as a matter of practice, but afterwards united as parts of a general principle. On the one side, it early became customary, shortly after the Hearsay rule was established (*ante*, § 1364) to

¹ The following are only a few of many instances: 1726, Gilbert, Evidence 137 ("As persons interested are utterly removed from being evidence for want of integrity, so on the other side the voluntary confession of the party in interest is reckoned the best evidence; for if a man's swearing for his interest can give no credit, he must certainly give most credit when he swears against it"); 1791, Lambe's Case, 2 Leach, Cr. L., 3d ed., 628 (Grose, J., for the twelve judges: "Confessions of guilt . . . 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"); 1846, State v. Kirby, 1 Strobb. 156 (Evans, J.: "There is no legal principle bet-

ter established than that a free and voluntary confession is deserving of the highest credit; for it is not to be presumed that one will falsely accuse himself of a crime especially when he knows that a conviction of it will incur a forfeiture of his life"); 1847, State v. Cowan, 7 Ired. 246 (Ruffin, C. J., "[We may] proceed upon the common experience of men's motives of action and of the tests of truth. Now few things happen seldomer than that one in the possession of his understanding should of his own accord make a confession against himself which is not true"); 1875, Levison v. State, 54 Ala. 525 (Brickell, C. J.: "The confession is admissible on the presumption that a person will not make an untrue statement criminating himself and militating against his own interest").

receive in evidence the account-entries of a deceased person's (particularly a bailiff or steward) charging himself with the receipt of money.¹ No distinct reason appears to have been expressed; but the practice was well-established, and its traces as an independent doctrine are found at a late period.² Analogous to this, and yet in origin probably independent, were the practices, already referred to (*ante*, § 1460), of receiving entries in a vicar's tithe-book and indorsements of payments on notes and bonds. On the other side, a practice obtained, in an independent series of rulings, of receiving declarations, usually oral, in disparagement of one's proprietary title.³

These lines of precedent proceeded independently till about the beginning of the 1800s, when a unity of principle came gradually to be perceived and argued for.⁴ This unity lay in the circumstance that all such statements, in that they concerned matters prejudicial to the declarant's self-interest, were fairly trustworthy and might therefore (if he were deceased) be treated as forming an exception to the Hearsay rule. This broad principle made its way slowly. There was some uncertainty about its scope; but it was an uncertainty in the direction of breadth; for it was sometimes put in the broad form that statements by a person "having no interest to deceive" would be admissible. This broad form never came to prevail. But acceptance was gained, after two decades, for the principle that *all declarations of facts against interest* (by deceased persons) were to be received. What is to be noted, then, is that from 1800 to about 1830 this was fully understood as the broad scope of the principle. It was thus stated without other qualification; and frequent passages show the development of the principle to this point.⁵

¹ 1737, *Manning v. Lechmere*, 1 Atk. 453 (rental-roll receipts by bailiffs); 1792, *Barry v. Hebbington*, 4 T. R. 514 (steward's receipts); 1792, *Stand v. Heaton*, 4 T. R. 670 (town account-books).

² 1811, *Holladay v. Littlepage*, 2 Munf. 320; 1815, *Manby v. Curtis*, 1 Price 229; 1832, *Ward v. Pomfret*, 5 Sim. 475.

³ 1787, *Davies v. Pierce*, 2 T. R. 54 (declarations of tenancy by leasees); 1808, *Doe v. Jones*, 1 Camp. 367 (charging one's self with rent due).

⁴ The case by which the argument was inspired was *Warren v. Greenville*, 2 Stra. 1129 (1740); to show the fact of a surrender of a life-estate, the books of a deceased attorney, charging for services in drawing and grossing the surrender, and acknowledging payment therefor, were admitted; "it was a circumstance material upon the inquiry into the reasonableness of presuming a surrender; and not [to] be suspected to be done for this purpose; that if E. was living he might undoubtedly be examined to it, and this was now the next best evidence." But the broad argument seems not to have been deliberately recognized until 1808, in *Ivat v. Finch*, 1 Taunt. 141; here, the plaintiff's acquisition of ownership from the deceased W. being in issue, W.'s declaration that she had given the property to him was admitted; Mans-

field, C. J.: "The evidence ought to have been received. . . . This admission, supposed to have been made by Mrs. W., was against her own interest."

⁵ In 1806, Lord Ellenborough speaks (*Higham v. Ridgway*, 10 East 109) of "the broad principle on which receivers' books have been admitted, namely, that the entry made was in prejudice of the party making it." In *Roe v. Rawlings*, 7 East 290 (1806), the same judge had said that "there are several instances in the books where the declaration of a person having no knowledge of a fact and no interest to falsify it, has been admitted as evidence of it after his death." He then goes on to point out that in the case in hand there was even an interest that would be injured by the fact stated. But he makes no distinct separation, as a class, of statements against interest. Yet in 1811 (*Stanley v. White*, 14 East 341) he appears to recognize such a class. In 1812 again (*Doe v. Robson*, 15 East 34), he phrases it that "the ground upon which this evidence has been received is that there is a total absence of interest . . . to pervert the fact." Bayley, J., in the same case, however, puts it as "an established principle of evidence," that the entries are admissible "because it is against his own interest." But the broadest form never obtained acceptance. In

But in 1844, in a case in the House of Lords, not strongly argued and not considered by the judges in the light of the precedents, a backward step was taken and an arbitrary limit put upon the rule. It was held to exclude the statement of a fact subjecting the declarant to a criminal liability, and to be confined to statements of *facts against either pecuniary or proprietary interest*.⁶ Thenceforward this rule was accepted in England;⁷ although it was plainly a novelty at the time of its inception; for in several rulings up to that time such statements had been received.⁸ The same attitude has been taken by many American Courts,⁹ excluding confessions of a crime, or other statements

1826, in *Barker v. Ray*, 2 Russ. 76, where the counsel had argued as if the rule required merely "total absence of interest" (in Lord Ellenborough's words), Lord Eldon said: "The only doubt I have entertained was as to this position that you are to receive evidence of declarations where there is no interest. At a certain period of my professional life, I should have said that that doctrine was quite new to me. I do not mean to say more than that I still doubt concerning it." Thenceforward, however, and up to the fourth decade of the century, the phrase "against interest" was used without limitation. Bayley, B., says, in 1829 (*Middleton v. Melton*, 10 B. & C. 317): "It is a general principle of evidence, that declarations or statements of deceased persons are admissible when they appear to have been made against their interest." Littlehale, J., in the same case, speaks of "this general principle, that where a person has peculiar means of knowing a fact, and makes a declaration or written entry of that fact, which is against his interest at that time, it is evidence of the fact as between third persons after his death." Parks, J., uses identical language.

⁶ 1844, *Sussex Peerage Case*, 11 Cl. & F. 109 (declarations of a clergyman that he had performed a marriage which would subject him to a prosecution were rejected; *Lyndhurst, L. C.*: "A is indicted for murder; B, who is dead, made while living a declaration that he was present at the murder; that declaration is against his own interest, and would, had he lived, have subjected him to a prosecution. It is in principle the very case supposed in the argument, and it is not possible to say that such a declaration would have been receivable in evidence").

⁷ 1844, *Davis v. Lloyd*, 1 C. & K. 276, *Lord Denman, C. J.*; 1855, *Papendick v. Bridgwater*, 5 E. & B. 180, *Erle, J.* ("It is contended that there is a wide and universal principle that the declaration of a dead person, made against his interest, is admissible. No doubt many judges do use that language; but I think that this principle must be limited [giving the above limits]. . . . The argument in support of the evidence has almost gone the length of asserting that this declaration becomes admissible where any hope or fear might have prompted a contrary assertion; but it was admitted that the rule could not go so far; and in the case in the House of Lords . . . it was said that the interest, to make the

declaration admissible, must be either pecuniary or proprietary").

⁸ These rulings were not considered in the *Sussex Peerage Case*: 1660, *Hulet's Trial*, 5 How. St. 1185, 1192 (charged as being the executioner of King Charles; it was disputed—and has never been clearly known—whether Gregory Brandon, the common hangman, officiated on that occasion, the executioner being masked; the defendant Hulet tried to prove that Brandon did the deed; Witness: "When my lord Capell, dukes of Hamilton, and the earl of Holland, were beheaded in Palace-Yard, in Westminster, my lord Capell asked the common hangman, said he, 'Did you cut off my master's head?' 'Yes,' saith he. 'Where is the instrument that did it?' He then brought the ax. . . . My lord Capell took the ax, and kissed it, and gave him five pieces of gold. I heard him say: 'Sirrah, wert thou not afraid?' Saith the hangman, 'They made me cut it off; and I had thirty pounds for my pains'); 1680, *Hale, Pleas of the Crown*, I, 306 ("In relation to the manner of their testimony, . . . if it be a hearsay from the offender himself confessing the fact, such a testimony upon hearsay makes a good witness within the statute [of treason]"); 1791, *Standen v. Standen*, Peake 32 (a marriage-register entry recited the publication of banns; the clergyman's confession that he had married without banns, received; *Kenyon, L. C. J.*, pointing out that a false entry was a felony: "He put himself in a dangerous situation by making such a confession"); 1833, *Powell v. Harper*, 5 C. & P. 590 (libel, charging the plaintiff with being a receiver of stolen goods; the declarations of A that he had stolen them, received).

⁹ The following rulings to this effect are further commented on *post*, § 1477: *Can.*: 1842, *Blair v. Hopkins*, 1 Kerr N. Br. 540 (confession of a third person that he and the plaintiff committed the felony, excluded; here the third person was not accounted for); *A/a.*: 1846, *Smith v. State*, 9 Ala. 995 (declarant not deceased); 1887, *Snow v. State*, 58 id. 375; 1884, *West v. State*, 76 id. 99; 1892, *Welsh v. State*, 96 id. 92, 11 So. 450 (confession of L, not accounted for, excluded); *Cal.*: 1892, *People v. Hall*, 94 Cal. 595, 30 Pac. 7 (confession of K, killed while escaping from arrest for the same charge, excluded); *Conn.*: 1889, *Benton v. Starr*, 58 Conn. 285, 20 Atl. 450 (bastardy; confessions of paternity by a third person, excluded; here his absence was unaccounted for);

of facts against penal interest, made by third persons; although there is not wanting authority in favor of admitting such statements.¹⁰

Ga.: 1857, *Lyon v. State*, 22 Ga. 399 (declarant not accounted for; treated in terms of admissions); 1880, *Daniel v. State*, 65 Id. 199 (declarant not accounted for); 1889, *Kelly v. State*, 82 Id. 441, 9 S. E. 171 (like the *Lyon* case); 1896, *Delk v. State*, 99 Id. 667, 26 S. E. 752; 1897, *Lowry v. State*, 100 Id. 574, 28 S. E. 419 (the third person here not accounted for); 1901, *Robinson v. State*, 114 Id. 445, 40 S. E. 253 (joint indictment of R. and H.; before trial, H. disappeared; his declaration confessing the killing and exonerating R., not received); *Ind.*: 1878, *Jones v. State*, 64 Ind. 473, 484 (declarant not accounted for; treated on the principle of admissions); 1897, *Hunk v. State*, 148 Id. 238, 46 N. E. 127, 47 N. E. 465 (abortion; a letter of the deceased asserting that she had herself attempted to procure it, excluded); *Ia.*: 1902, *State v. Sale*, 119 Id. 92 N. W. 680, 95 N. W. 193 (murder; declarant's statement that "he was to blame," excluded, ignoring the present point of view); *Ky.*: 1893, *Davis v. Com.*, 95 Ky. 9, 23 S. W. 585 (confession of P., deceased, excluded); *La.*: 1893, *State v. West*, 45 La. An. 928, 929, 13 So. 173 (the confession of B., killed while resisting arrest for the charge, excluded); 1901, *State v. Young*, 107 La. 618, 31 So. 993 (confessions of one G., not accounted for, held inadmissible); *Me.*: 1855, *Pike v. Crehore*, 40 Me. 503, 511 (to disprove the receipt of money sent by mail, the alleged payee offered the confession of the letter-carrier in that town, made while in prison, that he had taken the money; excluded, the letter-carrier being presumably available as a witness); *Md.*: 1880, *Munshower v. State*, 55 Md. 11, 18 (not admissible, even to discredit the declarant testifying for the State); *Mass.*: 1804, *Com. v. Chabock*, 1 Mass. 144 (declarant not shown to be deceased); 1866, *Com. v. Denmore*, 12 All. 537 (Bigelow, C. J., excluding declarations of the deceased offered by the defence on a trial for manslaughter: "We are not aware that the exception [against interest] has ever been extended farther, so as to render competent declarations which are not otherwise against the interest of the party who made them except that they tend to throw on himself some degree of blame or criminality in relation to a particular transaction and to exonerate others therefrom"); 1894, *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. 783 (bastardy; admission of paternity by another person not accounted for, excluded); 1899, *Com. v. Chanco*, 174 Id. 245, 54 N. E. 551; *Mich.*: 1882, *People v. Stevens*, 47 Mich. 411, 11 N. W. 220 (one defendant in court admitted his guilt and offered to withdraw his plea of not guilty, yet apparently did not go on the stand; excluded); *Miss.*: 1890, *Helm v. State*, 67 Miss. 572, 7 So. 487 (declarations of the deceased, on a trial for murder, inculcating himself, were offered as declarations against interest, but rejected on precedent and also on the rather curious ground that "how any declarant can be said to be against the interest of a man already passed into

the other world . . . is wholly incomprehensible by us"); *Mo.*: 1874, *State v. Evans*, 55 Mo. 460 (declarant not accounted for); 1893, *State v. Duncan*, 116 Id. 288, 311, 22 S. W. 699 (declaration of S., admitting the shooting, excluded); 1893, *State v. Hack*, 118 Id. 92, 98, 23 S. W. 1089 (confession of a co-defendant, not accounted for, excluded); *N. Y.*: 1881, *Greenfield v. State*, 85 N. Y. 75, 86, 88 (declarant in court and not called); *N. C.*: 1833, *State v. May*, 4 Dev. 332 (larceny; declarant absconded); 1846, *State v. Duncan*, 6 Ired. 239 (declarant not shown deceased); 1873, *State v. White*, 68 N. C. 158 (like *State v. May*); 1874, *State v. Haynes*, 71 Id. 84 (same); 1875, *State v. Bishop*, 73 Id. 44 (same); *Or.*: 1893, *State v. Fletcher*, 24 Or. 295, 300, 33 Pac. 575 (murder; confession of a third person, who had fled, excluded); *Tenn.*: 1836, *Wright v. State*, 9 Yerg. 344 (declarant not deceased); 1837, *Rhea v. State*, 10 Id. 260 (same); 1870, *Sible v. State*, 3 Heisk. 137 (larceny; confessions of a co-indictee, incompetent as a witness, not admitted for the defendant); 1887, *Peck v. State*, 86 Tenn. 259, 6 S. W. 389 (confession of a person not accounted for, excluded); *Vt.*: 1900, *State v. Totten*, 72 Vt. 73, 47 Atl. 105 (indefinite confession by a third person, not accounted for, excluded); *Wyo.*: 1896, *Reavia v. State*, 6 Wyo. 240, 44 Pac. 62 (perjury in testifying that C. did not commit an assault; confession of C., unaccounted for, not admitted for the prosecution; treated on the principle of admissions).

¹⁰ 1846, *Smith v. State*, 9 Ala. 995, cited *supra*, (Goldthwaite, J., dissenting: "When the other facts and circumstances connect the party with the act, and the confession is made under circumstances which repel the suspicion of any motive, I can see no reason why a doubtful crime may not be thus fixed on the confessing person, though the fact of that confession may tend to exculpate another, to whom the circumstances equally point as the guilty person"); 1898, *Mason v. F. A. A. v. Riley*, 65 Ark. 261, 45 S. W. 684 (policy on accidental death; confession of S., shortly after the death, that he had killed the deceased, admitted, perhaps on the *res gestae* grounds, *post*, § 1747); 1850, *Coleman v. Frazier*, 4 Rich. L. 152 (a third person's statement that he had stolen money was admitted; O'Neill, J.: "This is not of a matter of business, like those spoken of in that case, but was a criminal act. . . . The admission of such testimony arises from necessity, and the certainty that it is true from the want of motive to falsify. Both these are apparent here. . . . Here we have every guaranty of its truthfulness—the grave consequences of infamy, and at the least ten years' imprisonment, would certainly insure the truth of the speaker"); 1894, *Martin v. State*, 33 Tex. Cr. 317, 26 S. W. 400 (perjury in falsely testifying to larceny by S. and P.; confessions of B. and B. that they committed the larceny, admitted).

§ 1477. **Same: Policy of this Limitation.** It is plain enough that this limitation, besides being a fairly modern novelty, is inconsistent with the broad language originally employed in stating the reason and principle of the present exception (*ante*, §§ 1457, 1476) as well as with the settled principle upon which Confessions are received (*ante*, § 1475).¹ But, furthermore, it cannot be justified on grounds of policy. No plausible reason of policy has ever been advanced for such a limitation.² Furthermore, the practical consequences of this unreasoning limitation are shocking to the sense of justice; for, in its commonest application, it requires, in a criminal trial, the rejection of a confession, however well authenticated, of a person deceased or insane or fled from the jurisdiction (and therefore quite unavailable) who has avowed himself to be the true culprit. The absurdity and wrong of rejecting indiscriminately all such evidence is patent.

The rulings already in our books cannot be thought to involve a settled and universal acceptance of this limitation. In the first place, in almost all of the rulings the declarant was not shown to be deceased or otherwise unavailable as a witness, and therefore the declaration would have been inadmissible in any view of the present exception (*ante*, § 1456). Secondly, in some of the rulings (for example, in North Carolina) the independent doctrine (*ante*, §§ 139-141) was applicable that, in order to prove the accused's non-commission of the offence by showing commission by another person, not merely one casual piece of evidence suffices but a *prima facie* case resting on several concurring pieces of evidence must be made out. Finally, most of the early rulings had in view, not the present exception to the Hearsay rule, but the doctrine of Admissions (*ante*, §§ 1076, 1079) that the admissions of one who is not a co-conspirator cannot affect others jointly

¹ The limitation is apparently supported by the doctrine (*ante*, §§ 1076, 1079) that the confessions of an accomplice are not to be used by the prosecution against the accused except so far as they are the admissions of a co-conspirator; for A's confession implicating himself and B, the accused, is at least against his own penal interest, and therefore might seem to fall under the present supposed principle. But (1) the interest of A in obtaining a pardon by confessing and betraying his co-criminals is in such cases usually so important that, according to the doctrine of preponderance of interest (*ante*, § 1464), the statement would not even under the present exception be admissible; (2) the question has usually been dealt with according to the doctrine of Admissions (Tong's Case, quoted *infra*, note 3), and the present aspect has not been considered; (3) the accomplice must, according to the present exception, be shown deceased or otherwise unavailable, and this showing has usually not been attempted in such cases; the following case shows its application: 1832, R. v. Turner, 1 Lew. Cr. C. 119 (the confession of one of the other prisoners, on examination before a magistrate, it was objected to, "secondly, that it was not the best evidence that the circumstances of the case admitted of, inasmuch as

the prisoner whose examination it purported to be was not attained [he had pleaded guilty, but sentence had not been passed], and might therefore be put into the box and examined as a witness, which would give the prisoner's counsel an opportunity of cross-examining her on oath"; the confession was rejected, without indicating the grounds).

² The following suggestion, to be sure, is found: 1857, McDonald, J., in *Lyon v. State*, 22 Ga. 399, 401: "All one defendant would have to do would be to admit that his guilty accomplice was innocent and that he himself had perpetrated the crime, absent himself so as to enable the party on his trial to have the benefit of his admission, and after his acquittal appear, demand his trial, and prove by the evidence of the acquitted party that he was in fact the guilty person." That any judge could believe such a scheme to be within the possibilities of successful accomplishment seems curious. Besides, if it were, that is no reason for refusing such evidence in cases where the defendant may be entirely innocent; if the evidence in truth is not concocted, as supposed by this fantastic suspicion, then the judge is perhaps an instrument in that harshest of tortures, — the refusal to allow an innocent man to prove his innocence.

charged.³ It is therefore not too late to retrace our steps, and to discard this barbarous doctrine, which would refuse to let an innocent accused vindicate himself even by producing to the tribunal a perfectly authenticated written confession, made on the very gallows, by the true culprit now beyond the reach of justice. Those who watched with self-righteous indignation the course of proceedings in Captain Dreyfus' trial should remember that, if that trial had occurred in our own Courts, the spectacle would have been no less shameful if we, following our own supposed precedents, had refused to admit what the French Court never for a moment hesitated to admit, — the authenticated confession of the escaped Major Esterhazy, avowing himself the guilty author of the treason there charged.

³ 1663, *Tong's Case*, Kelyng 18 ("Such confession [before a justice or a privy councilor on examination] so proved is only evidence against the party himself who made the confession, but

cannot be made use of as evidence against any others whom on his examination he confessed to be in the treason").

SUB-TITLE II (continued): EXCEPTIONS TO THE HEARSAY RULE.

TOPIC III: DECLARATIONS ABOUT FAMILY HISTORY (PEDIGREE).

CHAPTER XLIX

§ 1480. In general; Statutory Provisions.

1. The Necessity Principle.

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3. Testimonial Qualifications and other Independent Rules of Evidence.

§ 1485. (1) Testimonial Qualifications.

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§ 1491. Same: Relationship always Mutual; Connecting the Declarant with Both Families.

§ 1492. Same: Relationship of Illegitimate Child.

§ 1493. Same: Testimony to one's Own Age.

§ 1494. Same: Statements of Family History, to Identify a Person.

§ 1495. (b) Form of the Assertion (Family Bibles or Trees, Tombstones, Wills, etc.).

§ 1496. (2) Authentication; Proving Individual Authorship.

§ 1497. (3) Production of Original Document; Preferred Writings.

2 and 3. Kind of Fact that may be the Subject of the Statement.

§ 1500. General Principle.

§ 1501. Statements as to Place of Birth, Death, etc.

§ 1502. Sundry Kinds of Facts.

4. Arbitrary Limitations.

§ 1503. Kind of Issue or Litigation involved.

§ 1480. In general; Statutory Provisions. This is one of the oldest of the exceptions. In the 1800s, little difficulty was made about accepting reputation-evidence generally. It could hardly be otherwise when the jury-practice had just been freed (*ante*, § 1364) from the traditional notion that the jury themselves represented the reputation or community-knowledge of the neighborhood. Soon, however, the use of reputation became limited to what had doubtless been its commonest instances, — matters of prescriptive possession and of pedigree or genealogy. From the former was then developed the exception for Reputation to Land-Boundaries (*post*, § 1582); from the latter, the present exception. Here the notion of general reputation as the distinguishing form of the evidence has long since disappeared. The evidence may be in the form of individual declarations; though it may also be in the form of family reputation. In general, the scope of the present exception has been much enlarged during the past century in this country. Occasionally a statute has attempted to define its terms.¹

¹ Cal. C. C. P. 1872, § 1852 ("The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such repu-

tation is admissible"); § 1870, par. 4 ("the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person" is admissi-

1. The Necessity Principle.

§ 1481. *Death, etc., of Declarant or of Family.* The Necessity principle (*ante*, § 1421) is here satisfied by the general difficulty of obtaining any other than traditional evidence in matters of family history. The following passages illustrate the accepted judicial attitude:

1806, *L. C. Erskine*, in *Voules v. Young*, 13 Ves. 140: "Courts of law are obliged in cases of this kind to depart from the ordinary rules of evidence, as it would be impossible to establish descents according to the strict rules by which contracts are established and subjects of property regulated, [by] requiring the facts from the mouth of the witness who has the knowledge of them. In cases of pedigree, therefore, recourse is had to a secondary sort of evidence, — the best the nature of the subject will admit, establishing the descent from the only sources that can be had."

1811, *Lawrence, J.*, in *Berkeley Peerage Case*, 4 Camp. 409: "From the necessity of the thing, the declarations of members of the family in matters of pedigree are generally admitted, . . . [the rejection of which] would often be the rejection of all the evidence that could be offered"; *Mansfield, C. J.*: "In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted."

1836, *Story, J.*, in *Ellicott v. Pearl*, 10 Pet. 434: "In cases of pedigree, [hearsay] is admitted upon the ground of necessity, or the great difficulty and sometimes the impossibility of proving remote facts of this sort by living witnesses, . . . there being no *lis mota* or other interest to affect the credit of their statement."

1886, *Woods, J.*, in *Fulkerson v. Holmes*, 117 U. S. 389, 29 Sup. 915: "This exception has been recognized on the ground of necessity; for as, in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial and were known to but few persons, it is obvious that the strict enforcement in such cases of the rules against hearsay evidence would frequently occasion failure of justice."

1891, *Peckham, J.*, in *Eisenlord v. Clum*, 126 N. Y. 552, 27 S. E. 1024: "In many cases it will readily be seen such evidence may under the circumstances be the only evidence which can be obtained. . . . Traditional declarations become the best evidence sometimes, when those best acquainted with the fact are dead."

It will be noticed that the language here used offers opportunity for choice between three distinct and competing rules in the application of the Necessity principle.

(1) First, there are references to "past generations," "many years before," "lapse of time," "after one generation has passed away," and the like. These imply that the exception comes into play only where the matter is "ancient," *i. e.* of a past generation; and that therefore, on the one hand, matters of recent occurrence may not be so proved, whether or not there are

ble); § 1870, par. 13 ("entries in family Bibles or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree," are admissible; see also § 1872, par. 11, cited *post*, § 1580, under Reputation); Commissioners' amendments of 1901 (in C. C. P. § 1852, after "pedigree," insert, "birth, parentage, age, marriage, death, or relationship"; in C. C. P. § 1870, after "in respect to the," insert as a substitute, "pedigree, birth, parentage, age, marriage, death, or relationship," etc.; in C. C. P. § 1870, par. 13, insert at the end the

same words, following "pedigree," and then add, "of any member of such family"); for the validity of these amendments, see *ante*, § 488; *Ga.*: Code 1895, § 5177 ("Pedigree, including descent, relationship, birth, marriage, and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, inscriptions, 'family trees,' and similar evidence"); *Mont.* C. C. P. 1895, §§ 3128, 3148, par. 4, 11, 13 (like Cal. C. C. P. §§ 1852, 1870); *Or.* C. C. P. 1892, §§ 688, 706, par. 4, 11, 13 (like Cal. C. C. P. §§ 1852, 1870).

living witnesses, and, on the other hand, that matters of a time whose witnesses are likely to have passed away may be so proved, whether or not living witnesses are available. But there appears to be in fact no rule of such a form, in spite of the implication of the above language. The tendency is against such a narrowness for the rule.¹

(2) Secondly, a similar but slightly broader rule may be seen indicated by the phrases, "no living witnesses can be had," "the great difficulty of procuring living witnesses," and by the statements that such evidence is admissible because living witnesses can "often" or "usually" not be had. The implication is that where *any living witness to the same matter*, particularly a member of the family, can be had, no hearsay statement of any deceased persons can be received. This form of rule, which has had some support in decisions,² is perhaps appropriate enough where the evidence is offered in the shape of *family reputation*; for there is in strictness no necessity for resorting to the hearsay of the family as such, until it appears that members of the family cannot be had to testify on the stand.

(3) But where the evidence offered is the *declaration of an individual member of the family*, the necessity for this person's hearsay lies merely in the impossibility of procuring the declarant himself to testify on the stand; *i. e.* the death, absence, insanity, or the like, of the declarant alone suffices. Such is the rule dictated by the analogies of the other Hearsay exceptions admitting individual statements (for example, Dying Declarations, Statements against Interest, Regular Entries). In the exception for Reputation

¹ 1870, *Scharff v. Keener*, 64 Pa. 379 (*acme*, that the recent date of the occurrences is immaterial).

² 1847, *White v. Strother*, 11 Ala. 724 (excluded, where other members of the family were alive); 1890, *Traveler's Ins. Co. v. Sheppard*, 85 Ga. 751, 779, 12 S. E. 18 (insurance claim; family reputation as to the fact of death, the time being less than a year before, the members of the family still surviving, excluded); 1884, *Ross v. Loomis*, 64 Ia. 432, 20 N. W. 749 (present reputation at M.'s place of residence "among the relatives and family" of M., as to his decease, the wife being alive, excluded); 1846, *Covert v. Hertzog*, 4 Pa. St. 146 (hearsay declarations were rejected as evidence of "a comparatively recent marriage," where "there was abundance of such evidence by living witnesses"); 1859, *Campbell v. Wilson*, 23 Tex. 252 (unidentified entries in a family Bible were rejected, where the father was dead but the mother was alive and in the jurisdiction); 1896, *Hurlburt's Estate*, 68 Vt. 366, 35 Atl. 77 (H. went to Dakota in 1882; reputation in the family, consisting of sister, mother, and brother, the father alone being dead, as to the fact of H.'s death, excluded; "when all the facts relative to a question of pedigree are within the knowledge of living witnesses, and none of such facts are derived from the declarations of deceased members of the family, there is no necessity for resorting to so-called 'family reputation,' created wholly by the living, any more than in

any other kind of case not involving pedigree"). In the following cases peculiar modifications of this rule were laid down: 1883, *Harland v. Eastman*, 107 Ill. 538 (several members of the family were living and available; Dickey, J.: "They are all living and their sworn testimony is better than their unsworn statements. It follows that the witness cannot properly be allowed to state his conclusion from such unsworn statements, unless all of them taken together, with their surroundings, enable him to say such was the accepted state of the case in the family or such was the uncontradicted repute in the family"); 1818, *Crouch v. Eveleth*, 15 Mass. 305 (family hearsay of the existence of children as heirs was rejected because no effort had been made to obtain the record of marriage and no showing that it was lost; this would hardly be followed).

If a person's testimony as to his *own age* is to be treated as a report of family hearsay (*post*, § 1495), this rule would require that the members of his family be accounted for. *Contra*: 1880, *Cherry v. State*, 68 Ala. 30 (a person's statement as to his age was treated as based on pedigree hearsay; but no specific decease was required to be shown). In the same State the ruling of *Rogers v. De Bardeleben Co.*, 97 Ala. 154, 12 So. 81, that a brother and a brother-in-law could not testify on the stand to the plaintiff's age, because third persons whose declarations are offered must be deceased, is incomprehensible.

(*post*, § 1580) there is some support for the notion that the necessity must consist in the lack of other evidence of any sort; but where individual declarations are receivable, no claim can be made for such a broad idea of necessity. Accordingly the only sound rule for the use of individual declarations is that the declarant himself must be shown to be unavailable.³

It should be noted that since entries in a *family Bible*, or the like, may usually be treated as representing either the entrant's individual assertion or the family's reputation, it should therefore be enough, if the entrant is identified, to show the entrant alone to be unavailable, and not to show also the unavailability of other members of the family.

(4) Supposing the evidence offered to be the declaration of an individual, it is clear that at least *the declarant must be shown unavailable*, by decease or otherwise.⁴ Here the analogies of the other exceptions, as well as the nature of the necessity-principle itself, indicate that not only *death*, but other circumstances—such as *insanity*, absence from the jurisdiction, and the like—may create such a necessity. On this point, however, the rulings are few.⁵

2. The Circumstantial Guarantee.

§ 1482. **General Principle.** The circumstantial guarantee for trustworthiness (*ante*, § 1422) has been found in the probability that the "natural effusions" (to use Lord Eldon's often-quoted phrase) of those who talk over family affairs when no special reason for bias or passion exists are fairly trustworthy, and should be given weight by judges and juries, as they are in the ordinary affairs of life. The sentence of Lord Eldon's in *Whitlocke v. Baker* has become the classical passage on this subject:

1700, *Ashhurst, J.*, in *R. v. Erinswell*, 3 T. R. 720: "It is natural for persons to talk of their own situations and of their families. The evidence is in its nature of an unsuspecting kind; it is generally brought from remote times, when no question was depending or even thought of, and when no purpose would apparently be answered."

1807, *L. C. Eldon*, in *Whitlocke v. Baker*, 13 Ves. 514: "Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles and registry

³ 1860, *Cranford v. Blackburn*, 17 Md. 54 (*Bartol, J.*): "This exception to the general rule had its origin in the necessity of the case. . . . It is objected that . . . the necessity did not exist [for a husband's declarations as to the marriage], there being a party to the alleged marriage [the wife] living and competent to testify. . . . This objection arises from a misapprehension of the rule. Such declarations are not held to be admissible or inadmissible according to the necessity of the particular case; but . . . by the established rule of law, which, though said to have its origin in necessity, is universal in its application."

⁴ *Eng.*: 1859, *Butler v. Mountgarret*, 6 H. L. C. 648; *Cm.*: 1848, *Doe v. Servos*, 5 U. C. Q. B. 284, 288; *U. S.*: 1897, *People v. Mayne*, 118 Cal. 516, 50 Pac. 654 (a family-Bible entry, made by the mother; excluded, the mother being alive and available); 1899, *James' Es-*

tate, 124 id. 653, 57 Pac. 579, 1008; 1817, *Chapman v. Chapman*, 2 Conn. 349; 1870, *Greentleaf v. R. Co.*, 30 Ia. 303; 1828, *Waldron v. Tuttle*, 4 N. H. 378; 1854, *Mooers v. Bunker*, 29 id. 432; 1854, *Emerson v. White*, ib. 491; 1829, *Leggett v. Boyd*, 3 Wend. 379; 1851, *Robinson v. Blakely*, 4 Rich. 538 (a father's entry in a family register, and a father's declarations, the father being still alive and in the jurisdiction, excluded); 1894, *Peterson v. Ankrom*, 25 W. Va. 56, 62.

⁵ 1897, *May v. Logie*, 27 Can. Sup. 443, 445 (statements of a father, living in England, excluded, since his deposition might have been obtained); 1884, *Ross v. Loomis*, 64 Ia. 432, 20 N. W. 749 (statements as to M.'s decease, by M.'s wife, living in another jurisdiction, excluded); 1859, *Campbell v. Wilson*, 23 Tex. 252, *semble* (absence from the jurisdiction sufficient); and the Codes quoted *ante*, § 1480.

books, all are admitted upon the principle that they 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."¹

1811, *Berkeley Peerage Case*, 4 Camp. 406, 409, 420; *Lawrence, J.*: "Where the declarator had no interest to serve, and there is no ground for supposing that his mind stood otherwise than even upon the subject, . . . we may reasonably suppose that he neither stops short nor goes beyond the limits of truth in his spontaneous declarations respecting his relations and the state of his family"; *Wood, B.*: "The admission of hearsay evidence of the declarations of deceased persons in matters of pedigree is an exception to the general law of evidence; and it has ever been received with a degree of jealousy, because the opposite party has had no opportunity of cross-examining the persons by whom the declarations are supposed to have been made. But declarations, to be receivable in evidence, . . . must have been the natural effusions of the mind of the party making them, and must have been made on an occasion when his mind stood in an even position, without any attempt to exceed or fall short of the truth"; *Eldon, L. C.*: "if the entry be the ordinary act of a man in the ordinary course of life, without interest or particular motive, this, as the spontaneous effusion of his own mind, may be looked at without suspicion and received without objection. Such is the contemporaneous entry in a family Bible, by a father, of the birth of a child."

1840, *Verplanck, Sen.*, in *People v. Fire Ins. Co.*, 23 Wend. 220: "In order to adhere as closely as possible to the policy of shutting out all vague, second-hand, and unauthenticated evidence, such exception is made in favor of proof of declarations and reputation [of family history] only where the persons whose opinion and declarations are relied upon, besides being those most likely to be well informed as to the facts, were also, so far as appears, free from all possible inducement to misrepresent the truth themselves or from any danger of being misled by others so interested. . . . It is then received . . . because ordinarily they could have no temptation to falsehood or misrepresentation on such a subject."

1849, *Pearson, J.*, in *Moffitt v. Witherspoon*, 10 Ired. 192: "[Pedigree] is a matter about which they [the members of a family] are presumed to be particularly interested to ascertain and declare the truth. Every one from a feeling of nature endeavors to know who his relations are and will seldom declare those to be his kinsmen who are not."

In applying this principle, what specific rules have been deduced?

§ 1483. **Declarations must have been made before Controversy.** First, declarations made during the course of a controversy are to be regarded as lacking in the guarantees of trustworthiness. In the traditional phrase, the declarations, to be receivable, must have been made *ante litem motam*:

1811, *Heath, J.*, in *Berkeley Peerage Case*, 4 Camp. 413: "When the contest has originated, people take part on one side or the other; their minds are in a ferment, and if they were disposed to speak the truth, facts are seen by them through a false medium. . . . It would hold out an invitation to fabricated testimony if declarations could be received in evidence which have been made when the contest was actually begun."

1831, *L. C. Brougham*, in *Monkton v. Attorney-General*, 2 Russ. & M. 160: "If there be *lis mota*, or anything which has precisely the same effect upon a person's mind with *litis contestatio*, that person's declaration ceases to be admissible in evidence. It is no longer what Lord Eldon calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances that what he says is said, not because it is true, not because he believes it, but because he feels it to be profitable or that it may hereafter become evidence for him or for those in whom he takes an interest after his death, it is excluded. . . . "The ques-

¹ Approved by Lord Cranworth in *Butler v. Mountgarret*, 6 H. L. C. 6' (1859).
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tion then always will be, . . . Was the evidence in the particular circumstances manufactured, or was it spontaneous and natural ? ”

On two occasions, judges have doubted the expediency of this limitation ;¹ but it is entirely an analogy to the limitations in other exceptions, and, so long as the Hearsay rule is enforced in its present form, this limitation has a legitimate place.²

Principle requires, however, that the dispute, if it is to exclude the statements, should have been more or less over the precise point to which the statements refer ; else no bias could be supposed to affect it. There is opportunity for much latitude in applying this limitation. Judges' opinions have differed ;³ but it should be a matter for the trial Court's discretion whether under the circumstances of each case bias can be supposed to have existed :

1810, *Verplanck, Sen.*, in *People v. Fire Ins. Co.*, 25 Wend. 215, 224 : “ the rule that actual litigation or litigious controversy without actual suit always vitiates the hearsay declaration of those in whose family it existed be narrowed down to controversies upon the very point afterwards sought to be ascertained, and strictly and legally involving it, the reason of the rule is lost sight of. The result would be to exclude such family traditions when the parties had an accurate knowledge of their legal rights or the legal grounds of their claim, whilst it would admit them in cases where the claim pursued with equal ardor and interest is erroneously understood by the parties themselves, and where, for that very reason, they and their friends are more disposed to see the whole question and its evidence through a false medium, and to suffer their wishes and feelings to disturb or discolor their recollections or relations of facts. The spirit and reason of the rule in my judgment, therefore, apply to every ancient controversy involving or affected by the question afterwards in litigation or supposed at the time to be involved in it or affected by it.”

On the other hand, it is not necessary that litigation should actually have begun at the time of the declaration. The element to be avoided is a bias in the mind of a declarant ; and this is sufficiently probable if a dispute or controversy is actually in progress, even though it may not have reached the stage of legal proceedings :

¹ 1811, *Graham, B.* in *Berkeley Peerage Case*, 4 Camp. 408 ; 1821, *Boudereau v. Montgomery*, 4 Wash. C. C. 190 (Washington, J., admitting depositions in a previous cause : “ It is not without great diffidence that I venture to dissent from the reasoning of the judges in the Berkeley Peerage Case. But it seems to be rather artificial than solid, when directed against the admissibility of the evidence ; although I acknowledge that the possibility of an undue bias having been produced by the existence of a controversy might with propriety be urged against the credit to be given to the evidence, where the proofs in the cause are contradictory and to be weighed. I am apprehensive that great mischief and injustice might be the consequence of excluding the only species of evidence which circumstances not within the control of the parties interested may have left to them, on the ground of a presumed bias created by an existing or even presumed controversy ”).

² Limitation recognized: *Eng.*: 1816, *Freeman v. Phillipps*, 4 M. & S. 397 ; 1881, *Dysart Peerage Case*, L. R. 2 App. Cas. 489, 503 ; *U. S.*: 1817, *Chapman v. Chapman*, 2 Conn. 349 ; 1859, *Collins v. Grantham*, 12 Ind. 444 ; 1881, *De Haven v. De Haven*, 77 Id. 238, 237 ; 1840, *People v. Fire Ins. Co.*, 25 Wend. 210 ; 1825, *Morgan v. Purnell*, 4 Hawks 97 ; 1900, *Nehring v. McMurrin*, 94 Tex. 45, 57 S. W. 943 ; 1839, *Stein v. Bowman*, 13 Pet. 209, 220.

³ The following cases apply the rule: 1816, *Freeman v. Phillipps*, 4 M. & S. 397 ; 1857, *Gee v. Ward*, 7 E. & B. 511 ; 1860, *Shedden v. Patrick*, 2 Sw. & Tr. 170, 188 (“ if a controversy exist, it must be on the very point in respect of which the declarations are sought to be used ” ; here there had been controversy about the legitimacy of children, but not about a cohabitation or a deathbed marriage, with which the admitted letter dealt) ; 1828, *Elliott v. Peirsol*, 1 Pet. 337.

1831, L. C. Brougham, in *Monkton v. Attorney-General*, 2 Russ. & M. 100: "Prove that . . . the person concocting or making the declaration took part in the controversy. Show me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall hold that it comes within the rule which rejects evidence fabricated for a purpose by a man who has an interest of his own to serve."

1830, Willen, J., in *Butler v. Mountgarret*, 6 H. L. C. 611: "The *lis* would surely have dated at least from the time when the parties had respectively assumed a hostile attitude. . . . A suit is not necessary to constitute *lis*."⁴

The fact that no controversy existed, being preliminary to the admission of the evidence, must be shown by the party offering it.⁵ But, as this is in effect proving a negative, slight evidence should suffice.

§ 1484. **No Interest or Motive to Deceive.** The existence of a controversy is only one circumstance (though the most common one) likely to produce a bias fatal to the trustworthiness of the declaration. Judicial opinion seems to hold, and properly, that other considerations may under certain circumstances operate to exclude the declarations. In general, they would be excluded where there is any specific and adequate reason to suppose the existence of a motive inconsistent with a fair degree of sincerity. In Lord Eldon's words, they must appear to be the natural effusions of a party standing in an even position:

1801, Channell, B., in *Plant v. Taylor*, 7 H. & N. 237: "Perhaps the learned judge was right in rejecting the evidence on the ground that any declaration made by Thomas Taylor, the father, . . . would be a declaration by a person whose mind could not be free from bias. It was manifestly in many ways directly for his interest to make a declaration tending to disavow his first marriage, or having a tendency to show that it was an illegal marriage and consequently did not invalidate the second. No case has been cited in which the declaration of a deceased person obviously for his interest has been received."¹

⁴ Compare the opinions of the other law lords, and the opinion of Greene, B., in the same case below, in 6 Ir. C. L. 94.

It was once said by Baron Alderson (1834, *Walker v. Beauchamp*, 6 C. & P. 561) that it was sufficient if at the time of the declaration the state of facts existed (for example, the birth of a child) as to which the controversy afterwards arose. This, however, obviously cannot be sound; for it is to the controversy, and to nothing else, that the bias is to be attributed. Mr. Baron Alderson's opinion has been more than once repudiated, and has apparently never been confirmed: 1843, *Reilly v. Fitzgerald*, 6 Ir. Eq. 344 (Sugden, L. C.: "The point of inquiry respecting the admissibility of such evidence is, not the existence of a state of facts out of which a claim has arisen, but the existence of a controversy or dispute respecting that claim"; here the question depended on whether a child was born alive or not, but no one supposed till several years afterwards that anything depended on the child's birth). *Accord*: 1856, *Pigot, C. B.*, in *Butler v. Mountgarret*, 6 Ir. C. L. 107; 1836, *Shadwell, V. C.*, in *Staney v. Wade*, 7 Sim. 615; 1860, *Shedden v. Patrick*, 2 Sw. & Tr. 170, 187.

⁵ 1825, *Morgan v. Purnell*, 4 Hawks 97;

1890, *Hodges v. Hodges*, 106 N. C. 374, 11 S. E. 364.

It has been held that the existence of a controversy between certain members of the family is sufficient to condemn declarations by a member who was himself ignorant of the controversy and therefore quite unbiassed: 1811, *Berkeley Peerage Case*, 4 Camp. 417 (Mansfield, C. J.): "I have now only to notice the observation that to exclude declarations you must show that the *lis mota* was known to the person who made them. There is no such rule. . . . If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted and great confusion would be produced". But this is against the reason of the rule, and cannot be supported: 1860, *Shedden v. Patrick*, 2 Sw. & Tr. 170, 187 (Crosswell, J.: "We must judge of the feelings of the party from what he knew at the time").

¹ *Accord*: 1828, *Doe v. Randal*, 2 Moo. & Rob. 25; 1831, *Monkton v. Attorney-General*, 2 Russ. & M. 147; 1843, *Reilly v. Fitzgerald*, 6 Ir. Eq. 345; 1817, *Chapman v. Chapman*, 2 Conn. 349; 1823, *Waldron v. Tuttle*, 4 N. H. 378; 1895, *Byers v. Wallace*, 87 Tex. 503, 29 S. W. 760 (excluding the statements of

But this principle must not be pushed too far. Cautions have more than once been given to avoid excluding evidence merely because there *might* have been a bias:

1847, *L. C. J. Danman*, in *Doe v. Davies*, 10 Q. B. 325: "[A declaration in a deed] was objected to on account of the interest they had in making out things to be as there represented, and at least this intention of disposing of property was said to be equivalent to a *lis mota*. But we think this objection also fails. . . . The parties did what they had a right to do if members of the family. Almost every declaration of relationship is accompanied with some feeling of interest, which will often cast suspicion on the declarations, but has never been held to render them inadmissible."

1840, *Walworth, C.*, in *People v. Fire Ins. Co.*, 25 Wend. 215: "The declarations of deceased relatives are not to be absolutely rejected because there is room for a suspicion that they may have been made for a sinister purpose, if the party making them has no interest in their truth."*

In particular, as to the entry of a birth declared to be legitimate, the mere circumstance that the entry was made *with a view to perpetuating evidence* of legitimacy or of the date of birth should not exclude the entry; otherwise very few such entries would be receivable, and the chief and honorable purpose of making them would be defeated:

1801, *Mansfield, C. J.*, in *Berkeley Peerage Case*, 4 Camp. 418 (for all the Judges, respecting an entry in a family Bible): "The father is proved to have declared that he made such entry for the express purpose of establishing the legitimacy of his son and the time of birth, in case the same should be called in question after the father's death. The opinion of the Judges is that the entry would be receivable in evidence, notwithstanding the professed view with which it was made. Its particularity would be a strong circumstance of suspicion; but still it would be receivable, whatever the credit might be to which it would be entitled."†

Finally, the offeror of the evidence must perhaps show the absence of motive to deceive;‡ but slight evidence should suffice.

3. Testimonial Qualifications, and Other Independent Rules of Evidence.

§ 1485. (1) **Testimonial Qualifications.** As in the other exceptions to the Hearsay rule (*ante*, § 1424), there are here found certain requirements resting upon the general principles of Testimonial Qualifications which are applicable to all testimonial statements and have been already examined for testimony in general. Chiefly there arise here questions as to the means of

one asserting the death of a nephew whose sole heir he was; superseding *Fowler v. Simpson*, 79 Id. 611, 614, 15 S. W. 682; 1899, *Turner v. Sealock*, 21 Tex. Civ. App. 594, 54 S. W. 358 (same; sister's declarations as to brother's death, excluded); 1899, *Lewis v. Bergess*, 22 Id. 262, 54 S. W. 609 (same; mother's declarations excluded).

Compare the cases cited *post*, §§ 1492, 1493, which are sometimes wrongly placed on this principle.

* *Accord*: 1831, *Shields v. Boucher*, 2 Russ. & M. 147, per *Broughem, L. C.*

† *Accord*: 1777, *Goodright v. Moss*, 2 Cowp.

594, *semble*, *Lord Mansfield, C. J.*; 1857, *Gee v. Ward*, 7 E. & B. 511; 1840, *People v. Fire Ins. Co.*, 20 Wend. 211, *Cowen, J. Contra*: 1817, *Chapman v. Chapman*, 2 Conn. 349 (*Swift, C. J.*: "When they are made for the express purpose of being given in evidence on a question of pedigree, they will not be received. If a person were to take up a Bible, and, having the idea that it was afterwards to be produced in evidence, were to write down at once the births and deaths of his children, such an entry would not be admissible").

‡ 1854, *Emerson v. White*, 29 N. H. 491; and cases *supra, semble*, §§ 1482, 1483.

Knowledge (*ante*, § 656) of the declarant, and the form of Communication (*ante*, § 766) of his knowledge.

§ 1486. (a) **Sufficiency of the Declarant's Means of Knowledge; General Principle.** The ordinary principle applicable to the situation would be (*ante*, §§ 654, 656) that the declarant must appear to have had fair knowledge, or fair opportunities for acquiring knowledge, on the subject alluded to. This principle, as applied to the facts of family history, indicates that the qualified persons will be found chiefly, if not exclusively, within the family circle; for they alone may be expected to have fairly accurate information. It is of course not to be expected that *personal observation* shall be demanded, *i. e.* that only from those who were present at the birth, wedding, or death, shall hearsay statements be received; this would be to misconceive the theory of the exception. That theory is that the constant (though casual) mention and discussion of important family affairs, whether of the present or of past generations, puts it in the power of members of the family circle to be fully acquainted with the original personal knowledge and the consequent tradition on the subject, and that those members will therefore know, as well as any one can be expected to know, the facts of the matter. It is not that they have, each and all, a knowledge by personal observation, but that they at least know the fact as accepted by family understanding and tradition, and that this understanding, based as it was originally on observation, is *prima facie* trustworthy. This has always been accepted as the sufficient reason for predicating sufficient testimonial qualification:

1807, L. C. *Eldon*, in *Whitelocke v. Baker*, 13 Ves. 514: "It was not the opinion of Lord Mansfield, or of any judge, that tradition, generally, is evidence even of pedigree; 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."

1811, *Mansfield, C. J.*, in *Berkeley Peerage Case*, 4 Camp. 416: "General rights are naturally talked of in the neighborhood, and family transactions among the relations of the parties. Therefore, what is thus dropped in conversation upon such subjects may be presumed to be true."¹

¹ *Personal knowledge* of the facts is therefore not requisite: 1831, *Monkton v. Attorney-General*, 2 Russ. & M. 165 (*Brougham, L. C.*: "The declarations tendered in evidence may either refer to what the party knew of his own personal knowledge, or, as is much more frequently the case, to what he had heard from others to whom he gave credit"). *Accord*: 1879, *Van Sickle v. Gibson*, 40 Mich. 173; 1843, *Jewell's Lessee v. Jewell*, 1 How. 231. Nor need the knowledge, such as it is, be exact in its details; for example, the declaration, in affirming relationship, need not particularize as to the degree, where that is not material in the case: 1806, *Vowles v. Young*, 13 Ves. 147, L. C. *Erskine*; 1823, *Doe v. Randall*, 2 Moo. & R. 25, *Burrough, J.*

The following rulings therefore seem sound: 1899, *Rothwell v. Jamison*, 147 Mo. 601, 49 S. W. 503 (a person testifying on the stand to family history must have personal knowledge,

unless he professes merely to give family repute upon the subject); 1903, *Grand Lodge v. Barter*, — Nebr. —, 96 N. W. 186 (wife's statement of her deceased husband's age, based solely on the statement of the priest at the time of marriage, excluded). The following ruling seems unavailing: 1873, *Deedes v. Giles*, 17 Sol. J. 420, 7 Alb. L. J. 269 (statements by a deceased grandfather about his own grandfather, who died before his birth, excluded, because it did not appear that the former's information was obtained from members of the family). The following case is hardly a ruling of exclusion: 1841, *R. v. Lydeard, St. Lawrence*, 11 A. & E. 616 (pauper settlement; a witness' statement, "I was born in the parish of L. St. L., as I have heard and believe," held not to be of itself sufficient to prove the place of his birth; *Patterson, J.*: "It does not appear when or where the son was born, except by his own evidence; he could not know these facts; and they do not

The difficulties, then, that arise are concerned with drawing the line between declarants that may fairly be supposed to be thus qualified and those that may not. The questions here are of two general sorts: *First*, Shall a line be drawn between those who are relatives, *i. e.* strictly members of the family circle, and those who are not, *i. e.* servants, friends, neighbors, and the like? *Secondly*, Shall any line be drawn between different kinds of relatives, for example, according as they are near or distant, or as they are related by consanguinity or by affinity?

Before considering these two great classes of questions, it is desirable to examine the language of the Courts and observe what general notions, if any, are expressed, as to the scope of this knowledge-qualification:

1790, L. C. J. *Kenyon*, in *R. v. Eriswell*, 3 T. R. 707: "I admit, declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence as to pedigrees; but evidence of what a mere stranger has said has ever been rejected in those cases."

1806, L. C. *Erskine*, in *Vowles v. Young*, 13 Ves. 140: "[A pedigree declaration] is evidence from the interest of that person in knowing the connections of the family. Therefore the opinion of the neighborhood or what passed among acquaintance will not do."

1817, *Swift*, C. J., in *Chapman v. Chapman*, 2 Conn. 349: "The declaration 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 connexions, they are speaking the truth and cannot be mistaken. . . . The opinion of deceased neighbors or acquaintances of the family are not evidence in a question of pedigree; for they cannot be supposed to have that certain knowledge which can be relied on. . . . From this it appears that the deceased relative whose declarations are given in evidence is to be considered as standing on the foot of a witness, and the hearsay declarations admitted in lieu of his testimony. It is therefore essential that the relative whose declarations are given in evidence should be named, so that the Court may be enabled to know whether his relationship or connexion with the family whose pedigree is in question was such that he may be supposed to know the truth of the declarations."

1883, *Dickey*, J., in *Harland v. Eastman*, 107 Ill. 538: "What has been said by deceased members of the family is admissible upon the presumption that they knew from the general repute in the family the facts of which they speak."

§ 1487. **Same: Declarations of Non-Relatives.** The required qualification, then, in general may be supposed to be present whenever (following the judicial phrases) there are found persons "likely to know the facts," "having an opportunity to know the facts," or "holding a relation rendering it very probable that he would learn them truly." If this is so, the line need not be drawn strictly at relatives. But the language of Lord Erskine (quoted above), "the interest of the person in knowing the connections of the family" does require the line to be drawn there.¹

ask his father, who probably knew and was examined"; that the testimony was regarded as absolutely inadmissible does not clearly appear).

¹ Accordingly, this uncertainty of phrasing has led to conflicting rulings; note, however, that several of the rulings excluding the statements of non-relatives do so on the ground that

the declarant was not shown deceased (*ante*, § 1481) or that the particular declarant was not qualified on the facts of the case: *England*: 1743, *Craig* dem. *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1160 (the godmother of an alleged child, intimate friend of the mother; her hearsay to the child's existence and legiti-

Yet, after all, such a narrow test seems too narrow, at least for this country. Even in England, where so much of personal advancement and material prosperity for the individual depends upon his family rank and his rights of inheritance, it seems too much to say that only those who have this immediate property-interest in learning the family history can possibly have adequate information; for family physicians and chaplains, old servants, and intimate friends may, in cases, be equally and sufficiently informed. In this country at least, the conditions are such, for the mass of the population, that the

mncy, not allowed); 1754, *Robins v. Wolseley*, 2 Lee Eccl. 135, 421, 442 (deceased vicar's affidavit of the time of a marriage by him, admitted; whether by common law or canon law does not appear; compare § 1476, *ante*); 1776, *Duchess of Kingston's Trial*, 20 How. St. Tr. 355, 592 (bigamy; the widow of parson testified to knowing the defendant; Q. "you pry to her marriage in your husband's lifetime?") A. "I was not at the wedding; but I have heard my husband say he married them"; a Lord: "That is not evidence"; no ruling was made or asked for); 1811, *Berkeley Peerage Case*, Min. Ev. 655, quoted in *Hubback, Succession*, 246 (declaration of a deceased clergyman, chaplain to the Earl, that the Earl and Countess were married by him, and that a certain person was their legitimate son, excluded, by all the judges); 1812, *Walker v. Wingfield*, 18 Ves. 443, 446 (Eldon, L. C.: "The question whether a physician or a servant who has attended the family can be admitted as one of the family has not, I conceive, been decided"); 1824, *Johnson v. Lawson*, 2 Bing. 86 (quoted *post*); 1843, *Casey v. O'Shaughnessy*, 7 Jur. 1140 (Roman Catholic priest, excluded); 1879, *Polini v. Gray*, L. R. 12 Ch. D. 426, per James, L. J. (intimate friends, excluded); *Canada*: 1818, *Doe v. Auldjo*, 5 U. C. Q. B. 175 (declarations of an old body-servant, excluded, by two judges to one). In the British Indian Code, drawn by Sir James Stephen, declarations by persons having "special means of knowledge" are made admissible: *Whitley-Stokes' ed.* II, 875, § 32. *United States*: 1867, *Wilson v. Brownlee*, 24 Ark. 589 (it was conceded that declarations by others than members of the family were admissible; but declarations by persons as to whose knowledge nothing whatever was shown were rejected); 1817, *Chapman v. Chapman*, 2 Conn. 347 ("declarations of the deceased members of a family, or those who have lived in the family and may from their connexion with it be supposed to know the state of it," are admissible; but not "of deceased neighbours or acquaintances of the family," "for they cannot be supposed to have that certain knowledge which can be relied on"); 1901, *Alston v. Alston*, 114 Ia. 29, 86 N. W. 55 (declarations of F. and his wife, friends in whose family the plaintiff, the illegitimate child of a mother D., was brought up from a time shortly after his birth, were admitted to show plaintiff's paternity); 1811, *Jackson v. Cooley*, 8 John. 130 (Thompson, J.: the declarations of

"persons who from their situation were likely to know are competent evidence"; and a reputation among acquaintances of the family was admitted; *Spencer, J.*, dissented, but apparently on the chief ground that the acquaintances were not shown to be deceased); 1820, *Jackson v. Browner*, 18 id. 39 (*Spencer, C. J.*, rejected declarations from acquaintances of a particular ancestor in Ireland, because the witnesses "have not derived their information from such persons as had any connection or particular acquaintance with the family from which John M'Neil sprang"); 1902, *Dinan v. Supreme Council*, 201 Pa. 363, 50 Atl. 999 (health board's certificate, undertaker's coffin-plate, and newspaper obituary notice, stating the deceased's age, and founded on conflicting statements of various members of the family, excluded); 1889, *Howard v. Russell*, 75 Tex. 171, 176, 12 S. W. 525 (recitals in an ancient masonic lodge-record, as to the domicile of a visitor, received, as involving a question of pedigree); 1899, *Turner v. Sealock*, 21 Tex. Civ. App. 594, 54 S. W. 358 (declarations as to H.'s death, by persons who were with him, admitted); 1899, *Lewis v. Bergess*, 22 id. 252, 54 S. W. 609 (declarations of a friend who went with H. to the Mexican war, that he served in the army and died there unmarried, admitted); 1839, *Stein v. Bowman*, 13 Pet. 209, 220 (statements of "many old persons" in Germany, as to the plaintiff being brother to G. S., deceased, excluded, partly because the declarants were living, partly because the statements "do not appear to have been made by members of the family or by persons who had such connexions with the deceased as to have a personal knowledge of the facts stated"); 1876, *Connecticut Mut. Life Ins. Co. v. Schenck*, 94 U. S. 93 (an entry of age in the minute-book of a lodge of Old Fellows, of which the deceased was a member, was rejected, as being the statement of a "stranger"); 1896, *Flora v. Anderson*, 75 Fed. 217, 222 (declaration of one who was a servant in the household for an unspecified time, as to the birth of an illegitimate child to a daughter in the house; *semble*, excluded); 1884, *Peterson v. Ankrom*, 25 W. Va. 56, 61, 63 (affidavit of an intimate friend; undecided).

Distinguish the following, which seems to involve the principle of § 1788, *post*: 1897, *Posey v. Hanson*, 10 D. C. App. 497, 507 (in rebutting the presumption of death, the fact of the person being "heard from" may include the hearsay of persons not members of the family).

interest in family rank and inheritance cannot require such a narrowing of the test.

It is not necessary to maintain that the statements of any friend are always admissible; but it is desirable to disavow any limitation which would exclude the statements of one whose intimacy with the family could leave no doubt as to his sufficient acquaintance, equally with the family members, of the facts of the family history:

1848, *Robinson, C. J.*, in *Doe v. Auldjo*, 5 U. C. Q. B. 175 (holding admissible testimony from a member of the family that an old body-servant, now deceased, had returned from Africa and told them of the death there of his master, an explorer, the ancestor in question): "There is therefore no improbability in the servant's relation, which seems to have been credited at the time and ever since . . . and after fifty years parties are relieved from the necessity of attempting to account for him. . . . No better evidence would be required than the account brought back by his faithful servant to his family, and accredited by them and by the government which employed him."

The only reasoned defence of the narrower rule is found in the following opinion:

1824, *Johnson v. Lawson*, 2 Bing. 86; declarations of one who had been a housekeeper in the family for 24 years were rejected; *Best, C. J.*: "Evidence of that kind must be subject to limitation, otherwise it would be a source of great uncertainty; and the limitation hitherto pursued, namely, the confining such evidence to the declarations of relations of the family, affords a rule at once certain and intelligible. If the admissibility of such evidence were not so restrained, we should on every occasion, before the testimony could be admitted, have to enter upon a long inquiry as to the degree of intimacy or confidence that subsisted between the party and the deceased declarant."

It may be noted, as to this reasoning, first, that its result is inconsistent with the general language used in earlier judicial opinions (*ante*, § 1486), and is supportable only on the narrow test of Lord Erskine before mentioned; secondly, that the special reason given, namely, the inconvenience of an investigation into sources of knowledge, is anomalous in the law of evidence; for no Court is allowed to decline to investigate the sources of a witness' qualifications so far as may be necessary, while in each case the investigation need be no more tedious than the judge's discretion permits; and, finally, that the proof of intimacy in the household would surely be no more tedious than proof of family membership is often found to be.

§ 1488. **Same: Reputation in the Neighborhood or Community.** The use of declarations of individual friends and intimates is to be distinguished from the use of reputation in the neighborhood or community. The elements of trustworthiness that are found in a community-reputation, and are recognized as sufficient to render it evidential in certain classes of cases are examined under the Reputation-Exception to the Hearsay rule, and the application of that principle to facts of family history (such as race-ancestry, marriage, birth, and death), can there best be dealt with (*post*, § 1605). In the Courts recognizing the use of neighborhood-reputation for the present class of facts, the recognition has historically been reached often as a direct extension of the principle of family-reputation.

§ 1489. **Same: Declarations of Relatives; Distinctions between Different Kinds of Relatives.** Is there any reason for excluding any class of relatives as not having probable adequate information?

1. First, there has been no attempt to rule out specific consanguines because of the *remoteness of relationship*. This might, perhaps, well be done in a given case; but the rule has apparently crystallized with this arbitrary limit.

2. Next, should any distinction be made between a *relation by blood* and a *relation by marriage*, to the disadvantage of the latter? All that can be said for such a distinction is that relations by marriage are likely to be less intimate in the family circle and to have little or no interest depending upon a chance of inheritance. But the general likelihood of their being correctly informed is perhaps quite as great as for distant consanguineous relations, and is sufficient in the ordinary instances. As a matter of precedent, the statements of one who is a *party to a marriage* are regarded as acceptable (*i. e.* statements regarding the other marital party's family history). Historically, this was first settled for the case of a declarant *husband*:

1806, L. C. *Erskine*, in *Vowles v. Young*, 13 Ves. 140: "The law resorts to hearsay of relations upon the principle of interest in the person from whom the descent is to be made out. . . . As far as hearsay is evidence of anything within the knowledge of a man, no man can be supposed ignorant of the reputation of the descent of his wife. . . . But it must be considered whether that can extend to mere collateral declarations of this kind [a wife's illegitimacy], where there is no interest in the husband. . . . Consider, then, whether the knowledge of the husband as to the legitimacy of his wife is not likely to be more intimate, and his interest stronger, than that of any relation however near in blood. First, if she has an estate tail, he is tenant by the curtesy. Has he not an interest in knowing her legitimacy, his expectation depending upon it? So as to her personal estate, he is entitled to all that comes to her. Is not that a strong interest?"¹

Then, tardily, it was settled for the case of a declarant *wife*.² Furthermore, in general, the declaration of any person connected on one side of a marriage concerning relationship in the family on the other side would probably be received, unless the probable absence of adequate information should be made to appear in a given instance:

1828, *Best*, C. J., in *Doe v. Randall*, 2 Moo. & P. 25: "Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that a party by marriage is more likely to be informed of the state of the family of which he is become a member than a relation who is only distantly connected by blood, as by frequent conversation the former may hear the particulars and characters of branches of the family long since dead."³

¹ *Accord*: 1825, *Doe v. Harvey*, 1 Ry. & Moo. 297; 1843, *Jewell's Lessee v. Jewell*, 1 How. 231.

² 1857, *Shrewsbury Peerage Case*, 7 H. L. C. 22, 26; presumably superseding *Davies v. Lowndes*, 1843, 7 Scott N. R. 183, and confirming *Doe v. Randall*, 1828, 2 Moo. & P. 25.

³ *Accord*: Codes cited *ante*, § 1480; 1840, *People v. Fire Ins. Co.*, 25 Wend. 209 (admitting declarations by deceased members of the

family of a grandson of a maternal uncle of W., the propositus, as to the non-existence of collateral relatives of W. on the paternal side); 1894, *Pickens' Estate*, 163 Pa. 14, 28 Atl. 875. *Contra*: 1895, *Turner v. King*, 98 Ky. 253, 32 S. W. 941 (a family Bible of the testator's mother's father, to show the testator's age, excluded as not being the reputation of the testator's family; this is unsound; is not a grandchild a member of the grandfather's blood-family?).

§ 1490. **Same: Declarant's Qualifications must be shown.** Upon the general principle for testimonial knowledge (*ante*, § 654), the qualifications of the deceased declarant — his relationship, or whatever is relied upon as equipping him with information — must be shown in advance.¹ In other words, the relationship of the declarant to the family whose history he refers to must be shown by evidence independent of his mere declaration; otherwise, there would be a begging of the question. The only apparent exception is found in the case of a declarant speaking of his own personal history, — for example, of his marriage.² But obviously a person is qualified to speak of himself; it is only where a relationship with others is involved that the fact must be made to appear independently.

§ 1491. **Same: Relationship always Mutual; Connecting the Declarant with Both Families.** It follows, in applying the foregoing principle, that where an alleged relationship between Doe and Roe is to be testified to, a relation of Doe may speak to it, because it concerns the relationships of Doe's family, while a relation of Roe may equally speak to it, because it concerns the relationships of Roe's family; hence, all that is required of the declarant is a *connection with either one or the other*, but *not with both*.

This truth, however, has been obscured by what must be regarded as erroneous rulings. The question being whether Doe is related to Roe (for example, so as to share in Roe's inheritance), the argument has been that it would be idle to require merely that the declarant should be shown to be related to Doe alone, because then any family could connect itself with any other by its members' mere assertion of the relationship. But the proper way to approach the question seems to be a different one, and is as follows: Any member of Doe's line may declare as to the relationships (*i. e.* memberships) of that family, and any member of Roe's line may declare as to the relationships (*i. e.* memberships) of that family; and the qualifications of the declarant, as such member, must of course be shown beforehand, like the qualifications of any witness (*ante*, § 1486). Thus, before declarations of a supposed member of Doe's family can be admitted, the declarant's membership in Doe's family — for example, that he is Doe's son — must be shown. But that is the whole effect of this requirement. The further question, if any, is, whether a declaration of Doe's son that Doe is related to Roe

¹ 1810, Banbury Peerage Case, 2 Selw. N. P. 764, and in App. to LeMarchant's Gardner Peerage Case, 110. 412; 1848, Doe v. Servos, 5 U. C. Q. B. 224, 239; 1882, Wise v. Wynn, 69 Miss. 592; 1901, Young v. Shulenberg, 165 N. Y. 385, 58 N. E. 135; 1880, Thompson v. Woolf, 8 Or. 463; 1884, Sittler v. Gehr, 105 Pa. 592; 1886, Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. 780. Of course, also, it must be shown that the *witness on the stand*, reporting the family reputation, has sufficient acquaintance with the family to know what that reputation is; this, again, is an ordinary question of the testimonial qualifications, *i. e.* of the witness on the stand, and is not peculiar to the Hearsay exception: 1833, Harland v. Eastman, 107 Ill. 539; 1854,

Emerson v. White, 29 N. H. 491; 1820, Jackson v. Browner, 18 John. 29; 1814, Barnet's Lessee v. Day, 3 Wash. C. C. 243; 1869, Eaton v. Tallmadge, 24 Wis. 222. But the witness on the stand need not be related to the family of the declarant: 1900, Elder v. State, 124 Ala. 69, 27 So. 305.

² 1819, Allen v. Hall, 2 Nott & McC. 114 (partition; defendant claiming against a grantee from their ancestor's alleged wife were allowed to show their ancestor's declarations that he was not married). Compare § 268, *ante* (conduct as evidence of marriage), and § 2063, *post* (testimony to illegitimacy of offspring during marriage).

(for example, is Roe's cousin) is a declaration as to Doe's family at all, — *i. e.* whether it is not, for the case in hand, solely a declaration about Roe's family-relationships, as to which Doe's son is by hypothesis not yet shown to be a qualified declarant. Now the state or condition of relationship must always in effect, though not in form, be double or mutual;¹ *i. e.* the fact that Doe is cousin to Roe is also the fact that Roe is related as cousin to Doe. Hence, a statement of Doe's son that Doe is cousin to Roe, though in one form an assertion of Roe's relationships, is also and equally a declaration that one of the relations of Doe (*i. e.* one of the members of Doe's family) is Roe, — for example, that one of the grandsons of Doe's grandfather is Roe. It is therefore a declaration upon which Doe's son is qualified to speak. The doubt, then, can only be as to whether it should make any difference that in the case in hand it is Roe's descendants who are seeking Doe's estate or Doe's who are seeking Roe's estate. This surely cannot affect the evidential value of the declarations; for that must depend on the circumstances at the time of making, and no one has ever contended that, apart from the *lis mota* and kindred limitations (*ante*, §§ 1483, 1484), it makes any difference whether the declarant belongs to a poor or obscure branch of the family or to a rich and notorious one. Moreover, it is usually at a later date only that it has become apparent which branch would have a pecuniary interest in connecting itself with the other. The difference, then, is a matter of the form of statement only, and such assertions as the above must be treated as in substance declarations as to Doe's family-relationships; whether it is Doe's or Roe's family that now happens to be seeking the inheritance is immaterial.² Any other rule would produce this singular inconsistency, that if in 1863,

¹ L. C. Brougham, in *Monkton v. Attorney-General*, cited *infra*: "It is not more true that things which are equal to the same thing are equal to one another than that persons related by blood to the same individual are more or less related to each other."

² *Accord*: 1831, *Monkton v. Attorney-General*, 2 Russ. & M. 147 (declarations of J. T. as to the relationship of S. T. and G. T. were admitted, J. T.'s kinship with G. T., but not with S. T., being first shown; Lord Brougham, L. C.: "I cannot go to the length of holding that you must prove him to be connected with both the branches of the family touching which his declaration is rendered"); 1901, *Mann v. Cavansugh*, 110 Ky. 776, 62 S. W. 854 (recitals of grantors' heirship of J. C. in an ancient deed by J. J. C. and others, held sufficient to prove J. C. the ancestor of J. J. C.); 1884, *Sitler v. Gehr*, 105 Pa. 577, 592 ("The declarants were A. M. G. and John G.; the plaintiff's ancestor was Joseph G.; the deceased ancestor was Balsler G., of Berks County. It was not denied that the declarants were of the family of Joseph G., and it was attempted to show by their declarations that the above-named Joseph G. and Balsler G. were related to each [other]. . . . The plaintiffs in error contend, not only that the declarants must be shown by evidence *aliunde*

to be related to the family as to which declarations were made, but also that they must be thus shown to be related to the person who died seised. . . . Although there is some conflict in the cases, the weight of authority seems to be that while a declarant must be shown by evidence *aliunde* to belong to the family, it does not appear to be necessary to show that he belongs to the same branch of it"; *Monkton v. Attorney-General* followed); 1891, *Robb's Estate*, 37 S. C. 19, 22, 33, 36, 16 S. E. 241 (declarations of G., son of M. M., whose sister was J. M., that R. was the son of R. and J. M., admitted; the family to which it was necessary to connect the declarant being that of M., not R.) Compare the cases cited *post*, § 1573 (recitals of heirship in *ancient deeds*), which often give the same result.

Where the declarant is the *intestate himself*, his declarations may be received as admissions of a predecessor in title (*ante*, § 1082), and the present question need not arise; *e. g.*: 1901, *Malone v. Adams*, 115 Ga. 791, 39 S. E. 507 (one claiming as niece and heir, allowed to prove her relationship to the decedent by the decedent's declarations; distinguishing *Greene v. Almand*, 111 id. 735, 36 S. E. 957, which, however, seems *contra*).

Doe and Roe being both poor, Doe's son James mentions Roe in a letter as his father's cousin, and then dies in 1864, and if in 1884 litigation arises and James is proved to be the son of Doe, his letter would be received if Doe had become the wealthy one and Roe's relatives were claiming a share, but would be rejected (without other proof) if Roe had happened in the meantime to become the wealthy one and Doe's relatives were seeking a share. Yet this seems to be the logical consequence of the doctrine laid down by the Federal Supreme Court.²

§ 1492. **Same: Relationship of Illegitimate Child.** It has been ruled in England that where the relationship claimed and to be testified to is that of an *illegitimate* child, the father's relations are not qualified declarants, because (apparently) the claimant is legally not of the declarant's family.¹ But this seems a mere juggling with legal rules. The question is, Was the declarant in such a position as to be likely to know something of this alleged fact of family history? Whether the illegitimate child is or is not a lawful heir according to the rules of the substantive law about succession, is quite beside the point in determining the evidential question of the declarant's probable information. The principle of the ruling has been disapproved in England,² and ought not to be followed in this country.³ It seems never to have been doubted that the declarations of the *parents themselves*, or the repute in the household where the child lived, as to a child's legitimacy or illegitimacy, are receivable;⁴ although it is obvious that upon the false theory of Crispin

¹ The following cases take the stricter view: 1849, *Dunlop v. Servos*, 5 U. C. Q. B. 288 (here the plaintiff claimed as heir of J. D., and declaration of A. D., the plaintiff's father, that the plaintiff was the heir, were offered; it was held that A. D.'s relationship to J. D. must first be shown); 1896, *Jennings v. Webb*, 8 D. C. App. 43, 56 (*Blackburn v. Crawfords*, U. S., followed); 1882, *Wise v. Wynn*, 59 Miss. 588, 592 (C. W.'s estate being claimed by children of an alleged brother T. W., C. W.'s declarations that he had a brother T. W., admitted; but they would have been excluded if the claim here had been by C. W.'s children to T. W.'s estate); 1865, *Blackburn v. Crawfords*, 3 Wall. 187 (declarations by A., sister of B., that B. was married to X., the brother of Y., whose property-succession was in issue, were rejected, because the declarant did not belong to the family whose pedigree was in issue). In *Plant v. Taylor*, 1861, 7 H. & N. 226, 237, the reasoning is hopelessly confused.

² 1863, *Crispin v. Dogliani*, 3 Sw. & Tr. 44 (declarations of J. as to the relationship of illegitimate son which the plaintiff claimed with J.'s brother were excluded, by Sir C. Cresswell, because "the plaintiff according to his own account is *filius nullius* by our law"). *Accord*: 1837, *Doe v. Barton*, 2 Moo. & Rob. 28 (declarations of B., an illegitimate son, as to the death of an illegitimate brother, excluded).

³ 1878, *Murray v. Milner*, L. R. 12 Ch. D. 849 (admitting declarations in a will as to the naturalness of a child, *semble*). The following ruling seems to require too much: 1871, *Hitchine*

v. Eardley, L. R. 2 P. & D. 248 (whether M. was the legitimate child of J. and L.; M.'s declarations admitted, after a *prima facie* case of legitimacy was otherwise made out).

⁴ It has however been at least twice approved: 1844, *Northrop v. Hale*, 76 Me. 312 (approving *Crispin v. Dogliani*; but here admitting declarations of the mother's sister, because a bastard is legally of his mother's family); 1896, *Flora v. Anderson*, 75 Fed. 217, 234 (following *Crispin v. Dogliani*). Compare *Barnum v. Barnum*, in the next note.

⁵ 1777, *Goodright v. Moss*, Cowp. 594 (quoted *post*, § 1497); 1791, *Goodright v. Saul*, 4 T. R. 356 ("the reputation in the family of the son's being a bastard," received without question); 1901, *Heaton's Estate*, 135 Cal. 385, 67 Pac. 321 (claim of inheritance as illegitimate child of H.; declarations of H., in whose family the claimant lived, held admissible); 1903, *Heaton's Estate*, 139 id. 237, 73 Pac. 186 (preceding ruling affirmed); 1874, *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 453, 460; 1862, *Niles v. Sprague*, 13 Ia. 198, 207; 1899, *Watson v. Richardson*, 110 Id. 673, 80 N. W. 407; 1901, *Alaton v. Alston*, 114 id. 29, 86 N. W. 55 (declarations as to paternity of a conceded illegitimate child, admitted); 1848, *Copes v. Pearce*, 7 Gill 247, 264; 1875, *Barnum v. Barnum*, 42 Md. 251, 304 (declarations of the mother of R. as to the non-marriage of R. and C., and the illegitimacy of their child J., admitted); 1894, *Jackson v. Jackson*, 80 id. 176, 30 Atl. 752 ("declarations of deceased parents are

v. Doglioni, the father's declarations of illegitimacy would be inadmissible. There is a danger of being too nice in the logical application of the substantive law of relationship to the present testimonial rule, which rests rather upon the moral probabilities of trustworthiness in the declarant.

§ 1493. **Same: Testimony to one's Own Age.** Testimony to one's own age may be treated in one of two ways. (1) The objection may be made that the statement on the stand (for example, "I am twenty years of age," or, "I was born January 1, 1860") is not founded on adequate knowledge. Whether it is so, although not based on personal observation and direct memory, but on hearsay sources, is a question of Testimonial Qualifications. From this point of view, it should nevertheless be regarded as admissible; and is therefore accepted by most Courts (*ante*, § 667). (2) But if it is not, it may still be admissible, under the present Exception, as in effect an assertion of the family reputation. Some Courts so treat it, and therefore admit it.¹ The only question can then be whether it is necessary to show that all the members of the family are unavailable (*ante*, § 1481).

§ 1494. **Same: Statements of Family History to Identify a Person.** Where a mere question of identity of person is involved, *i. e.* whether J. S., formerly c. Millville, is the same person as J. S. deceased in San Antonio, all the personal marks of the two become relevant (*ante*, § 411). From this point of view the person's history, and in particular his beliefs and utterances, may have a bearing, and therefore his claims of relationship may be receivable. They are not offered testimonially, and therefore are not obnoxious to the Hearsay rule (*post*, § 1791). It is true that their testimonial use will tend to be employed by indirection, especially if in the case there is also an issue as to relationship. Yet, even when offered testimonially, it would seem that they are receivable without connecting the declarant to a particular family by other evidence, if they concern merely the declarant's personal doings

admitted as evidence to prove the legitimacy of their children"); 1862, *Haddock v. R. Co.*, 3 All. 298 (deceased mother's statement that her daughter was illegitimate, admitted); 1890, *Woodward v. Blue*, 107 N. C. 407, 410, 12 S. E. 458 ("Was not the violent grief of David, the king, upon the death of the child, some corroboration that he, and not Uriah, was its father!"). If the declarant is available, such statements are of course inadmissible: 1825, *Stegall v. Stegall's Adm'r*, 2 Brockenb. 256, 262.

Compare the cases cited *ante*, § 269 (parents' conduct as evidence of legitimacy).

Distinguish the question whether a parent may testify to facts of *non-access* as evidencing the illegitimacy of a child born *after marriage*, *post*, § 2063.

For *community-reputation* of illegitimacy, see *post*, § 1805.

¹ 1880, *Cherry v. State*, 68 Ala. 30; 1888, *Kreitz v. Behrensmeyer*, 125 Ill. 141, 135, 17 N. E. 232 ("What was your reputed birthday in the family?"; allowed, the father being out of the jurisdiction); 1892, *Houlton v. Manteuffel*,

51 Minn. 185, 187, 53 N. W. 541; 1894, *State v. Congot*, 121 Mo. 463, 26 S. W. 566 ("that a witness may be permitted to state his or her own age, subject to cross-examination as to the sources of his or her information, is the settled practice"; but here excluded because it appeared to rest solely on perusal of a church record); 1897, *State v. Marshall*, 137 Id. 463, 39 S. W. 63, *semble*; 1891, *State v. Best*, 108 N. C. 749, 12 S. E. 907; 1845, *Watson v. Brewster*, 1 Pa. St. 383; 1884, *Siltler v. Gehr*, 105 Id. 592; 1877, *Hart v. Stickney*, 41 Wis. 620, 638 ("It was a matter of repute in the family when the defendant was born, and though he could not have any personal knowledge of [the date of] his birth, yet he might testify as to his age as he had learned it from his parents and relatives"; yet the point was not "absolutely decided"). *Contra*: 1847, *Doe v. Ford*, 3 U. C. Q. B. 352 (deceased person's statement as to his own age, excluded, as not based on "personal knowledge"; here his testamentary capacity was involved). Compare the cases cited *ante*, § 1486.

(*ante*, § 1489). In any event, they are independently receivable so far as they serve legitimately the purpose of identifying one person with another.¹

§ 1495. (b) *Form of the Assertion (Family Bibles or Trees, Tombstones, Wills, etc.)*. According to the general testimonial principle (*ante*, §§ 789, 799), the testimonial statement may be in any form. It may be oral or written; it may consist in words or in conduct;¹ it may be made by the declarant's own writing, or by assenting to or adopting the writing of another. This is equally true, whether the statement offered be an individual's assertion or the family repute:

1777, *Lord Mansfield, C. J.*, in *Gootright v. Moss*, Cowper 50: "Suppose from the hour of one child's birth to the death of its parent it had always been treated as illegitimate, and another introduced and considered as the heir of the family, that would be good evidence. An entry in a father's family Bible, an inscription on a tombstone, a pedigree hung up in a family mansion (as the Duke of Buckingham's was), are all good evidence."

1806, *Erskine, L. C.*, in *Vowles v. Young*, 13 Ves. 140: "Inscriptions upon tombstones are admitted, as it must be supposed the relations of the family would not permit an inscription without foundation to remain. So engravings upon rings are admitted upon the presumption that a person would not wear a ring with an error upon it."

1811, *Mansfield, C. J.*, in *Berkeley Peerage Case*, 4 Camp. 416: "If the father is proved to have brought up the party as his legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate."

1880, *Lord Blackburn*, in *Sturla v. Freccia*, L. R. 5 App. Cas. 641: "Such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them or assented to them, or did anything that amounted to showing that they recognized them."

That the document containing the assertion is a formal one — as, a deed or will — does not make the assertion inadmissible.² That the assertion is made in the course of a deposition or trial-testimony is immaterial, so long as the litigation does not involve a controversy rendering the statement biased and untrustworthy.³ An assertion may have necessary implications which should be given full effect by natural interpretation; for example, an assertion by a woman that she is a widow implies clearly enough that her husband is deceased.⁴ Even the failure to make an express assertion, where it would

¹ 1900, *Young v. State*, 36 Or. 417, 59 Pac. 812, 60 Pac. 711 (John F.'s property was escheated; plaintiff claimed it as heir of Jonas F., identical with John F.; declarations of John F. as to his family relationships with persons of plaintiff's family, admitted, as identifying circumstances); and cases cited *ante*, §§ 270, 413, *post*, § 1791. Compare also some of the cases cited *post*, § 1502.

The practical difference between the present rule and that of the principles above cited would be that the death of the declarant must here be shown.

² For *conduct*, as evidence of marriage and legitimacy, see also *ante*, §§ 268, 269.

³ 1867, *Smith v. Tebbitt*, L. R. 1 P. & D. 354 (deed); 1879, *Murray v. Milner*, L. R. 12 Ch. D. 849 (will); 1901, *Heaton's Estate*, 135

Cal. 385, 67 Pac. 331 (will); 1900, *Summerhill v. Darrow*, 94 Tex. 71, 57 S. W. 942 (will).

For recitals of pedigree in *ancient deeds*, see *post*, § 1573.

⁴ Cases cited *ante*, §§ 1483, 1484. The opinion of the judges in the *Banbury Peerage Case*, 1809 (extracted in 2 Selwyn's *Nisi Prius*, c. 18, 11th Eng. ed., p. 765), excluding a certain bill in chancery, as a "declaration respecting pedigree," is supportable on the ground that the fact of legitimacy, asserted in the bill, was apparently already in controversy, for the bill was filed to perpetuate testimony of that fact. For the use of depositions, bills, and answers, as *parties' admissions*, see *ante*, §§ 1065, 1075.

For *certificates and registers of marriage, birth, or death*, see *post*, § 1642.

⁵ 1897, *Harnan v. Stearns*, 95 Va. 58, 27

naturally have been made if the fact existed, may (on the same principle as in § 1071, *ante*) be construed as an assertion that the fact does not exist.⁴

§ 1496. (2) **Authentication; Proving Individual Authorship.** The principles of Authentication (*post*, § 2129), as applicable to proof of the execution or genuineness of a writing, are in general applicable to a writing offered under the present exception. No special considerations here need attention, except as regards the necessity of proving the handwriting of entries in family Bibles or the like. The fundamental idea of Authentication is to connect the writing with the person alleged to be its author. Now under the present exception the testimonial statement may be the assertion either of an individual member or of the family. Hence, it is not necessary, where a family Bible or family tree is offered as embodying the family repute, to prove the entry to be that of an individual member, for its adoption by the family makes it a family assertion:

1830, *Bigelow, C. J.*, in *North Brookfield v. Warren*, 16 Gray 174 (speaking of a pedigree-chart): "They are in their nature public, openly exhibited, and well-known to the family, and therefore may be presumed to possess that authenticity which is derived from the tacit and common assent of those interested in the facts which they record."

1876, *Alcey, J.*, in *Jones v. Jones*, 45 Md. 160: "Proof of the handwriting or authorship of the entries is not required when the book is shown to have been the family Bible or Testament, for then the entries, as evidence, derive their weight not more from the fact that they were made by any particular person than that, being in that place as a family registry, they are to be taken as assented to by those in whose custody the book has been kept."¹

On the other hand, if the signature of a specific member of the family can be authenticated, proof of this general family-recognition, by a public exposure of the writing, is not needed:

1831, *L. C. Brougham*, in *Monkton v. Attorney-General*, 2 Russ. & M. 163 (admitting a signed chart): "It is urged . . . that the principle of all those cases would exclude such

S. E. 601 (recital in a deed by a woman that she was a widow, admitted to show the fact of her husband's death); 1899, *James' Estate*, 124 Cal. 653, 57 Pac. 579 (declarations of intestate, that he was unmarried, not admissible for heirs denying the alleged wife's claim; unsound, because the intestate virtually declared that there was in his family no person who was his wife).

A statement that a person is the declarant's "sister" or the like is to be construed as asserting legitimate relationship: 1867, *Smith v. Tehbitt*, L. R. 1 P. & D. 354.

² 1812, *Doe v. Griffin*, 15 East 293 (that an absent family-member had never been heard of in the family as married, admitted); 1852, *Crouch v. Hooper*, 16 Beav. 182, 186 (omission of entry in baptismal register, though other children were entered, admitted); 1848, *Copes v. Pearce*, 7 Gill 247, 265 (lack of entry of alleged illegitimate child's name in family Bible; not given weight on the facts).

³ 1846, *Perth Peerage Case*, 2 H. L. C. 876 (held sufficient, where the documents had been hung up on the wall of a room of a family rela-

tive, the room being a general reception-room to which all visitors had access); 1866, *Hubbard v. Lee*, L. R. 1 Exch. 258 (family Bible); 1896, *People v. Ratz*, 115 Cal. 132, 46 Pac. 915 (a family Bible with entries in English; the fact that the mother, who authenticated it, could not read or write English, held immaterial); 1898, *People v. Slater*, 119 id. 620, 51 Pac. 957 (family Bible received to show the date of a child's birth); 1879, *Weaver v. Lelman*, 52 Md. 719; 1848, *Eatman v. Martin*, 19 N. H. 157; 1896, *Union Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421 (family Bible admissible, no matter who made the entry). *Contra*, but erroneous: 1897, *Supreme Council v. Conklin*, 60 N. J. L. 565, 38 Atl. 659 (family Bible, used in the family, with entries in different handwriting and in different ink; "there is no evidence showing when the dates were placed in the book or by whose authority"; not received to show the deceased father's age; no precedents cited); 1897, *State v. Hairston*, 121 N. C. 579, 28 S. E. 492 (handwriting of the mother in a Bible, spoken of as material).

a pedigree as this, which was not hung up or in any way made public. . . . But why is it that the publicity is relied upon in those cases? Why is it that the family Bible, the public wearing of a ring, the public exposure of an inscription upon a tombstone, and the public hanging up of the family pedigree in the mansion, are all relied upon in respect of their publicity? It is because in all those cases the publicity supplies a defect, there existing but not here existing, — the want of connection between the pedigree, the tombstone, the ring, or the Bible with particular individuals, members of the family. . . . The presumption is, it would not be suffered to remain if the whole of the family did not more or less adopt it and thereby give it authenticity."

Moreover, even where it is offered as an individual's assertion, the individual's personal execution of the writing is not always essential; for he may have adopted something written by another, — as, by wearing a ring engraved with a marriage-date, or by ordering a tombstone to be carved, or by carrying about a certificate of marriage.²

§ 1497. (3) Production of Original Document; Preferred Writings. If the statement offered is in the form of a writing, the general rule requiring the production of the writing itself (*ante*, § 1179), is of course applicable.¹ But if the object of the offer is an oral declaration of an individual, or the general unwritten family repute, the terms of no writing are in question, and the rule of production is not applicable. Furthermore, it has been already seen (*ante*, § 1335) that there is no general principle preferring written statements above oral statements; hence, the mere existence of a written statement, in the form of a Bible-entry or the like, does not render it necessary to use that writing in preference to independent oral statements otherwise admissible.

2 and 3. Kind of Fact that may be the Subject of the Statement.

§ 1500. General Principle. In considering what sort of facts it is that may be the subject of the declarations, it is seen that the limitations must rest partly on the principles of both the second and the third groups just considered; that is, (2) the circumstantial guarantee that ordinary family conversation will be indifferent and sincere is true of certain topics only, namely, the ordinary incidents of family life; while (3) the probability that the various members of the family will have fair information (*i. e.* will be testimonially qualified) is also true for certain topics only, namely, the topics that are most likely to be the subject of repeated conversation and of fairly definite knowledge.¹ The combined effect of these two principles, therefore, is to limit the topics with which the declarations may be concerned to the *events*

¹ 1874, *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 453, 461 (extracts from parish register, passport, etc., found among deceased's effects, and reciting his marriage and the birth and names of his children, admitted as statements of the deceased); 1900, *Hall v. Cardell*, 111 Ia. 206, 82 N. W. 503 (leaves of a family Bible, with entries said to be copied from another Bible, admitted).

² 1873, *McDeed v. McDeed*, 67 Ill. 545, 559

(leaf of Bible "blotched" but legible; production required); 1888, *Kreitz v. Behrensmeyer*, 125 id. 141, 185, 17 N. E. 232 (production of family-record required).

³ "Family transactions," says Mansfield, C. J., in the *Berkeley Peerage Case*, 4 Camp. 416, "are naturally talked of among the relations of the parties. Therefore what is thus dropped in conversation upon such subjects may be presumed to be true."

regarded commonly as of importance in the family life. This certainly includes the fact and date of birth, marriage, and death, and the fact and degree of relationship, — as has always been conceded. But there has been more or less fluctuation and uncertainty about the exact limits to be applied, and upon certain classes of facts some doubt still unnecessarily exists.

§ 1501. **Declarations as to Place of Birth, Death, etc.** The place of birth or death — something more than the fact of birth or death — has by some Courts been thought to be an inadmissible subject. But there is no apparent reason to conclude that a statement on this topic is, from either of the above points of view, less trustworthy:

1847, *Knight-Bruce, V. C.*, in *Shields v. Boucher*, 1 DeG. & Sm. 53 (declaring in favor of statements concerning the place of birth, place of residence, and the like, so far as material in a pedigree case): "I own myself not convinced that the reasons and grounds (so far as I can collect and understand them) upon which births and times of births, marriages, deaths, legitimacy, illegitimacy, consanguinity generally, and particular degrees of consanguinity and of affinity, are allowed to be proved by hearsay (from proper quarters) in a controversy merely genealogical, are not as applicable to interrogatories . . . like the present . . . Who generally is more likely to know whence a man or a family came than the man or the family? Does the emigrant, living or dying, forget his native soil? Is a woman less likely to state her country than her age with accuracy? . . . Nor are there, perhaps, any recollections or traditions of the old more readily communicated or more acceptable to an auditory of descendants than the original seat of the family, its former residences and possessions, its migrations, its local and other distinctions of the past, its advancement or its decay. If such topics are not strictly genealogical, they are at least intimately connected with genealogy . . . and in the most striking manner with the reason [of the rule]."

Such is the conclusion to-day generally and properly accepted.¹ The truth seems to be that the doubt as to receiving declarations of place was originally due solely to a misunderstanding of the obscure language of the ruling in *R. v. Erith* (*post*, § 1503); in that case the ruling actually proceeded on the nature of the issue involved (*post*, § 1503) — a pauper's settlement — and not on the kind of fact stated. In England this misunderstanding has now been recognized;² but in the United States it has had considerable influence, and a few Courts have excluded declarations as to place.³

§ 1502. **Sundry Kinds of Facts.** There is in truth no definite or formal limitation as to the kind of fact that may be the subject of the statement. The general inquiry, as already indicated (*ante*, § 1500), should be: Were the circumstances named in the statement such a marked item in the ordi-

¹ 1812, *Doe v. Griffin*, 15 East 293 (ejectment; family repute that a member had died in the West Indies, admitted); 1844, *Rishton v. Nesbitt*, 2 Moo. & Rob. 554; 1861, *Attorney-General v. Köhler*, 9 H. L. C. 686; 1882, *Wise v. Wynn*, 59 Miss. 588, 591; 1818, *Jackson v. Boneham*, 15 John. 227; 1884, *Hammond v. Noble*, 57 Vt. 193, 203, *semble*.

² 1847, *Knight-Bruce, V. C.*, in *Shields v. Boucher*, 1 DeG. & Sm. 40 ("If the place of birth in *Rex v. Erith* had been a genealogical fact, as it was not, — had been material, namely, for any genealogical purpose, which it was not,

Lord Ellenborough and the Court of King's Bench might possibly have dealt with the evidence differently"). See also *Lord Brougham, L. C.*, in *Monkton v. Attorney-General*, 2 Russ. & M. 156. *Contra* in Canada: 1885, *Currie v. Stairs*, 25 N. Br. 4, 10 (entries in a family Bible, not admitted to prove the place of birth).

³ 1821, *Brooks v. Clay*, 3 A. K. Marsh. 550; 1826, *Winnington v. Burlington*, 4 Pick. 175; 1876, *Tyler v. Flanders*, 57 N. H. 618, 624; 1827, *Independence v. Pompton*, 4 Halst. 212; 1875, *Carter v. Montgomery*, 2 Tenn. Ch. 229.

nary family history and so interesting to the family in common that statements about them in the family would be likely to be based on fairly accurate knowledge and to be sincerely uttered? There is ample authority for a broad application of this principle, although the rulings are by no means in harmony.¹

4. Arbitrary Limitations.

§ 1503. **Kind of Issue or Litigation involved.** On principle, the kind of issue involved in the litigation ought to have no bearing on the admission of the present class of declarations. A deceased father's entry in a family Bible is equally trustworthy or untrustworthy whether the issue subsequently arising happens to be framed upon a claim to an inheritance, a plea of infancy to a promissory note, or an application to appoint a guardian. But historically these declarations were first customarily (though not exclusively) used in inheritance cases, where the pedigree or genealogy of a claimant was directly a part of the issue; and this traditional use served to give the impression to many Courts that the rule had crystallized into an arbitrary shape. This rule, thus interpreted, says that declarations, otherwise satisfactory, can nevertheless be used in those cases only where the issue involves as material a question of pedigree, *i. e.* genealogy, — chiefly, therefore, in inheritance cases:

1807, Lord *Ellenborough*, C. J., in *R. v. Erith*, 8 East 530 (settlement of a pauper; the father's declarations as to his bastard birth and the place of birth were rejected): "The only doubt which has been introduced into this case has arisen from improperly considering it as a question of pedigree. The controversy was not, as in a case of pedigree, from what parents the child has derived its birth; but in what place an undisputed birth, derived from known and acknowledged persons, has happened. The point thus stated turns on a single fact, involving no question but of locality, and therefore not failing within the principles of or governed by the rules applicable to cases of pedigree."

1801, *Earl J.*, in *Eisenlord v. Clum*, 126 N. Y. 552, 27 N. E. 1024: "A case is not necessarily one of that kind [pedigree], because it may involve questions of birth, parentage,

¹ *Admitted*: 1844, *Rishton v. Neabltt*, 2 Moo. & Rob. 554 (the existence of relatives in a certain town); 1861, *Attorney-General v. Köhler*, 9 H. L. C. 686 ("events in the early life of J. G. which identify him with G. K."; such as his trade, enlistment in the army, running away from home, sending home money, etc.); 1904, *Locklayer v. Locklayer*, — Ala. —, 35 So. 1008 (the declarant's negro race); 1900, *Woolsey v. Williams*, 128 Cal. 552, 61 Pac. 670 (enlisting in the Federal army in the civil war, and being there killed); 1820, *Walkup v. Pratt*, 5 Harr. & J. 56 (the purchase and sale of a slave; here, in order to identify the alleged ancestor and trace descent); 1879, *Fraser v. Jennison*, 42 Mich. 206, 214, 235, 3 N. W. 882 (that two brothers came from Michigan together, and were the only two brothers of the family that came); 1818, *Jackson v. Boneham*, 15 John. 227 (the death in war and the place of death of an ancestor); 1900, *Young v. State*, 36 Or. 417, 59 Pac. 812, 60 Pac. 711 (that the declarant had enlisted, gone to Washington, deserted, etc.; here, on

the theory of identifying circumstances); 1848, *Story v. Saunders*, 8 Humph. 667, *semble* (that S. had died in the revolutionary army); 1894, *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1059 (that a person went to Texas, and enlisted in the army, and was killed at the Fannin massacre; overruling *Smith v. Shinn*, *infra*); 1869, *Webb v. Richardson*, 42 Vt. 465, 471 (time of death); 1872, *Du Pont v. Davis*, 30 Wis. 178 (that A. was killed by the explosion of a powder-mill in 1855 or 1856). *Excluded*: 1903, *Wright v. Com.*, — Ky. —, 72 S. W. 340 (family tradition, to show ancestral and collateral insanity); 1870, *Crane v. Reeler*, 21 Mich. 83 (the existence of heirs; failure of heirs being *in line*); 1826, *Jackson v. Etz*, 5 Cow. 319 (the circumstances of the finding and burial of a body); 1897, *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730 (family reputation as to insanity); 1882, *Smith v. Shinn*, 58 Tex. 1 (service in war). Compare the *Coles* quoted *ante*, § 1480, and the cases cited *ante*, § 1494. For *neighborhood-repute* to this class of facts, see *post*, §§ 1605, 1623-1626.

age, or relationship. Where these questions are merely incidental, and the judgment will simply establish a debt, or a person's liability on a contract, or his proper settlement as a pauper, and things of that nature, the case is not one of pedigree."

This strict limitation was probably a novelty of Lord Ellenborough's;¹ though it came to prevail in England and in some courts of the United States.² But in the majority of American jurisdictions this limitation is ignored; the declarations are now admitted whatever the general nature of the issue, and whether or not the issue is one of genealogy, pedigree, or descent.³ This is a just result. Any such arbitrary and unreasoning limitation places the rules

¹ 1664, *Herbert v. Tuckal*, T. Raym. 84 (devisor's capacity to make a will; father's entry of age in almanac, admitted). In settlement cases (which were notoriously esoteric in their practice) Lord Ellenborough appears to have gone directly against the previous practice: 1744, *E. v. Greenwich*, Burr. Settl. Cas. 1, 343; 1772, *R. v. Nutley*, id. 11, 701; 1782, *R. v. Holy Trinity*, Calh. Just. Peace (Settl. Cas.), 141.

² 1841, *Figg v. Wedderburne*, 11 L. J. Q. B. 46, *semble* (contract; plea of infancy); 1881, *Haines v. Guthrie*, L. R. 13 Q. B. D. 813 (contract (plea of infancy)); 1897, *People v. Mayne*, 118 Cal. 518, 50 Pac. 651, *semble* (rape on a child under 14); 1873, *Union v. Plainfield*, 39 Conn. 561 (pauper settlement); 1882, *Com. v. Felch*, 132 Mass. 22 (criminal charge of abortion); 1896, *State v. Marshall*, 137 Mo. 463, 36 S. W. 619 (criminal action for seduction where the offence could by statute be committed only upon a person under 18 years of age); 1826, *Westfield v. Warren*, 8 N. J. L. 251 (pauper settlement); 1891, *Eisenlord v. Clum*, 128 N. Y. 552, 27 N. E. 1021 (quoted *supra*); 1902, *Washington v. Bank*, 171 id. 166, 63 N. E. 831 (action for money in the defendant savings bank, deposited by the plaintiff's intestate in the name of certain alleged sons, the plaintiff claiming that the beneficiaries were fictitious, and the defendant denying this; held, that the issue was as to "the right of succession to the personal property of a deceased person" and therefore one of pedigree); 1903, *Danby v. State*, — Tex. Cr. —, 71 S. W. 958, *semble* (the statement of a brother, not shown to be deceased, as to the age of a prosecutrix in rape, excluded); 1876, *Connecticut Mut. L. Ins. Co. v. Schenck*, 94 U. S. 598 ("The present case [an action on a life-insurance policy] involves no question of pedigree; the proof of age was not offered for the purpose of proving parentage or descent, both of which were impertinent to the issue between the parties"); 1902, *Fidelity Mutual L. Ass'n v. Mettler*, 185 id. 308, 22 Sup. 682 (insurance policy; death of the insured); 1856, *London-Lerry v. Andover*, 23 Vt. 429 (pauper settlement).

³ 1880, *Cherry v. State*, 68 Ala. 30, *semble* (selling liquor to a minor); 1867, *Wilson v. Brownlee*, 24 Ark. 589 (action on a promissory note; plea in abatement that one of the joint payees was dead); 1874, *Kansas Pac. R. Co. v. Watson*, 2 Colo. 442, 453, 461 (action by administrator for damages for death); 1874, *Southern Life*

Ins. Co. v. Wilkinson, 53 Ga. 547 (entries in a family Bible; the issue being as to the age of the insured in an action on an insurance policy; § 3772 of the Code was perhaps slightly involved); 1859, *Collins v. Grantham*, 12 Ind. 444 (plea of infancy to a note); 1860, *Carnes v. Crandall*, 10 Ia. 379 (*scire facias* to revive a judgment; hearsay as to the fact of the defendant's death was rejected on grounds not affecting the nature of the issue); 1870, *Greenleaf v. R. Co.*, 30 id. 302 (declarations of a father as to the son's age, in an action for death by a brakeman's carelessness, were held admissible, though ruled out for other reasons); 1879, *Fraser v. Jennison*, 42 Mich. 206, 235, 3 N. W. 882 (will-contest); 1891, *Lamoureux v. Attorney-General*, 89 id. 146, 50 N. W. 812 (*mandamus* to institute *quo warranto* proceedings as to the right to exercise a sheriff's office); 1892, *Houlton v. Mautenffel*, 51 Minn. 185, 187, 53 N. W. 541 (plea of infancy to action on note; point not raised); 1840, *Carskadden v. Poorman*, 10 Witta 84 (action against a magistrate to recover a penalty for marrying a minor); 1845, *Watson v. Brewster*, 1 Pa. St. 383 (action on a note, with a plea of infancy); 1846, *Ford v. Ford*, 7 Humph. 98 (a testator devised to negroes, and his sanity was impeached; hearsay was accepted to show that they were his illegitimate children, and thus to sustain his capacity); 1883, *Swink v. French*, 11 Lea 79 (in an action on a note, a contract to extend the time was alleged, and infancy was alleged in reply; hearsay of the date of birth was admitted); 1851, *Prinni v. Stewart*, 7 Tex. 178, 182 (whether W. was dead when a power of attorney from him was executed; rule held not confined "to cases where the question is one of pedigree"); 1900, *Summerhill v. Darrow*, 94 id. 71, 57 S. W. 942 (vendor's lien; whether the statute of limitations was suspended by coverture; her mother's will-recitals admitted); 1872, *Mason v. Fuller*, 45 Vt. 30 (bastardy complaint); 1884, *Hammond v. Noble*, 57 Vt. 193, 203, *semble* (petition for new trial, because of a juror's alienage; family declarations admitted); 1872, *Du Pont v. Davis*, 30 Wis. 178 (the death of A. was shown, as indicating the non-necessity of joining him as a party plaintiff in a suit relating to land of which he was assumed to be joint tenant); 1877, *Hart v. Stickney*, 41 id. 630, 638 (plea of infancy to a promissory note; defendant's testimony to the family repute of his age, admitted, yet the point was not "absolutely decided").

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of evidence on a par with the rule of chess that a king may move one square only, or the rule of whist that the card played must follow the suit led,— rules, that is, which justify their existence because they add complexity, and therefore interest, to the game. If a trial upon evidence is a game, such limitations have a place in the law of evidence; if it is the employment of rational and practical methods in the discovery of truth, such limitations should be discarded without scruple:

1860, *Bigelow, C. J.*, in *North Brookfield v. Warren*, 16 Gray 175 (admitting evidential declarations where the main issue was as to a pauper's settlement): "Upon principle we can see no reason for such a limitation. If this evidence is admissible to prove such facts at all, it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation."

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE.

TOPIC IV: ATTESTATION OF A SUBSCRIBING WITNESS.

CHAPTER I.

§ 1505. Theory of the Exception.

1. The Necessity Principle.

§ 1506. Attester must be Deceased, Absent from Jurisdiction, etc.

2. The Circumstantial Guarantee of Trustworthiness.

§ 1508. General Principle.

§ 1509. Who is an Attester; Definition of Attestation.

3. Testimonial Principles.

§ 1510. Attester must be Competent at time of Attestation.

§ 1511. Implied Purport of Attestation; (1) All Elements of Due Execution implied.

§ 1512. Same: Lack of Attestation-Clause is Immaterial.

§ 1513. Same: (2) Must the Maker's Signature or Identity also be otherwise proved?

§ 1514. Attester may be Impeached or Supported like other Witnesses.

§ 1505. **Theory of the Exception.** It has long been unquestioned that the attestation of an attesting or subscribing witness to a document may be used, when the attester is unavailable in person, as evidence of the document's execution; and according to the orthodox form of the Preferred Witness rule (*ante*, § 1320), the attestation must even be used in preference to other testimony. There was apparently a time, to be sure, when the testimony of the attester in person was so rigorously required that even his death could not excuse his absence (*ante*, §§ 1287, 1311), and in that period it cannot be said that the present exception to the Hearsay rule (if indeed there existed then any Hearsay rule) was recognized. But the recognition unquestionably came by the second half of the 1700s, and this use of an attestation has since then been unquestioned.

What has not been always clearly understood is that such a use of an attestation is in truth an exception to the Hearsay rule, *i. e.* is the testimonial use of an extrajudicial assertion as evidence of the truth of the fact asserted (*ante*, § 1362). In practice, the dramatic feature of the evidence has tended to obscure the legal principle; that is to say, the mode of using it consists merely in proving the genuineness of the attester's signature to the document. That this is after all nothing less than offering the attester's written statement, expressly or impliedly made at the time of execution, that the document was seen by him to be executed as it purports to be, seems too clear for argument. It was always assumed in judicial opinion, until the following perverse utterance from an eminent judge shook the faith of the profession:

1836, *Stobart v. Dryden*, 1 M. & W. 615; declarations of a deceased attesting witness M., whose handwriting had been proved, were offered as amounting to an acknowledgment of forgery, but were rejected; *Counsel*: "Proving the signature of the deceased witness is no more than [proving] a declaration on his part that he saw the party execute the

deed. . . . If the plaintiff is permitted to prove declarations of M. to sustain the deed, the defendant may use them also to impugn it. If the signature does not amount to a declaration that the witness saw the party sign, it amounts to nothing"; Lord Abinger, C. B.: "Is it not an assumption of yours that the signature is a declaration? It is a fact"; . . . Parke, B. (for the Court): "One of the grounds [of argument] was that as the plaintiff used the declaration of the subscribing witness, evidenced by his signature, to prove the execution, the defendant might use any declaration of the same witness to disprove it. The answer to this argument is that evidence of the handwriting in the attestation is not used as a declaration by the witness, but to show the fact that he put his name in that place and manner in which in the ordinary course of business he would have done if he had actually seen the deed executed. A statement of the attesting witness by parol, or written on any other document than that offered to be proved, would be inadmissible. The proof of actual attestation of the witness is therefore not the proof of a declaration, but of a fact."

As to this, it may be said (1) that all evidential data whatever are merely "facts"; the testimonial utterance of a witness on the stand is merely a "fact," *i. e.* we are asked to believe that A struck B because of the evidential "fact" that M, a competent observer, is willing to assert under oath on the stand that A struck B (*ante*, § 475). (2) If, however, by "fact" the learned judge be supposed to have meant an extrajudicial utterance, and to have looked upon all such statements as circumstantial evidence in distinction from testimonial evidence, then it must be answered that the distinction between testimonial and circumstantial evidence admits of no such significance (*ante*, §§ 25, 479). The Hearsay rule, to be sure, draws a distinction between testimonial utterances made upon the stand and made off the stand (*ante*, § 1362); but a human assertion offered as evidence of the truth of the assertion is testimonial evidence, no matter where it is uttered. (3) If, finally, by "fact" the learned judge meant that the act of subscribing in attestation, when proved in Court for the purpose of establishing the maker's execution, is a mere act or circumstance and not an implied assertion of the fact of execution, his notion is clearly not correct. It might as well be argued that, because a deponent merely signs his name to a deposition, his act is mere circumstantial evidence and not testimony.

That this singular aberration of *Stobart v. Dryden* is unfounded is shown by the constant judicial treatment of the whole subject as indicated in the following sections (particularly in §§ 1511-1513); but the error is especially repudiated in the following passages:

1824, *Per Curiam*, in *Clark v. Boyd*, 2 Oh. 280 (37): "The proof of the handwriting of the witness is *quasi* bringing him into Court. . . . It proves as much as the subscribing witness can prove himself in many cases."

1842, *Nelson, C. J.*, in *Losee v. Losee*, 2 John. 609: "Proof of the signature of a deceased subscribing witness is presumptive evidence of everything appearing upon the face of the instrument relative to its execution; as it is presumed the witness would not have subscribed his name in attestation of that which did not take place. . . . The attestation comes in by way of substitute for his oath"; note by Mr. Nicholas *Hill* (afterwards judge): "The act of attesting an instrument is regarded as a written declaration of the subscribing witness, to which the law, in the event of his death or absence, yields a reluctant credit by way of necessary substitute for his oath."

1807, *Thompson, J.*, in *Kirk v. Carr*, 54 Pa. 283, 290: "Memory can no more be kept alive than the body, and hence the law allows the attesting signature to speak when the tongue may be silent."

1807, *Wright, J.*, in *Boyens' Will*, 23 Ia. 354, 357: "The witnesses to a will become such from the moment they sign it. They testify from that moment, and hence, though they should die before the testator or before the probate of the will, it is still good."¹

The attestation, then (when proved to have been made), by establishing the genuineness of the signature, comes in as an extrajudicial or hearsay assertion of the attester.² What are the limitations to its use, upon the general principles of the Hearsay exceptions as already expounded?

1. The Necessity Principle.

§ 1506. **Attester must be Deceased, Absent from Jurisdiction, etc.** Upon the general principle already noted for the preceding Exceptions (*ante*, § 1421), the attester's hearsay statement cannot be used unless the attester is unavailable for the purpose of giving testimony in person. The various situations which fulfil this condition — *death, absence from the jurisdiction, insanity, illness*, etc. — have already been fully examined in connection with the rule of Preferred Witnesses (*ante*, §§ 1309-1319), and therefore need not be again considered here. The case of *failure of memory* of an attester, called to the stand, is later examined (*post*, § 1511).

2. The Circumstantial Guarantee of Trustworthiness.

§ 1508. **General Principle.** Unquestioned as the reception of this hearsay statement has been, no judicial attempt seems to have been made to define the reasons for the trustworthiness thus accorded, by exception, to this class of hearsay statements.¹ The question is virtually this (*ante*, § 1422): What guarantee is there that the attester did not sign his name as attester to a document which he did *not* see executed by the purporting maker? The circumstances tending to trustworthiness seem to be four. (1) The occasion is a formal one, and the statement requires a writing; and there is commonly a radical disinclination to take part in a false transaction of such a sort. (2) The concoction of a false document will either fix an innocent party with a false obligation or will divest legitimate heirs of their rights, and there is a natural repugnance to giving assistance in such a wrong. (3) The

¹ *Accord*: 1803, *Farleigh v. Kelley*, — Mont. —, 72 Pac. 756 (good opinion by Holloway, J.); 1850, *Boylan v. Meeker*, 28 N. J. L. 274, 294; 1832, *Daniel, J.*, in *Crowell v. Kirk*, 3 Dev. 356; 1847, *Gibson, C. J.*, in *Hays v. Harden*, 6 Pa. St. 412 ("the equivalent of the witnesses' oath"); 1848, *Rogers, J.*, in *Harden v. Hays*, 9 id. 156.

² Of course, it *may* be proved without any attempt to use it testimonially, as where the law requires an attestation as an element in the validity of the document and the party desires merely to show that the elements of validity exist: 1860, *Boylan v. Meeker*, 28 N. J. L. 274, 295 (where the signature was proved merely to

show the statutory requirement fulfilled, and the will's execution was otherwise proved).

³ The following suggestions are found: 1819, *Kirkpatrick, C. J.*, in *Newbold v. Lamb*, 2 South. N. J. 449, 451 ("The only reason why the proof of the handwriting of the subscribing witness is taken as sufficient proof of the execution of a deed is founded upon the presumption that what an honest man hath attested under his hand is true"); 1823, *Gibson, J.*, in *Crouse v. Miller*, 10 S. & R. 158 ("The handwriting of a witness, . . . standing in the place of the oath, derives its claim to respect from the consideration that the law presumes every man honest till the contrary appears").

making of a false attestation, whether or not it is in criminal law a forgery or a perjury, is popularly supposed to be such, and the attester would probably be at least an accomplice in a forgery; so that the subjective sanction deterring from a crime would probably operate to prevent a false attestation. (4) The attester knows that he is liable at any time to be called upon in Court to substantiate his attestation; and not only is his falsity likely there to be exposed by the opponent's witnesses, but he will there be obliged either to commit perjury by swearing to the fact of execution or to undergo the disagreeable ordeal of recanting and confessing his falseness. There is thus a combination of circumstances which easily account for the establishment of this Exception to the Hearsay rule.

§ 1509. **Who is an Attester; Definition of Attestation.** An attesting or subscribing witness, then, is a person who, at the request or with the consent of the maker, places his name on a document for the purpose of making thereby an express or implied statement that the document was then known by him to have been executed by the purporting maker. Only such a signature can be used as a hearsay statement. Thus, it cannot be used if the person did not write it himself, or not at the time, or if he did not sign as an attester but for some other purpose. These and related questions have been already treated in examining the notion of an attesting witness under the rule of Preferred Witnesses (*ante*, § 1292), and their solution would probably be the same for the present subject. The *kind of issue* in which the attestation is offered is immaterial, so long as it is offered to prove the execution of a document.¹ But the only statement admissible as made under circumstances of trustworthiness is the *written statement in the document*, either expressed or implied by the signature; so that any oral statement otherwise made is not receivable;² except when offered as a self-contradiction to impeach the written statement (*post*, § 1514). The statement need not be *expressly written in full*; the placing of the signature implies an assertion of execution (*post*, § 1511).

3. Testimonial Principles.

§ 1510. **Attester must be Competent at time of Attestation.** The attestation is offered as the statement of the attester made at the time of attestation. (1) Hence, if he was *at that time* not qualified as a witness,¹ his statement in the attestation is not admissible. The usual instance of

¹ *Contra*: 1895, *Walker v. State*, 107 Ala. 5, 18 So. 393 (perjury for falsely swearing that he had not signed a conveyance; evidence of the handwriting of a deceased attesting witness was not admitted to show that the defendant had signed it; "upon this question he was entitled to be confronted by the witnesses against him, and not be prejudiced by evidence that the paper bore the names, as attesting witnesses, of persons who are not examined on the trial"; this is unsound; on such a doctrine no excep-

tions to the Hearsay rule could ever exist; see *ante*, §§ 1397, 1398).

² 1866, *Boardman v. Woodman*, 47 N. H. 120, 135 (excluding statements by the deceased witness as to the sanity of the testator; such statements are not an implied part of the attestation).

³ Whether in such a case, under the Preferred Witness rule, he may be disregarded as not an attester, and need not be called or accounted for, is a different question, treated *ante*, § 1292.

this has been the case of a disqualification by interest.³ (2) If the attester was then qualified, but has *since* become disqualified to take the stand, his attestation is receivable, because it speaks as from a time when he was qualified.³ Whether in this case the attestation is valid as an element of execution, under statutes requiring the attester to be a credible witness, is a matter of substantive law not here involved.⁴

§ 1511. **Implied Purport of Attestation;** (1) **All Elements of Due Execution implied.** When the attester's signature is identified as genuine, what does the attester thereby purport to testify to? Does he purport to testify at all? Assuming that the signature is appended to a clause of attestation expressly stating the facts of execution, it is clear that the signed attestation is a *testimonial assertion of all the facts thus required to be stated*. This has never been doubted for the case of an attester deceased or otherwise unavailable in person. But it has not been always so easy to appreciate in the case of an attesting witness who on being called to the stand is found to have forgotten all the circumstances. In such a case, it is not doubted that the proponent may, if he pleases, prove the facts of execution by other witnesses (*ante*, § 1302). But, apart from that, does not the signed attestation serve as some testimony of the facts, the attester's failure of memory having practically made his present testimony unavailable? On this point there can be no doubt:

1839, *Tucker, P.*, in *Clarke v. Dunnivant*, 10 Leigh 13, 30, 35: "[If the witness is dead, or the like,] his attestation is a sufficient ground for presuming that the instrument has been executed with all the solemnities and ceremonies required by the law. . . . It is then a question for the jury whether under the circumstances of the case it is probable that all the formalities of the statute were regularly observed. . . . The question still recurs whether, as the witnesses have been actually examined and have failed to prove a compliance with all the requisitions of the statute, that compliance can be inferred from their attestation. . . . [This is answered in the affirmative, by the precedents,] nor do I apprehend any evil from this decision. It may perhaps sometimes lead to the establishment of wills not duly executed, as doubtless may be the case also where the witnesses are all dead or absent, and everything is presumed from their attestation. But far greater mischiefs would arise from a contrary decision, which should make the rights of every devisee and legatee depend not only upon the honesty but also upon the slippery memory of witnesses. Under such a decision, no man could be sure of dying

³ 1793, *Swire v. Bell*, 5 T. R. 371 (interest existing at the time of attestation and since; handwriting not allowed, the case of a subsequent incompetency being distinguished); 1841, *Amherst Bank v. Root*, 2 Metc. 522, 532; 1813, *Hamilton v. Marsden*, 6 Binn. 45, 50, per Yeates, J.; 1820, *Miller v. Carothers*, 6 S. & R. 215, 222 (will); 1852, *Harding v. Harding*, 18 Pa. St. 340, 342; 1859, *Jones v. Jones*, 12 Rich. 116, 120. This question seldom rises under the present rule of evidence, because the same incompetency usually makes the attestation, and therefore the document, void in substantive law.

⁴ The cases are collected *ante*, § 1316, in dealing with the excuses for not calling the attesting witness.

That his *good character* need not first be

shown in any case is clear: 1850, *Chaffe v. Cnpp*, 5 La. An. 684 (Slidell, J., diss., being apparently the only person who ever doubted). Compare § 1104, *ante*.

⁴ Compare the following: 1865, *Sparhawk v. Sparhawk*, 10 All. 155 (Bigelow, C. J.: "It is to be borne in mind that the question to be determined in this case is, not whether the witness objected to at the trial was competent to give evidence in the case, but whether he was competent according to the rules of the common law to act as a subscribing witness. If he was, then the will was duly attested; but if he was not, then the will cannot be admitted to probate, because it was not subscribed in the presence of the testator by three competent witnesses").

testate, since the forgetfulness of a witness would frustrate all his precaution; and a question of title by will, which in the spirit of the statute of frauds, the Legislature designed to rest upon written evidence alone, would after all depend upon the integrity and the memory of those who were called on to attest the instrument. . . . It would tend, I have no doubt, to multiply the attempts, already too common, to set aside wills; since the chances of success must be very much increased if the frailty of human memory is to be called in to the aid of the discontented heir."

1819, *Gibson, C. J.*, in *Greenough v. Greenough*, 11 Pa. St. 489, 498: "What avails it that the man is living, if his memory is dead? If it were blotted out by paralysis, or worn out by decay, his attestation would stand for proof by a witness; but it must be immaterial how or by what means it lost its tenacity."

That the attestation may thus, in all cases where the witness is unable to testify in person, be taken as evidence of the fact of execution is not doubted.² The matter of controversy has usually been merely the effect of such evidence, i. e. whether it should be given the force of a presumption or merely suffices as evidence to go to the jury (*post*, §§ 2490, 2520),—a matter not here involved.

As to the specific facts to be taken as a part of the assertion,—delivery, presence, request, publication, and the like—, there is perhaps some room for doubt. Assuming that there is on the document an attestation-clause of some sort, it is generally said that the attestation is evidence of *all the facts essential to a due execution* of the document under the substantive law applicable to that kind of document.³ A few Courts have here and there hesi-

¹ *Accord*: 1846, *Hitch v. Wells*, 10 Beav. 84, 89 (in this case "where one witness is dead, [and] another is not to be believed [in denying attestation], and the third is an ignorant man whose recollection fails him, you must supply it [publication] by presumption"); 1895, *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107; 1898, *Thompson v. Owen*, 174 Ill. 229, 233, 51 N. E. 1046; 1973, *Kellum's Will*, 52 N. Y. 517, 519 ("where failure of memory on the part of the witnesses shall not defeat a will, if the attestation clause and other circumstances are satisfactory to prove its execution"). So, too, from another point of view, the failure of memory of an attester called to the stand excuses the party under the Preferred Witness rule, as if through death or the like his attendance could not be had (*ante*, § 1315).

² Whether the attestation suffices under the Quantity rule, requiring two witnesses not necessarily attestors, is noted *post*, § 2048.

³ *England*: 1739, *Croft v. Pawlet*, 2 Stra. 1109 (the attestation clause to a will said nothing about the witnesses' signing in the testator's presence; and it was objected that "the hands of the witnesses could only stand as to the facts they had subscribed to"; but the Court left it to the jury to say whether there was "a compliance with all circumstances [required]"); 1808, *Milward v. Temple*, 1 Camp. 375 (debt on bond; the plaintiff put in a paper, signed by the defendant's attorney, whereby the signatures of the defendant and the attesting witness to the bond were admitted; L. C. J. Ellenborough at first doubted whether the

delivery of the bond by the defendant as his deed ought not also to have been admitted, or must not still be proved to entitle the plaintiff to a verdict; but upon consideration, "his lordship said, as the attesting witness' handwriting was admitted, this might be taken as a presumptive admission of all he professed to attest and would have been called to prove"); 1834, *Tindal, C. J.*, in *Wright v. Tatham*, 1 A. & E. 3, 22 ("the presumption [is] that he witnessed all that the law requires for the due execution of a will"); *Canada*: 1843, *Hamilton v. Love*, 2 Kerr 243, 250 (on the facts); 1874, *Hanlon's Will*, 15 N. Br. 136, 140; *United States*: *Ga.*: 1900, *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788 (the clause "raises a presumption that such paper was executed with all the requisite legal formalities"); *Ill.*: 1895, *Hobart v. Hobart*, 154 Ill. 610, 614, 619, 39 N. E. 581 (proof of handwriting presumes due attestation); 1898, *Thompson v. Owen*, 174 id. 229, 233, 51 N. E. 1046; *Ia.*: 1898, *Scott v. Hawks*, 107 Ia. 723, 77 N. W. 467 (proof of handwriting is proof of due execution, even where the testator signs by mark); 1902, *Hull's Will*, 117 id. 738, 89 N. W. 979; *Ky.*: 1829, *Pate v. Joe*, 3 J. J. Marsh. 113, 116; 1847, *Chisholm v. Ben*, 7 B. Monr. 408, 410, *semble*; *Mass.*: 1853, *Nickerson v. Buck*, 12 Cush. 332, 342 (the signature is to be taken as "put there for the purpose stated in connection with the signature"); *Mich.*: 1860, *Lawyer v. Smith*, 8 Mich. 411, 414, 423 (identification of his signature by the witness, sufficient to go to the jury); *Miss.*: 1857, *Fatherine v. Lawrence*, 33 Miss. 585, 618; 1858, *Nixon v.*

tated in regard to its application to individual kinds of facts; but the principle as above stated is the orthodox one and is in general acceptance. It has commonly been extended to imply an assertion of the maker's *sanity*.⁴ But it could not cover facts not ordinarily known to the attester at the time of execution.⁵

§ 1512. **Same: Lack of Attestation-Clause is Immaterial.** It cannot be material, for this purpose, whether the signature is accompanied by an at-

Porter, 34 id. 697, 706; *N. J.*: 1819, *Newbold v. Lamb*, 2 South. 449, 451 (an attestation-clause not specifying sealing and delivery, held not sufficient to show that a scroll-seal was made before attestation; *Southard, J., diss.*); 1858, *Mundy v. Mundy*, 15 *N. J. Eq.* 290, 293 ("the attestation-clause . . . is *prima facie* evidence of the facts stated in it"); 1872, *Alpaugh's Will*, 23 id. 507 (death or non-recollection; "the attestation-clause must be taken as true"); 1875, *Allaire v. Allaire*, 37 *N. J. L.* 312, 325 ("proof of their signature will be evidence that what they attested in fact did take place"); 1876, *Tappen v. Davidson*, 27 *N. J. Eq.* 459 (similar); 1882, *Turnure v. Turnure*, 35 id. 437, 440 (publication also, if recited, is presumed); 1886, *McNurdy v. Neall*, 42 id. 333, 7 *Atl.* 1566; 1887, *Ayres v. Ayres*, 43 id. 565, 569, 12 *Atl.* 621; 1888, *Elkinton v. Brick*, 44 id. 154, 167, 15 *Atl.* 391; 1892, *Farley v. Farley*, 50 id. 435, 439, 26 *Atl.* 178; *N. Y.*: 1841, *Rensen v. Brinckerhoff*, 26 *Wend.* 323, 339 (attestation-clause is "good presumptive evidence . . . and sufficient to prove the will, if not refuted"; but see *ib. p.* 332); *N. C.*: 1832, *Crowell v. Kirk*, 3 *Dev.* 356, *semble*; *Or.*: 1902, *Skinner v. Lewis*, 40 *Or.* 571, 62 *Pac.* 523, 67 *Pac.* 951; *Pa.*: 1847, *Hays v. Hardin*, 6 *Pa. St.* 409, 412 (attestation is "*prima facie* evidence of execution"; here, of the testator's signing); 1849, *Greenough v. Greenough*, 11 id. 489, 498 (attestation presumes "compliance with the requisitions of the statute"; here, that the testator's name was written by his express direction); 1847, *Barr v. Graybill*, 13 id. 396, 399 ("his memory, in respect of it, was extinct, and he himself legally dead; . . . his attestation would have stood for proof by a witness"; but in this case there was not such a failure of memory); 1850, *Barker v. McFerran*, 26 id. 211, 214 (attestation presumes "everything else necessary to establish the will"; here, that the testator's name was written by his express direction); 1858, *Vernon v. Kirk*, 30 id. 218, 224 (like *Greenough v. Greenough*; attestation implies "that everything else necessary to give the instrument validity existed"; the Court may treat this as a presumption to control the jury); 1865, *McKee v. White*, 50 id. 354, 360 (like *Greenough v. Greenough*); 1867, *Kirk v. Carr*, 54 id. 285, 290 (same); 1867, *Leckey v. Cunningham*, 56 id. 370, 373 ("proof of attestation proves the will"; here, held to imply a signing in the witness' presence); 1868, *Hamsher v. Kline*, 57 id. 397, 402, *semble*; *S. C.*: 1817, *Pearson v. Wightman*, 1 *Mill Const.* 336, 341 (publication may be presumed); 1831, *M'Elwee v. Sutton*, 2 *Bail.* 128, 129 (attestation imports "the testimony which the law presumes him to give"; "the proof of his handwriting after

his death established the deed as a true and genuine paper, on presumptions, 1st, that if it had not been so, he would not have witnessed it, and 2d, that if he had been alive, he would have given all the evidence necessary to support it"); 1839, *Dawson v. Dawson*, *Rice Eq.* 243, 254 ("Attestation is evidence of what it professedly declares"; here an attestation of signing and sealing was held not to imply delivery); 1840, *Edmonston v. Hughes*, *Cheves* 81, 83 (the grantor's "signature, seal, and delivery are proved when the handwriting of the witnesses is proved"); 1892, *Re Brock*, 37 *S. C.* 348, 353 (attestation presumes all essential facts); *St.* 1839, *Gen. St.* 1882, § 1871, *Code* 1902, § 2492 (attestation and testator's signature are *prima facie* evidence "that the testator did execute the will in question in the presence of the witnesses thereto"); *Tenn.*: 1877, *Beadles v. Alexander*, 9 *Baxt.* 604, 609 (attestation raises a presumption of the presence of testator); 1830, *Crane v. Morris*, 6 *Pet.* 598, 616 (*Story, J.*: "[T]here arises" only a presumption of the due execution of the deed from the mere fact that the signature of the witness is to the attestation clause"); *Vt.*: *R. S.* 1839, *Stats.* 1894, § 2363 (the handwriting of the witnesses is usable "where the names of the witnesses are subscribed to a certificate stating that the will was executed as required in this chapter"); 1901, *Claffin's Will*, — *Vt.* —, 50 *Atl.* 815 (the attestation clause is evidence of due execution); *Va.*: 1799, *Bogle v. Sullivant*, 1 *Call* 561, *semble*; 1846, *Pollock v. Glassell*, 2 *Gratt.* 439, 464, *semble* (attestation is evidence of a "compliance with all the circumstances"); *W. Va.*: 1881, *Wehb v. Dye*, 18 *W. Va.* 376, 388 (attestation suffices to show all the requirements of execution); 1898, *Thompson v. Halstead*, 44 id. 390, 29 *S. E.* 991; *Wis.*: 1903, *Gillmor's Will*, 117 *Wis.* 302, 94 *N. W.* 32, 4 *1900*, *Stevens v. Leonard*, 154 *Ind.* 67, 56, *N. E.* 27 ("The witness must be understood to attest, not merely the act of signing, but also the mental capacity of the testator to sign"); 1830, *Scribner v. Crane*, 2 *Palgo* 147, 149 (attestation implies sanity); 1871, *Sellers v. Sellers*, 2 *Heisk.* 430 (same). *Contra*: 1856, *Baxter v. Abbott*, 7 *Gray* 71, 82; 1848, *Flanders v. Davis*, 19 *N. H.* 139, 148 (attestation does not imply testimony to a grantor's sanity). Compare the cases cited *ante*, § 689 (attesting witness qualified to speak to sanity).

⁴ 1838, *People v. McHenry*, 19 *Wend.* 482, 484 (where it appeared that the signature of the debtor was not in his handwriting, the proof of the subscribing witness' signature was held not to imply that the person signing for the debtor had a power of attorney).

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testation-clause expressly stating all the facts; for, in the first place, the sole object of the signature is to attest the facts of execution; secondly, the maker and the witness may not know these facts to be essential or may not suppose it necessary to state them in writing, although the facts have occurred; and, thirdly, experience teaches that, if heed were given to the contrary possibility, more genuine and properly-executed documents would fail of proof than forged or improperly executed documents would be established by proof of the mere signature:

1777, *Lord Mansfield, C. J.*, in *Graft v. Lord Bertie, Peake*, Evidence, 72: "Dadley's [the deceased attesting-witness] hand is proved as evidence of all he would have said if living."

1872, *McCay, J.*, in *Deupree v. Deupree*, 45 Ga. 415, 443: "As a matter of course, the presumption is stronger or weaker according to any material facts connected with the case; and if it was recited, this would strengthen it. But it is a wise rule of law that such a presumption should exist. How many wills do not come up for probate until many years after the execution of them! Sometimes the witnesses can only recognize their own handwriting; sometimes they can only remember the fact that the testator signed, and perhaps only that they signed. Who was present, and all the other details, have passed from memory. To say that under such circumstances the will is not to be probated would be a death-blow to wills. . . . I only say that if the jury had been told there was a presumption of the presence of the testator . . . it is possible they might have come to a different conclusion [than they did here in finding against the will]."

Such seems always to have been the rule in England;¹ and it obtains, with scarcely an exception, in all the American jurisdictions in which the question has arisen.²

¹ 1694, *Dayrell v. Glascock, Skinner* 413 (that a will-witness will not swear to execution, held, not fatal; "if proved to be his hand, and that he set it as a witness to the will, it is sufficient to satisfy the statute"); 1736, *Hauda v. James*, 2 Comyns 331 (the clause did not recite the witnesses' signing in testator's presence; *per Curiam*: "In case the witnesses be dead, . . . the proof must be circumstantial, and here are circumstances: 1. Three witnesses have set their names, and it must be intended that they did it regularly; 2. One witness was an attorney of good character, and may be presumed to understand what ought to be done, rather than the contrary. . . . It being a matter of fact, was proper to be left to them [the jury]"); 1737, *Brice v. Smith*, ib. 539, *Willies* 1 (apparently, similar); 1844, *Burgoyne v. Showier*, 1 Rob. Eccl. 5; 1859, *Thomas' Goods*, 1 Sw. & Tr. 255; 1860, *Trott v. Skidmore*, 2 id. 12; 1890, *Harris v. Knight*, L. R. 15 P. D. 170 (by two judges to one; a probative case for study; *Lopes, L. J.*: "The inference to be drawn in cases of this kind depends upon a number of circumstances peculiar to the cases in which they arise").

The following is apparently the only contrary expression: 1855, *Roberts v. Phillips*, 4 E. & B. 450, 457 (Lord Campbell, C. J.: "What effect then arises from the entire absence of a *testimonium* clause? A *testimonium* clause not being indispensable, we conceive that the absence

of it would only make a difference in the extrinsic evidence which would be required to prove that the witnesses had seen the testator execute the will and that they signed it with the intention of attesting it at his request and in his presence").

² To the following cases, add a few of those noted in the preceding section, where the doctrine is apparently adopted to the present extent: 1900, *Woodruff v. Hundley*, 127 Ala. 640, 29 So. 98; 1898, *Tyler's Estate*, 121 Cal. 405, 53 Pac. 928 (all the statutory requisites presumed); 1838, *Pennei v. Weyant*, 2 Harringt. 501, 506 (attestation implies all necessary formalities; but not ordinarily for a foreign will, where the requirements of execution may differ from those of the forum); 1847, *McDermott v. McCormick*, 4 id. 543 (signature as witness does not imply all the requisites for a will, but does for other documents); 1872, *Deupree v. Denpre*, 45 Ga. 415, 441 (see quotation *supra*); 1860, *Ela v. Edwards*, 16 Gray 91, 97 (mere signature may suffice, if the tribunal is "reasonably satisfied of the fact of a proper attestation from other sources and the circumstances of the case"); 1865, *Eliot v. Eliot*, 10 All. 357 (preceding case approved); 1843, *Chaffee v. Baptist M. C.*, 10 Paige 85, 90, 91 ("the fact of such compliance may be . . . inferred from circumstances"); 1903, *Mendenhall's Will*, — (Or. —, 73 Pac. 1035; 1865, *McKee v. White*, 50 Pa. 354, 359 ("The name of the deceased witness stands for

§ 1513. Same: (2) Must the Maker's Signature or Identity also be otherwise proved? It has often been contended that the signature of the maker also, as well as that of the attester, must be proved. This contention means in effect that another witness to the maker's signature must be called; for (as has just been noted) the attestation is the attester's testimony to the fact of execution, *i. e.* the placing of the signature by the purporting maker. If, then, it is necessary to call a second witness to the maker's signature, this must be on the supposition that the testimony of the attestation, taken alone, does not go far enough in its implied or expressed statements. This is indeed the ground upon which in part the above contention has been rested. It argues, first, that the attestation, while asserting execution by a person of a certain name, does not sufficiently identify that person with the party in the case. It argues, furthermore, from the point of view of policy, that a person might be bribed to make a false attestation to a forged maker's signature, and then to abscond, leaving it feasible to prove the document against a deceased person by establishing the attester's genuine signature. These arguments are presented in the following passages:

1833, *Bayley, B.*, in *Whitelocke v. Musgrove*, 1 Cr. & M. 520: "I always felt this difficulty, that that proof alone [of the subscribing witness' handwriting] does not connect the defendant with the note. . . . What is the effect which, with the greatest degree of latitude can be given to the attestation of the subscribing witness? It is that the facts which he has attested are true. Suppose an attestation of an instrument which describes the person executing it as A. B. of C. in the county of York. Then the utmost effect you can give to the attestation 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, or in some manner establish that he is the person by whom the note appears to be executed. Now what does the subscribing witness in this particular case attest? Why, that this instrument was duly executed by a person of the name of Francis Musgrove. There may be many persons of that name, and if you do not show that the defendant is the Francis Musgrove who executed the instrument, you fail in making out an essential part of what you are bound to prove. It is not sufficient for the subscribing witness merely to prove that he saw the instrument executed. . . . Why? Because it is an essential part of the issue, which you are bound to prove, that the instrument was executed by the defendant in the suit. It seems to me, therefore, on principle, that you must give some evidence of the identity of the defendant with the party who has signed the instrument."

1828, *Porter, J.*, in *Dismukes v. Musgrove*, 7 Mart. n. s. 53, 63: "The only case that can be readily imagined where this rule would produce hardships is that of a stranger, whose handwriting was little known, coming into the country and exacting obligations before witnesses who after his departure died. No general rule can be laid down that will not do injury in some particular cases. But that just spoken of, in our judgment, is nothing in comparison with the danger that might result from sanctioning the other doc-

his solemn declaration that it was executed as it appears; . . . In all such cases, the proof of the signature by the witness proves the instrument"; here held to imply the testator's signature, request, etc.); 1839, *Clarke v. Dunnavant*, 10 Leigh 13, 22, 30 ("all the necessary requisites [may be implied] . . . although the memorandum of attestation is silent as to material ones"; *Brooke, J.*, dissent, except where the witnesses are unavailable; see the quotation

in the preceding section); 1855, *Dean v. Dean*, 27 Vt. 746, 750 (the signature, with no attestation-clause, is evidence "of all those facts which he was required to attest"; but see the statute quoted in the preceding section); 1888, *O'Hagan's Will*, 73 Wis. 78, 82, 40 N. W. 649 (the signature only is sufficient to show due execution). But whether a genuine presumption is raised by the signature alone might be differently decided.

trine. The facility of proving any instrument under it is obvious. Whether forged or not, nothing more is necessary than to procure a non-resident of the State to put his name to it as a witness; and thus, a paper false in itself might be established by proving nothing but the truth in a court of justice."¹

These arguments may be answered as follows. As to the first, it is at least an objection which may equally be made when the attester is called to the stand; for he may have known A. B. to execute the document, but he may not know him to be identical with A. B., a deceased party to the cause. Furthermore, sameness of name is always some evidence, and perhaps even raises a presumption, of identity of person;² so that his attestation-statement that A. B. executed the document is at least sufficient evidence of the identity of that and this A. B. As to the second argument, it is also equally, though not so strongly, available against an attesting witness on the stand; for it is equally possible, though perhaps more difficult, to bribe an attester to give false testimony on the stand to a forged maker's signature. Furthermore, the supposed requirement merely asks that another witness be brought to testify to the maker's signature; yet a proponent who has bribed an attesting-witness and forged a maker's signature will presumably not lack the scruple and the means to supply a false witness to meet this additional requirement. Finally, to fail to impose this requirement, merely relieves the proponent of an extra burden; it does not sanction his supposed forgery, and does not prevent the opponent, any more than before, from exposing the forgery, if it is one. These answers to the above arguments on behalf of such a requirement are in part represented in the following passages:

1808, *Marshall, C. J.*, in *Murdock v. Hunter*, 1 Brockenb. 135, 140: "If the plaintiff, by proving the death and handwriting of the subscribing witness, was only let in to prove the execution of the bond by other testimony, it would seem to be sufficient to prove the death of the subscribing witness and to identify his person by any other proof than that of his handwriting, — as, for instance, that he was the only person of that name in a situation to render it probable that he could have attested the bond. [But] since it is not only necessary to prove the death, but to prove the handwriting of the subscribing witness, it would seem that something further than the mere permission to establish the execution of the bond by other testimony was gained by this proof. This can only be the inference, which is drawn by the law, that if the person who attested the bond was present he could and would prove its execution. . . . It would seem, then, . . . that a naked case, standing singly on this proof, would be in favor of the plaintiff. But this evidence, which is merely circumstantial, may be met by other circumstantial evidence. Whatever deducts from it may and ought to be weighed against it. It is therefore always advisable to support it by other testimony, if such testimony be in the power of the plaintiff. . . . The Court is inclined to the opinion that, in a case unsupported and unopposed by any other circumstance whatever, this proof would be deemed sufficient to establish the execution of the bond."

1838, *Nelson, C. J.*, in *Kimball v. Davis*, 19 Wend. 442: "It seems to me, if proof of the signature of the witness amounts to anything, it must be carried in the first instance as far as an acknowledgment goes; otherwise it affords no evidence of the execution at

¹ Further expositions of the same notion will also be found here and there in the quotations in § 1320, ante; a good opinion is that of Gantt, *J.*, in *Flanck v. Bowman*, 2 McCord 139, 140 (1822).
² Post, § 2523.

all, because so much is essential to make out what the face of the deed purports, or any proof of the execution by the grantor."

These arguments, it would seem, should conclude us against imposing such a requirement as a general rule. The preferable rule is to allow the attester's signature to suffice, in the absence of special circumstances which might justify the trial Court, in its discretion, in exacting something more. At the same time, where the alleged maker is deceased (as in the case of wills), and therefore the counter-proof may likely be less available, it would be proper enough to insist on the present requirement.

So far as concerns the state of the law in the various jurisdictions, the requirement has been by some Courts repudiated; by others sustained; and the jurisdictions are fairly divided on the question; except that statutes almost always sanction the requirement for wills.⁸ Of those jurisdictions

⁸ The rulings in the various jurisdictions are as follows; but the statutes, which in the case of wills often expressly prescribe a rule, have been collected in one place, to avoid repetition, *ante*, § 1320 (where they are involved in the rule of Preferred Attesting Witnesses); the cases on the Presumption from Identity of Name (*post*, § 2529) may also be profitably consulted: *England: ante* 1767, *Buller, Nisi Prius* 171 ("Proof that one who called himself B. executed is not sufficient if the witness did not know it to be the defendant"; said of a witness on the stand); 1779, *Coghlan v. Williamson*, 1 Dougl. 93 (*Mansfield, L. C. J.*, allowed proof of both signatures, but it does not appear that he required it); 1798, *Buller, J.*, in *Adan v. Kerr*, 1 B. & P. 360 ("The handwriting of the obligor need not be proved; that of the attesting witness, when proved, is evidence of everything on the face of the paper; which imports to be sealed by the party"); 1790, *Wallis v. Delancey*, 7 T. R. 266, note (bond executed abroad; Lord Kenyon, C. J., ruled that the handwriting of the obligor as well as of one witness must be proved); 1817, *Parkins v. Hawkshaw*, 2 Stark. 239, *Holroyd, J.* (an attesting witness saw execution by a person introduced as H.; held, further evidence necessary); 1817, *Bayley, J.*, in *Nelson v. Whittall*, 1 B. & Ald. 19, 21 ("If the attesting witness himself gave evidence, he would prove, not merely that the instrument was executed, but the identity of the person so executing it"; and he required the same when the attester's signature was used); 1827, *Page v. Mann*, Moo. & M. 79 (the attesting witness' signature having been proved, evidence that the defendants were the parties whose signature he had attested was held unnecessary; *Tenterden, L. C. J.*, would not follow *Bayley, J.*, in *Nelson v. Whittall*: "The practice has been otherwise; . . . if I am wrong, I may be corrected"); 1828, *Kay v. Brookman*, 3 C. & P. 555, 556 (a power of attorney; *Best, C. J.*: "It has been the uniform practice only to prove the handwriting of the attesting witness, and I am of opinion that it is the most convenient course"); 1833, *White-locks v. Musgrove*, 1 Cr. & M. 520 (*Exchequer*; see quotation *supra*; other evidence of maker's identity required; *Bolland, B.*: "It is a ques-

tion as to which eminent judges have certainly entertained different opinions. It seems clear from the case of *Wallis v. Delancey* that Lord Kenyon was of opinion that such evidence was necessary; and it is clear that Lord Ellenborough had not made up his mind upon the subject, because in *Nelson v. Whittall* he did not take upon himself to say what would be the case if no evidence of identity had been given. The opinion of Lord Tenterden was certainly invariably the other way, and Lord Chief Justice Best acted on the same view of the subject as Lord Tenterden"); 1841, *Jones v. Jones*, 9 M. & W. 75 (*King's Bench*; the attesting witness testified to the maker's signature "High Jones," but could not identify him with defendant, and it appeared that the name was there a common one; further evidence of identity held necessary; *Parke, B.*: "This point must be considered as settled by the case of *Whitlocke v. Musgrove*"); 1841, *Greenhields v. Crawford*, lb. 314 (bill drawn on "Charles Banner Crawford" and accepted "C. B. Crawford"; held sufficient; *Alderson, B.*: "It is quite a different question whether . . . [proof of an attesting witness' signature suffices]; I agree that in such a case there should be some additional evidence"); *United States: Ala.*: 1887, *Snider v. Burks*, 34 Ala. 53, 56, 4 So. 225 (other evidence of testator's signature, not required for wills); 1837, *Smith v. Keyser*, 115 id. 455, 23 So. 149 (witness' signature sufficient; here, a deed); *Del.*: 1837, *Layton v. Hastings*, 2 Harringt. 147 (witness ignorant of the maker's identity, but proving his own signature; proof also of the maker's handwriting, sufficient); *Ga.*: 1849, *Watt v. Kilbourn*, 7 Ga. 356, 358 (witness' signature suffices); 1850, *Settle v. Allison*, 8 id. 201, 206 (same); 1861, *Howard v. Snelling*, 32 id. 195, 202 (other evidence of maker's signature, not required; but here the maker signed by mark); 1893, *McVicker v. Conkle*, 96 id. 584, 586, 24 E. E. 23 (proof of the maker's signature not necessary; but the policy of this doubted by *Atkinson, J.*; the maker's signature held necessary where it was to be used merely as a standard for comparison of hands); *Ill.*: 1851, *Newsom v. Luster*, 13 Ill. 175 ("evidence of the handwriting of both party

sustaining the contention, some require, having respect to the first argument above noted, that other evidence of the maker's identity be offered; some

and witness would be requisite" for documents required by law to be attested); 1895, *Hobart v. Hobart*, 154 Id. 610, 615, 39 N. E. 581 (whether the testator's signature also must always be proved, undecided); *Ind.*: 1828, *Ungles v. Graves*, 2 Blackf. 191 (not decided); *Id.*: 1898, *Scott v. Hawk*, 105 Ia. 467, 75 N. W. 368 (not decided; will); *La.*: 1838, *Dismukes v. Musgrove*, 7 Mart. n. s. 58, 60 (other evidence of maker's signature required); 1836, *Tagliaco v. Mollard*, 9 La. 512, 521 (same; except where the maker signs by mark); 1837, *Madison v. Zahriske*, 11 id. 247, 251 (same); 1847, *Harris v. Patton*, 2 La. An. 317 (approving the preceding cases); 1849, *Rachal v. Rachal*, 4 Id. 500 (not required; preceding cases not noticed); 1850, *Chaffe v. Capp*, 5 id. 664 (required; earlier cases followed with hesitation; rule not applied where the obligor signs by mark); 1851, *Smith v. Gibbon*, 6 id. 664 (not clear); 1854, *Wattles v. Conner*, 9 id. 227 (required; earlier cases followed); 1857, *McGowan v. McLaughlin*, 12 id. 242 (same); *Md.*: 1800, *Collins v. Elliott*, 1 H. & J. 1 (signatures "of the testator and of all the witnesses," required for a will); 1864, *Keefe v. Zimmerman*, 22 Md. 274 (St. 1825, c. 20, making it lawful not to call the attesting witness, does not make proof of the grantor's signature preferable, and allows proof of the witness' signature as before); *Mo.*: 1874, *Gallagher v. Delargy*, 57 Mo. 29, 36 (witness' handwriting, no dispute as to identity, and direct testimony of execution; sufficient); *N. H.*: 1848, *Cram v. Ingalls*, 18 N. H. 613, 616 (for a mortgage, where witnesses are required by law, the grantor's and both witnesses' signatures must be proved); *N. J.*: 1832, *Kingwood v. Bethlehem*, 13 N. J. L. 221, 226 (indenture of apprenticeship; other evidence of the maker's signature required); *N. Y.*: 1800, *Mott v. Doughty*, 1 John. Cas. 230 (bond; the obligor's handwriting need not be proved; here the witness was dead); 1809, *Sinby v. Champlin*, 4 John. 461, 467 (same; here the witness was in foreign parts); 1822, *Jackson v. LeGrange*, 19 id. 386, 389 (will; other evidence of testator's signature required); 1825, *Jackson v. Lagnere*, 5 Cow. 221, 225 (same); 1828, *Jackson v. Vickory*, 1 Wend. 406, 412 (same); 1833, *M'Pherson v. Rathbone*, 11 id. 96, 99 (requirement repudiated for a deed); 1834, *Jackson v. Waldron*, 13 id. 178, 197, per Tracy, Sen. (preceding case approved); 1838, *Kimball v. Davis*, 19 id. 437, 442 (deed; requirement as to maker's identity repudiated; see quotation *supra*); 1840, s. c., appealed, a. v. *Brown v. Kimball*, 25 id. 259, 270, 273 (Verplanck, Sen., in cases where there was "anything to raise a counter-presumption of fraud or even of doubt," required additional evidence of either the signature or of the identity of the grantor; but whether he meant by "identity," the bearing of the signed name by the grantor, or the grantor's identity with another person, was not stated; *Walworth, C., and Edwards, Sen.*, thought proof of the witness' signature

was sufficient; by 11 to 9 the former opinion prevailed); 1844, *Northrop v. Wright*, 7 Hill 476, 493 (preceding case questioned); *N. C.*: 1793, *Nellis v. Brickell*, 1 Hayw. 19 (bond; other evidence of the maker's signature required); 1793, *Jones v. Brinkley*, ib. 20, *semble* (bond; *contra*); 1796, *Irving v. Irving*, 2 id. 27 (bond; like the first case); 1818, *Stump v. Hughes*, 5 id. 93, *semble* (witness' handwriting, and either grantor's handwriting or an admission of signature, or the handwriting of both witnesses, required); *Oh.*: 1824, *Clark v. Boyd*, 2 Oh. 280 (57) ("under proper circumstances . . . either may be sufficient"); 1858, *Richards v. Skiff*, 8 Oh. St. 566 (other evidence not required); *Pa.*: 1810, *Clark v. Sanderson*, 3 Blun. 192, 196 (bill; other evidence of the maker's signature, suggested as desirable but not as settled law); 1815, *Hamilton v. Marsden*, 6 id. 45, 47, 50 (requirement repudiated; here for a lease); 1815, *Powers v. M'Ferran*, 1 S. & R. 44, 46 (requirement repudiated; here for a deed); 1847, *Hays v. Harden*, 6 Pa. St. 409, 412 ("The witness' signature, when it is all that can be had, is an equivalent of the witness' oath; and, being *prima facie* evidence of execution, it is not indispensable that it be followed by evidence of the handwriting of the grantor, obligor, or drawer of a bill or note"; here applied to a will); 1857, *Trause v. Brown*, 31 id. 92, *semble* (same); 1868, *Hamsler v. Kilne*, 57 id. 397, 402 (signature of the witness, with evidence of identity of the maker's name, sufficient); *S. C.*: 1798, *Hopkins v. DeGraffenreid*, 2 Bay 187, 192 (for a "bond or deed," and here for a will, other evidence of maker's signature required); 1803, *Trner v. Moore*, 1 Brev. 236 (release; witnesses absent; proof of their handwriting held sufficient, without proof of the obligor's); 1810, *Shiver v. Johnson*, 2 id. 397 (witness' hand alone, sufficient, even where the maker signs by mark); 1820, *Bnasey v. Whitaker*, 2 N. & McC. 374 (note signed by mark; subscribing witness' signature, sufficient); 1822, *Plunket v. Bowman*, 2 McC. 139 (bond; signature of both witness and maker required for all documents); 1827, *Sims v. DeGraffenreid*, 4 id. 253 (deed; both required); 1840, *Edmonston v. Hughes*, Cheves 81, 83 (other evidence of the grantor's signature not necessary; "but it is usual to prove his handwriting, and where it can be done, it is safest and best to prove it"); 1841, *Trammell v. Roberts*, 1 McM. 305, 307 (both required at common law; here for a note); 1858, *Russell v. Tanno*, 11 Rich. 303, 318 (other evidence of the maker's handwriting or "something else to connect him with the instrument," necessary in addition to the witness' signature; here applied to an assignment; *Plunket v. Bowman* followed); 1859, *Jones v. Jones*, 12 id. 116, 120 (preceding case approved); 1878, *Lyons v. Hohnes*, 11 S. C. 429, 432 (handwriting of the two witnesses to a maker signing by mark, held sufficient, without other evidence of the mark, there being corroborating evidence besides;

require, having in view the second argument, that other evidence of the maker's signature be offered; some, again, require that evidence be offered of either the one or the other; and there are more sub-varieties of rule. In England, there was for a long time a varying practice, until finally a requirement apparently became fixed that other evidence of the maker's identity should be offered. In this country, the requirement, when any has been made, has usually been of other evidence of the maker's signature; though a few Courts have properly left the matter to depend on the circumstances of each case.

Whether the *attester's* signature *must* be proved, or the *maker's alone* suffices, is a different question, involving the rule of Preference for Attesting Witnesses, and has been examined under that head (*ante*, § 1320).

§ 1514. *Attester may be Impeached or Supported like other Witnesses.* Since the attestation is offered as testimonial evidence of the attester speaking at the time of attestation (*ante*, § 1505), his statement, though he himself is not on the stand, may be impeached or supported as any witness' statements may be:

1860, *Whelpiey, J.*, in *Boylan v. Meeker*, 28 N. J. L. 274, 294: "Whenever the attestation is offered in evidence as proof of the execution of the instrument, any evidence which would have been competent against the witness, had he been sworn, will be competent to overthrow the force of his declaration offered in evidence instead of his testimony."

(1) Thus his *moral character* as a witness may be impeached in the way (*ante*, §§ 920, 977) appropriate for an ordinary witness.¹ He may also be impeached by evidence of *bias or interest*,² or of *self-contradictions* or *inconsistencies*,³ or by other appropriate evidence.

Russell v. Tunno not overruled, but regarded as not to be extended; here there was such additional evidence as *Russell v. Tunno* required: 1892, *Martin v. Bowie*, 37 id. 102, 115, 15 S. E. 736 (deed; witness' proof of his own and the maker's signature, not enough; a singular novelty); *Tenn.*: 1850, *Jones v. Arterburn*, 11 *Humph.* 97, 103 ("the signature of the testator, though not absolutely essential, ought to be superadded"); 1855, *Harrel v. Ward*, 2 *Sneed* 610, 612, *semble* (other evidence of the maker's signature not necessary, unless required to prove identity); *Tex.*: 1878, *Gainer v. Cotton*, 49 *Tex.* 101, 118 (not clear); *U. S.*: 1808, *Murlock v. Hunter*, 1 *Brockenb.* 135, 139 (signature of the witness, usually enough; see quotation *supra*); 1823, *Spring v. Ins. Co.*, 8 *Wheat.* 268, 283 (where both are dead, other evidence of the signature of the party is required); 1830, *Walton v. Coulson*, 1 *McLean* 120, 124 (not required, "in ordinary cases"); 1882, *Stebbins v. Duncan*, 108 *U. S.* 32, 2 *Sup.* 313 (on objection that "as the testimony to establish its execution was the proof of the handwriting of subscribing witnesses, it was necessary to prove the identity of the grantor," the identity was then proved by other evidence).

² 1836, *Doe v. Harris*, 7 *C. & P.* 330, *Colebridge, J.* (here for "the attorney who prepared the will"; but the notion in the Court's mind

is evidently the general one); 1868, *Chamberlain v. Torrance*, 14 *Grant Ch. U. C.* 181, 184 (deed attempted to be proved by thirty years' age); *Mo. Pub. St.* 1883, c. 62, § 114 (former testimony of deceased subscribing witness, admissible in certain suits, may be impeached like that of a living witness); 1843, *Lawless v. Guelbreth*, 8 *Mo.* 139, 142; 1903, *Farleigh v. Keiley*, — *Mont.* — , 72 *l'ac.* 756 ("the petitioner may not have the benefit of the testimony of the two witnesses . . . without having such witnesses subject to be discredited"; here, by bad reputation for honesty and integrity); 1842, *Loosee v. Loosee*, 2 *Hill* 609, 611; 1854, *State v. Thomason*, 1 *Jones L.* 274, *semble*; 1848, *Harden v. Hays*, 9 *Pa. St.* 158; 1820, *Gardenhire v. Parks*, 2 *Yerg.* 23. This is of course allowable where the witness is *on the stand*: 1832, *Vandyke v. Thompson*, 1 *Harringt.* 109 (a subscribing witness who merely testifies to execution may be impeached).

Compare the cases cited *ante*, § 68 (character of a third person alleged to have forged a will).

³ 1868, *Chamberlain v. Torrance*, 14 *Grant Ch. U. C.* 181, 184 (bias).

³ The authorities will be found *ante*, § 1033, because the question is complicated by the supposed necessity of inquiring of the witness before proving the inconsistent statement.

(2) The party offering his attestation may in turn endeavor to rehabilitate him, by evidence of his *good character*,⁴ or otherwise, according to the principles applicable to the corroboration and rehabilitation of witnesses (*ante*, §§ 1100-1144).

⁴ 1801, *Doe v. Walker*, 4 Esp. 50, Kenyon, L. C. J. (deceased witnesses to a will; by the testimony of the survivor of three, the conduct of all appeared fraudulent; the good character of the deceased two was admitted); 1829, *Provis v. Reed*, 5 Bing. 435, 438 (deceased attorney who had prepared the will and was attesting witness; good character received in support, after imputations cast upon it; Best, C. J.: "The two decisions which have been cited, one of them from no less an authority than Lord Kenyon, are clearly in point; I have repeatedly tendered such evidence myself in similar cases when at the bar; I have had it tendered on the

other side and have never objected; and the common practice of Westminster Hall has always been to receive it"; Park, J., reaffirmed this, and Burrough, J., referred to *Doe v. Wood*, unreported); 1784, *Com. v. Fairfield*, Mass., Dane's Abr. c. 84, art. 2, § 3, *semble*; 1838, *People v. Rector*, 19 Wend. 569, 580 (good character received, after imputations of fraud); 1823, *Cronse v. Miller*, 10 S. & R. 158 (same); 1839, *Bradde v. Brownfield*, 9 Watts 124 (admissible; but whether merely because he is deceased, or not until his character is impeached, or in what way it must be impeached, does not appear).

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE.

Topic V: REGULAR ENTRIES.

CHAPTER LI.

- § 1517. In general.
- § 1518. History of the Two Branches of the Exception.
- § 1519. Statutory Regulation.

A. REGULAR ENTRIES IN GENERAL.

1. The Necessity Principle.

- § 1521. Death, Absence, etc., of the Entrant.

2. The Circumstantial Guarantee.

- § 1522. Reasons of the Principle.
- § 1523. Regular Course of Business; (1) Business or Occupation.
- § 1524. Same: English Rule; Duty to a Third Person.
- § 1525. Same: (2) Regularity.
- § 1526. Contemporaneous with the Transaction.
- § 1527. No Motive to Misrepresent.
- § 1528. Written or Oral Statement.

3. Testimonial Qualifications, and Other Independent Rules of Evidence.

- § 1530. Personal Knowledge of Entrant; Entries by Bookkeeper, etc., on report of Salesman, Teamster, etc.
- § 1531. Form or Language of the Entry Impaching the Entrant's Credit.
- § 1532. Production of Original Book.
- § 1533. Opinion Rule.

B. PARTIES' ACCOUNT-BOOKS.

- § 1536. In general.

1. The Necessity Principle.

- § 1537. Nature of the Necessity.
- § 1538. Not admissible where Clerk was Kept.
- § 1539. Not admissible for Cash Payments or Loans.
- § 1540. Not admissible for Goods delivered to Others on Defendant's Credit.
- § 1541. Not admissible for Terms of Special Contract.

- § 1542. Not admissible in Certain Occupations.

§ 1543. Not admissible for Large Items, or for Immoral Transactions.

§ 1544. Rules not Flexible; Existence of Other Testimony in Specific Instances does not exclude Books.

2. The Circumstantial Guarantee.

§ 1546. General Principle; Regularity of Entry in Course of Business.

§ 1547. Regularity, as affecting Kind of Occupation or Business.

§ 1548. Same, as affecting Kind of Book; Ledger or Daybook.

§ 1549. Same, as affecting Kind of Item or Entry; Cash Entry.

§ 1550. Contemporaneousness.

§ 1551. Book must bear Honest Appearance.

§ 1552. Reputation of Correct and Honest Bookkeeping.

3. Testimonial Qualifications, and Other Independent Rules of Evidence.

§ 1554. Party's Suppletory Oath; Cross-Examination of Party; Use of Books by or against Surviving Party.

§ 1555. Personal Knowledge of Entrant; Party and Salesman verifying jointly.

§ 1556. Form and Language of Entry; Absence of Entry.

§ 1557. Impaching the Book; Opponent's Use of the Book as containing Admissions.

§ 1558. Production of Original Book; Ledger and Daybook.

4. Present Exception as affected by Parties' Statutory Competency.

§ 1559. Theory of Use of Parties' Books as Hearsay.

§ 1560. Statutory Competency as Abolishing Necessity for Parties' Books; Using the Books to aid Recollection.

§ 1561. Relation of this Branch to the main Exception; Books of Deceased Party; Books of Party's Clerk.

§ 1517. In general. To this Exception there are two branches. Historically, they are separate, yet traceable to a common origin. Theoretically, they are by no means identical, yet closely related in principle. The main branch has a legitimate and living place among the Hearsay Exceptions. The other branch (for parties' account-books) has no longer on the whole any justification for a separate existence, and remains only as a fixed tradi-

tion, surviving, in a form more or less modified by statute, after the reasons for its establishment have passed away. The former involves a general exception in favor of regular entries made in the course of business (but in England only in the course of a specific duty), the entrant being no longer available as a witness on the stand. The latter sanctions the admission of a narrower class of regular entries, *i. e.* made by a party to the suit, whether available as a witness or not. The history of the two branches of the Exception must be considered before examining the tenor and limitations of each.

§ 1518. **History of the Two Branches of the Exception.**¹ (1) (a) First, there appears in *England*, at least as early as the 1600s, a custom to receive the shop-books of "divers men of trades and handicraftsmen" in evidence of "the particulars and certainty of the wares delivered"; and this whether the books were kept by the party himself or by a clerk, and whether the entrant were living or dead. But there was more or less abuse of this evidence, in "leaving the same books uncrossed and any way discharged" and still suing for the claim. Moreover, the whole proceeding was also discredited as involving the making of evidence for one's self, for "the rule is that a man cannot make evidence for himself. In 1609, then, a statute,² after reciting these considerations, forbade this use of parties' shop-books "in any action for any money due for wares hereafter to be delivered or for work hereafter to be done," except (a) within one year after the delivery of the wares or the doing of the work, (b) where a bill of debt existed, (c) "between merchant and merchant, merchant and tradesman, or between tradesman and tradesman," for matters within the trade. The higher Courts, applying the principle that a man cannot make evidence for himself, ultimately made this exclusion complete, by refusing to recognize these books at all, after the expiration of the year.³ In the lower courts, it is true (the Small Causes Court of London and provincial Courts of Request, succeeded by the County Courts), where the jurisdiction was limited to small claims, the use of these books continued to be a common practice, in many if not in all, — where indeed the general rules of evidence were perhaps, in the absence of counsel, more or less relaxed.⁴ But, apart from this local usage, the books of a party ceased after the 1600s to form the subject of a hearsay exception at common

¹ The history of the exception was first expounded by Professor Thayer, in his *Cases on Evidence*, 1st ed., 471 506, 516.

² 1609, St. 7 Jac. I, c. 12, continued by St. 3 Car. I, c. 4, § 22; St. 16 Car. I, c. 4; Rev. St. I, 691.

It would seem, however, that this English statute was merely falling in with a movement which had for a generation been proceeding, all along the line, in other headquarters of the mercantile world. The precise features of the statute, namely, exclusion of mercantile books from evidence above a certain sum and beyond a certain time, are found in numerous Italian and French ordinances of the same epoch, several of which dated between 1575 and 1609 (Pertile, *Storia del diritto italiano*, 2d ed.,

1900, vol. VI, pt. 1, pp. 421, 423); *e. g.* in 1575, "ad fraudem occasiones tollendas, aromstario- rum libris, ultra tres annos fides in judiciis ne habeatur," etc.; in 1582, "s'abbi da dare intera fede in giudizio insino alla somma di 10 scudi."

The practice of receiving the books appears considerably earlier in England, in the ecclesiastical Courts at least: 1552, *Reformatio Legum Ecclesiasticarum*, tit. *De fide*, c. 5.

³ *Cronch v. Drury*, 1 Keble 27 (1661); *Smart v. Williams*, Comb. 247 (1694); *Glynn v. Bank of England*, 2 Ves. 38 (1750); *Lefebvre v. Wordeu*, 2 Ves. 54 (1750); *Digby v. Stedman*, 1 Esp. 328 (1795); *Sikes v. Marshall*, 2 id. 705 (1798).

⁴ Thayer, *ubi supra*, *ex relations an English judge* (Thomas Hughes).

law in England. They came in again only under statutory rules of the late 1800s.⁵

(b) Next, however, it appears that before the end of the same century of the above statute (1600) the entries of a deceased clerk (even a clerk of a party) began to be admitted, on a principle distinctly that of the preceding Hearsay exceptions (*ante*, §§ 1421, 1422), — necessity and trustworthiness. At that time there was hardly a conscious and definite recognition of the scope of the Hearsay rule (*ante*, § 1364), but the idea was the fundamental idea of its exceptions. The admission of these books was treated as anomalous, and it was distinctly understood that their use, though affording some concession to parties, was an essentially different thing from the use of books kept by a living party himself. The cases begin with the 1700s;⁶ *Price v. Lord Torrington* is the one most frequently taken as the landmark of the rule. The attitude of the Courts at this time may be gathered from the following language of Lord Chancellor Hardwicke, in 1750, in *Lefebure v. Worden* :

"It must be admitted that by the rules of evidence no entry in a man's own books by himself can be evidence for himself to prove his demand. So far [nevertheless] 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 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. Farther, 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 far made covered only the books of the clerk of a party. But already there were instances foreshadowing a wider principle. In several rulings, books regularly kept by persons then deceased had been admitted, his death and the regularity of the book being more or less explicitly recognized as the grounds of admission.⁷ Finally, in 1832, in *Doe v. Turford*,⁸ following one or two minor cases, the doctrine was placed on a firm footing, and the general scope of the exception was recognized. It was understood to cover all entries made "by a person, since deceased, in the ordinary course of his business," whether a person wholly unconnected with the parties, or the clerk of a party, or the party himself; and it is this general exception that to-day is universally recognized.

⁵ See the quotations in the next section. Meantime, it is true, there was some recognition in chancery practice: 1828, L. C. Hart, in *Kilbee v. Sneyd*, 2 Moll. Ire. 186, 196 (used by the Chancellor "to inform his mind, although perhaps not absolutely to govern his decision").

⁶ *Pitman v. Maddox*, 1 Ld. Raym. 722 (1698-99); *Price v. Lord Torrington*, 2 id. 873 (1703);

Sir Biby Lake's Case, *Theory of Evidence*, 93 (1761); *Glynn v. Bauk of England*, *supra*; *Lefebure v. Worden*, *supra*.

⁷ *Smart v. Williams*, Comb. 247 (1694); *Woodnoth v. Lord Cobham*, Bunbury 180 (1724); *Sutton v. Gregory*, Peake's Add. Cas. 150 (1797).

⁸ 3 B. & Ad. 890.

(2) (a) The history of the doctrine was widely different in the *United States*. The English statute of 1609, or a similar one, for parties' shop-books, was in force, to a considerable extent, in the Colonies. In the Plymouth Laws, as well as in the later laws of Massachusetts, Connecticut, and other New England States, the use of parties' account-books was limited, but still authorized, by statutes; a special action of "book-debt" was in some places authorized.⁹ In New York and New Jersey the use seems clearly traceable to Dutch practice,¹⁰ which however did not vary in essentials from the English. In most of the jurisdictions (though not in all) the party was allowed and required to verify the accounts by a "suppletory" oath; but in all jurisdictions, though there were practically no limitations of time (as there were in England) to the use of the books, there were many restrictions as to the kind of business, the kind of transaction, and the like, which rested on the same distrust of a party's own evidence and seriously limited the use of the books. But a cardinal feature of the attitude of the Courts, peculiar to the United States, was that the evidence was treated on the same grounds already set forth (*ante*, §§ 1421, 1422) as underlying the Hearsay exceptions generally, — the principles of necessity and of a circumstantial guarantee of trustworthiness. The necessity was the fact that so many small traders, in the then condition of the country, keeping no clerk, and being as parties incompetent to take the stand, were totally bereft of any means of proof except their own extrajudicial statements in these books (*post*, § 1537). The guarantee of trustworthiness was that which we now recognize in the regularity of the entries (*post*, § 1522). What is to be noticed, then, is that the books were received practically on the footing of a special Hearsay exception. By keeping in mind that the party was unavailable as a witness for himself, and that there was thus a necessity for using his past, extrajudicial, *i. e.* hearsay statements, — that in short the judicial attitude was the same to this as to ordinary Hearsay exception, — is easy to follow out the rationalized form which this branch of the exception took, — a form usually, but incorrectly, regarded as merely arbitrary.

(b) At that time (*i. e.* up to the earliest part of the 1800s) no other exception of the sort appears to have been recognized in the United States, — that is, there was no using of regular entries except this limited use of a party's shop-books.¹¹ But a knowledge of the doctrine of *Price v. Lord Torrington* (1703) seems to have been then brought about by the English deci-

⁹ These statutes for the New England Colonies, will be found quoted or cited in Thayer, *ubi supra*, 508, 515. To those citations add, for North Carolina, St. 1756, and for South Carolina, St. 1721 (*post*, § 1519). These early statutes are not here set out, because nothing turns upon their wording; for either (as in New England) the statutes have fallen into desuetude and the rulings of the Courts since the Revolution have become the source of the law, or (as in North Carolina) a modern statute has superseded the early one.

¹⁰ This is pointed out by Mr. Justice Charles

P. Daly, the learned historian of New York, in his *History of the Court of Common Pleas*, in 1 E. D. Smith xxx; also in 4 id. 397. Possibly (on the lines suggested by Mr. Douglas Campbell, in his *Puritans in England, Holland, and America*) the English usage of Elizabeth's time was itself learned from the Dutch merchants.

¹¹ The following belongs under the older tradition: 1792, *Lewis v. Norton*, 1 Wash. Va. 76 (entries in the appellee's "store-books, which were proved to be in the handwriting of one of the appellee's bookkeepers, then dead," admitted).

sions of *Pritt v. Fairclough*¹² and *Hagedorn v. Reid*,¹³ rendered in 1812 and 1813; and shortly after this time two well-considered rulings, following these authorities, established on a firm footing the large and general principle of admitting regular entries by deceased persons, — the cases of *Welsh v. Barrett*,¹⁴ in Massachusetts, in 1819, and *Nicholls v. Webb*,¹⁵ in the Federal Supreme Court, in 1823. In these two decisions the Exception found a recognition entirely independent of the use of parties' books; and it was only in the course of time, especially through Professor Greenleaf's treatment in his work on Evidence, that the two branches of the exception became associated and their analogy recognized. When this relation came to be appreciated, certain difficulties had to be solved; for example, one of the questions presented to American Courts was whether the books of a deceased or an absent party should be treated according to the parties'-books doctrine or from the point of view of the broad and inclusive exception admitting regular entries of deceased persons generally. Another and analogous question was the place to be assigned to books kept by a deceased clerk of a party. These questions concerning the delimitation of the two divisions still trouble the waters of precedent.

By these stages the two parts of the Exception reached their present development in England and in the United States. It will be seen that in England there now exists (apart from statute) only the broad principle admitting regular entries of any sort by deceased persons generally; while in the United States there have grown up two branches, — one, the same general principle, the other, an analogous principle covering parties' account-books only.

§ 1519. **Statutory Regulation.** The main branch of the Exception — regular entries by persons deceased or the like — has seldom been intentionally dealt with in statutes. But the branch applicable to parties' books has been in many jurisdictions the subject of legislation.¹ In England this legislation

¹² 3 Camp. 305.

¹³ 3 Camp. 377.

¹⁴ 15 Mass. 380.

¹⁵ 8 Wheaton 326. There were one or two earlier cases, such as *Clarke v. Magruder*, 2 H. & J. 77 (Md., 1807), and *Sterrett v. Bull*, 1 Binn. 237 (Pa., 1808); but the former two were those chiefly esteemed by other Courts in establishing the doctrine.

¹ The statutes for books of a corporation are noted *ante*, § 1074; ENGLAND: 1883. Rules of Court, Ord. XXX, enacted 1894, Rule 7 ("On the hearing of the summons, the Court or judge may order that evidence of any particular fact, to be specified in the order, shall be given . . . by production of documents or entries in books, or by copies of documents or entries or otherwise as the Court or judge may direct"); Ord. XXXIII, Rule 7 ("The Court or judge," in directing an account, "may direct that in taking the account, the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained"); 1879, St. 42 Vict.

c. 11, Bankers' Books Evidence Act, § 3 (entries in a "banker's book" are to be *prima facie* evidence of "the matters, transactions, and accounts therein recorded"); § 4 (provided the book "was at the time of making the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody of the bank"); CANADA: *Dom. St.* 1900, c. 46, adding § 701a to *Crim. Code* 1892 (in proving the age of a young person, on certain charges, "any entry or record by an incorporated society or its officers having had the control or care" of the person about the time of his being brought to Canada, is admissible, if made before the offence committed); *B. C. St.* 1902, c. 22, § 5 (in actions in a county court for a demand not for tort and not exceeding \$250, the judge "on being satisfied of their general correctness" may receive in evidence "the books of the plaintiff," or for a payment or set-off or counterclaim, those of the defendant); *Man. Rev. St.* 1902, c. 38, § 135 (in any action "for a debt or demand, not being for tort, the judge, on being

has merely restored, in broad and indefinite language, something of the usage which for two centuries had ceased to be a part of the common law. In the

satisfied of their general correctness, may receive in evidence the books of the plaintiff," or, for a set-off or counter-claim or payment, the books of the defendant); *N. Br. Consol. St.* 1877, c. 49, § 91 (on a reference, "the books or writings of either party, or of any person or party represented by him or under whom he claims, may also be used in evidence for or against the party producing them"); *St.* 1895, c. 16 (on an issue as to the estate of a deceased person, "entries in the books of accounts of such deceased persons shall on proof of their being in the handwriting of the deceased or of a clerk who is deceased" be admissible and be *prima facie* proof, if the Court is satisfied "that they were made in the ordinary course of business"); *Newf. Consol. St.* 1892, c. 50, Rules of Court 30, par. 3 (parties' books of account, admissible in certain cases); *St.* 1897, c. 21 (entries in bankers' books made admissible, on certain conditions); *N. Sc. Rules of Court*, 1900, Ord. 32, R. 3 (in directing an account, the judge may direct that "the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence," with liberty to object); *Ont. Rev. St.* 1897, c. 60, § 148 ("in an action for a debt or demand, not being for tort and being under \$25"; the judge may admit the plaintiff's books, and also, for a set-off or payment, the defendant's books); *P. E. I. St.* 1889, § 52 ("Proof of the handwriting of any clerk, shopman, or servant, or other person, of any entry in any original book of entry, and made in the ordinary course of business, stating the delivery of goods, the payment of money, or the performance of labor," shall be evidence thereof, "in the absence from this Province of such clerk," etc., as if he were dead); *UNITED STATES: Ala. Code* 1897, § 1808 ("The original entries in the books of a physician are evidence for him in all actions brought for the recovery of his medical services, that the services were rendered, unless the defendant in open court deny on oath the truth of such entries, but the physician is required to prove the value of such services"; a denial by the opponent's representative may be on belief only); § 1809 ("Books of account kept by a deceased executor, administrator, guardian, or trustee, or entries or memoranda made by him in the course of business or duty, are admissible evidence; and if such book or memoranda be lost, a copy thereof, supported by the oath of the person making it, is admissible evidence"); *Ark. Stats.* 1894, § 2893 ("The regular and fairly kept books of original entries of a deceased merchant or regular trader, or any person keeping running accounts for goods, wares, merchandise, or other property sold or labor done, accompanied by the affidavit of the executor or administrator of such deceased person, or some creditable person for him, setting forth that they are the books or accounts of his testator or intestate, shall be evidence to charge the defendant for the sum therein specified, subject to be repelled by other competent testimony"); § 2894 ("To entitle

the party to introduce such evidence, he must first establish, to the satisfaction of the Court, that the testator or his intestate had the reputation of keeping correct books"); § 2895 (statute not to apply to "hawkers or peddlers"); *Cal. C. C. P.* 1872, § 1946 ("The entries and other writings of a decedent, made at or near the time of the transaction and in a position to know the facts stated therein, may be read as *prima facie* evidence of the facts stated therein, . . . 2, when it [the entry] was made in a professional capacity, and in the ordinary course of professional conduct; 3, when it was made in the performance of a duty specially enjoined by law"; amended by the Commissioners in 1901, by inserting in clause 3, after "law," the words "contract or employment"; for the validity of this amendment, see *ante*, § 488); § 1947 ("When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals"; amended by the Commissioners in 1901, by inserting at the beginning: "Entries in original books of account or other business records, made in the regular and ordinary course of business, and at or near the time of the transaction, may be read as *prima facie* evidence of the facts stated therein, though the person making such entries is not deceased, if it appears that they were made as provided in this section and that they were intended to be correct"; for the validity of this amendment, see *ante*, § 488); *Colo. Annot. Stats.* 1891, § 4817 (when in any civil action "the claim or defense is founded on a book account, any party or interested person may testify to his account-book and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself and are true and just, or that the same were made by a deceased person, or by a disinterested person, a non-resident of the State at the time of the trial, and were made by such deceased or non-resident person in the usual course of trade, and of his duty or employment to the party so testifying"); *Del. Rev. St.* 1893, c. 107, § 11 (a "book of original entries, regularly and fairly kept," offered with plaintiff's oath or affirmation, is admissible to charge the defendant "with the sums therein contained for goods sold and delivered, and other matters properly chargeable in an account," or is admissible, with defendant's oath or affirmation, to establish a set-off; "cash items are not properly so chargeable"; "provided that the party proving his book of original entries shall be subject to cross-examination touching the same and the entries therein and the transactions to which such entries relate"); *Fla. Rev. St.* 1892, § 1120 ("In all suits the shop-books and books of account of either party, in which the charges and entries shall have been originally made, shall be admissible in evidence in favor of such party," the jury to judge of credibility); *Ga. Code* 1895, § 5182 ("The books of account of any merchant, shopkeeper, physi-

New England States, the original colonial statutes fell into desuetude, and the practice was perpetuated by judicial rulings. But in some of the South-

ern, blacksmith, or other person doing a regular business and keeping daily entries thereof, may be admitted in evidence as proof of such accounts, upon the following conditions: 1. That he kept no clerk, or else the clerk is dead or otherwise inaccessible, or for any other reason the clerk is disqualified from testifying; 2. Upon proof (the party's oath being sufficient) that the book tendered is his book of original entries; 3. Upon proof (by his customers) that he usually kept correct books; 4. Upon inspection by the Court, to see if the books are free from any suspicion of fraud"; *Ida. Rev. St. 1897, § 5996* (like *Cal. C. C. P. § 1946*); *Ill. Rev. St. 1874, c. 81, § 3* ("Where in any civil action, suit, or proceeding, the claim or defense is founded on a book account, any party or interested person may testify to his account-book, and the items therein contained; that the same is a book of original entries, and that the entries therein were made by himself, and are true and just; or that the same were made by a deceased person, or by a disinterested person, a non-resident of the State at the time of the trial, and were made by such deceased or disinterested person in the usual course of trade, and of his duty or employment to the party so testifying; and thereupon the said account-book and entries shall be admitted as evidence in the cause"); 1872, *Presbyterian Church v. Emerson*, 66 Ill. 269, 271 ("This section is a repeal of the common-law rule as to the admissibility of an account-book"); 1892, *House v. Beak*, 141 Ill. 290, 297, 30 N. E. 1065 ("Section 3, which was first passed in 1867 (*Laws of 1867, § 3, p. 184*), adds to and enlarges, but does not repeal the common law; a contrary statement made in *Presbyterian Church v. Emerson*, 66 Ill. 269, was mere dictum, and not necessary to the decision of the case"); *Ia. Code 1897, § 4622* (like *Cal. C. C. P. § 1946*, with "or" instead of "and," in the second class of cases); § 4623 ("Books of account, containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances . . . First, the books must show a continuous dealing with persons generally, or several items of charges at different times against the other party in the same book or set of books; Second, it must be shown, by the party's oath or otherwise, that they are his books of original entries. Third, it must be shown in like manner that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof; Fourth, the charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made"); *Kan. Gen. St. 1897, c. 95, § 378* ("Entries in books of account may be admitted in evidence when it is made to appear by the oath of the person who made the entries that such entries are correct, and were made at or near the time of

the transaction to which they relate, or upon proof of the handwriting of the person who made the entries in case of his death or absence from the county"); *Ky. C. C. P. 1895, § 606, par. 7* (quoted *ante, § 488*); *La. Rev. Civ. C. 1888, § 2348* ("The books of merchants cannot be given in evidence in their favor"); *Mich. Comp. L. 1897, § 10192* ("In all trials . . . books of account, containing charges or entries for money paid, laid out, or furnished, shall be received and admitted as evidence, and deemed to be evidence of such charges and entries, and that such moneys were so paid, laid out, furnished, or lent, as is in such books charged or entered, and of the liability of the person charged therefor, in the same manner and to the same extent as books of account containing charges for goods, wares, or merchandise sold and delivered, are received and admitted as evidence of sale and delivery of such goods and merchandise, and of the liability of the person charged therefor; provided, this section shall not apply to cases where persons acting or having acted as commission merchants or agents for the sale of produce, grain, or other property, unless accompanied by a voucher or receipt for the money so claimed to be laid out, lent, or furnished"); *Minn. Gen. St. 1894, § 5738* (party's account-books admissible, when he produces them "and proves that the said books are his books of account kept for that purpose; that they contain the original entries of charges for moneys paid, or goods or other articles delivered, or work and labor or other services performed, or materials furnished; that the charges therein were made at the time of the transactions therein entered; that they were in the handwriting of some person authorized to make charges in said books, and are just and true as the person making such proof verily believes; the witness by whom said books are sought to be proved being subject to all the rules of cross-examination, and said books subject to all just exceptions as to their credibility"); § 5739 ("Where a book has marks which show that the items have been transferred to a ledger, the book shall not be testimony unless the ledger is produced"); § 5740 ("Any entries made in a book by a person authorized to make the same, he being dead, may be received as evidence, in a case proper for the admission of such book as evidence, on proof that the same are in his handwriting, and in a book kept for such entries, without further verification"); § 5741 (where a deposition is used, production of such books to the officer officing, and copies of entries may be attached); *Mo. Rev. St. 1899, § 4652* (quoted *ante, § 488*); *Mont. C. C. P. 1895, §§ 3237, 3238* (like *Cal. C. C. P. §§ 1946, 1947*); *Nebr. Comp. St. 1899, § 5919* (substantially like *Cal. C. C. P. § 1946*, substituting "or" for "and" in the second class, and "presumptive" for "prima facie"); § 5920 (like *Ia. Code, § 4623*, with "or set of books" omitted at the end of the first proviso); *N. M. Comp. L. 1897, § 3031* (in civil causes, "the books of account of any merchant,

ern States new statutes from time to time re-stated the terms of the rule; and in the legislation of many Western States this part of the exception

shopkeeper, physician, blacksmith, or other person doing a regular business and keeping daily entries thereof, may be admitted as proof of such accounts upon the following conditions: First, that he kept no clerk, or else the clerk is dead or inaccessible; Second, upon proof, the party's oath being sufficient, that the book tendered is the book of original entries; Third, upon proof, by his customers, that he usually kept correct books; Fourth, upon inspection by the Court to see if the books are free from any suspicion of fraud"; 1898, *Hyerts v. Robinson*, 9 N. M. 427, 54 Pac. 932 (the foregoing statute supersedes the common law); N. C. Code 1883, § 591; St. 1756, c. 57 (in claims "for goods, wares, and merchandise by him sold and delivered or for work done and performed," on the claimant's oath that the matter is a book account and "that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book," and that "it doth contain a true account of all the dealings or the last settlement of accounts" and that "all the articles therein contained and by him so proved were bona fide delivered, and that he hath given the opposing party all just credits," the book and oath are admissible for articles delivered within two years before action begun, but not "for any greater amount than sixty dollars"); § 592 (similar provisions for an executor, etc., using deceased's book, on oath that "there are no witnesses to his knowledge capable of proving," etc.; the matters to be within three years before suit begun and two years before the death of the deceased); § 593 (a copy of an account may be used instead of the original, unless the opponent has given ten days' notice to produce); *Oh. Annot. Rev. St. 1898*, § 5243, par. 6 (quoted *ante*, § 488); *Okla. Stats. 1893*, § 4277 ("Entries in books of accounts may be admitted in evidence, when it is made to appear by the oath of the person who made the entries that each entry is correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the county"); *Or. C. C. P. 1892*, § 767 (like Cal. C. C. P. § 1946, inserting, after "deceased," "or without the State," and after "writings," "of a like character"); § 768 (like Cal. C. C. P. § 1947); *Pa. St. 1883*, June 22, P. & L. Dig. "Evidence," 39, 40, § 1 ("book entries of any bank or banker doing business at the time" of the evidence required are provable by copy); § 2 (in admitting this copy, "there must be an affidavit or the testimony of an officer of the bank stating that the book is one of the ordinary books of the bank used in the transaction of its business, that the entry is as was originally made at the time of its date, and in the usual course of its business, that there are no interlineations or erasures, and that the copy has been compared with the book, and is a correct copy of the same, and such book shall be open to the inspection of any interested

party"); § 3 (this statute shall not apply to "any suit to which the bank or bankers is a party"); St. 1897, May 25, Pub. L. 82, § 1 ("Hereafter in any suit or action brought in any Court within this commonwealth in which the accounts kept by any common carrier, railroad company, chartered storage or transportation company, or other public corporation doing business within this commonwealth are involved in an issue between other parties, and in the result of which such common carrier, railroad company, chartered storage or transportation company, or other public corporation, has no direct or pecuniary interest, a copy of the books of account of original entry of such common carrier, railroad company, chartered storage or transportation company, or other public corporation, under the oath or affirmation of an officer or employee in charge of the books of such common carrier, railroad company, chartered storage or transportation company, or other public corporation, filed within ten days of the date of the trial or hearing of the issue in said suit or action, shall be and become *prima facie* evidence"); S. C. St. 1721, Gen. St. 1882, § 2228, Code 1902, § 2900 ("Books of original entry kept by farmers and planters relating to the transactions of their farms or plantations shall be receivable in evidence in all trials in which the business or transactions of their farms or plantations shall be called in question, as between the farmer or planter and his employees, in the same manner as books of merchants and shopkeepers are"); St. 1827, G. S. § 2229, Code 1902, § 2901 ("The books of accounts of tavern-keepers, shopkeepers, or retailers of spirituous liquors shall not be admitted, allowed, or received as evidence, in any court having a right to try, the same, of any debt contracted, or moneys due, for spirituous liquors sold in less quantity than a quart"); *Tenn. Code 1896*, § 5562 (in actions for goods sold and delivered or for work and labor, the plaintiff's books of account are to be admissible to prove sale and delivery of "articles not exceeding seventy-five dollars in value, which were delivered within two years before the action brought, if the plaintiff make oath (1) that the matter in dispute is a book account, (2) that he has no means to prove the delivery of such articles as he shall then propose to prove by his own oath, but by his book, (3) that the book contains a true account of all the dealings or last settlement of account between them, (4) that all the articles therein contained and by him so proved were really delivered, and (5) that he has given the defendant all just credits"); § 5563 (a deceased creditor's representative may use the book on swearing (1) that he believes the account just, (2) that there are no witnesses who can prove it, (3) that he "found the book with the account so stated," and (4) that he "knows of no further or other credit to be given"); § 5564 (a copy may be used unless the defendant has given notice, at the time of issue joined, to produce the book); § 5565 (if both parties are deceased per-

was also embodied in statutes. The history of this Western legislation is obscure; but it seems to have come about in general by way of imitation or adaptation of the Southern statutes familiar to many of the early emigrants. Much of it preceded the abolition of parties' disqualification (*ante*, § 577), and was intended to alleviate that rule. The Western legislation, however, was often broader in language than the Southern statutes, which usually did not do much more than perpetuate the original colonial practice with its narrow limitations. Moreover, at the time of the Western enactments, the main branch (or general exception for deceased persons' entries) was already fully recognized by the Courts; so that the language of these statutes often shows traces of this main exception, and in some respects serves to admit evidence which would ordinarily have been already available under the judicial exception. It is therefore sometimes difficult to know whether the statute is to be regarded as merely declaratory of the common law in those respects, or whether it must be taken as a substitute replacing and excluding the common-law principle. Having regard to the history of the parties'-books ex-

sons' representatives, the deceased opponent's book may be admitted to disprove charges); *Utah* Rev. St. 1898, § 3406 (like Cal. C. C. P. § 1946); *Vt.* Stats. 1894, §§ 1237, 1239 (quoted *ante*, § 488); *Wis.* Stats. 1898, § 4186 ("Whenever a party in any cause or proceeding shall produce at the trial his account-books and swear that the same are his account-books, kept for that purpose; that they contain the original entries of charges for goods or other articles delivered, or work or labor or other services performed or materials found, and that such entries are just, to the best of his knowledge and belief; that said entries are in his own handwriting, and that they were made at or about the time said goods or other articles were delivered, said work and labor or other services were performed, or said materials were found, the party offering such book or books as evidence, being subject to all the rules of cross-examination by the adverse party that would be applicable by the rules to any other witness giving testimony relating to said book or books, if it shall appear upon the examination of said party that all of the interrogatories in this section contained are satisfactorily established in the affirmative, then the said book or books shall be received"); § 4187 ("Whenever the original entries mentioned in the preceding section are in the handwriting of an agent, servant, or clerk of the party, the oath of such agent, servant, or clerk may in like manner be admitted to verify the same, and said books shall be testimony" as in § 4186; provided that under neither section shall a book "be admitted as testimony of any item of money delivered at one time exceeding five dollars, or of money paid to third persons, or of charges for rent"); § 4188 (a book with marks showing a posting in a ledger is inadmissible "unless the ledger be produced"); § 4189 ("Any entries made in a book by a person authorized to make the same, he being dead, may be received as evidence in a case proper for the admission of

such books as evidence. Entries in a book or other permanent form, other than those mentioned in §§ 4186 and 4189 b, in the usual course of business, contemporaneous with the transactions to which they relate and as part of or connected with such transactions, made by persons authorized to make the same, may be received in evidence when shown to have been so made upon the testimony either of the person who made the same, or if he be beyond the reach of a subpoena of the trial Court or insane, of any person having custody of the entries and testifying that the same were made by a person or persons authorized to make them in whose handwriting they are, and that they are true and correct to the best of his knowledge and belief. In case such entries are, in the usual course of business, also made in other books or papers as a part of the system of keeping a record of such transactions, it shall not be necessary to produce as witnesses all of the persons subject to subpoena who were engaged in the making of such entries; but before such entries are admitted, the Court shall be satisfied that they are genuine" and fulfil the above rules); § 4189 b ("Whenever any evidence shall be required . . . from the books of any bank or banker doing business at the time," copies of entries are admissible, with a bank officer's affidavit or testimony that the book is "one of the ordinary books of the bank used in the transaction of its business," that the entry "was originally made therein at the time of its date and in the usual course of the business of the bank, that there are no interlineations or erasures, that the book is in the custody or control of the bank"); § 3932 (after the decease of an executor or administrator, his books of account "as such executor or administrator, appearing to have been kept in his own handwriting," are admissible to prove receipts, disbursements, and services); *Wyo.* Rev. St. 1887, § 2590, par. 6 (quoted *ante*, § 488).

ception, it seems safer and more correct, as it certainly is more advantageous, to regard these statutes as intended to enlarge or to replace merely the parties'-books branch of the exception; so that whatever principle there was at common law for the main exception (for regular entries by deceased persons in general) remains unabolished by these statutes. Their clauses, therefore, which deal with such entries of persons deceased or absent, are merely declaratory and cumulative, and the remaining limitations or elements of the main exception at common law, unmentioned in the statute, remain in force as at common law. The result of these statutes, as affecting in general the existence of either of the branches of the Exception, is later dealt with (*post*, § 1561).

The statutes in their details may affect any of the topics of the ensuing sections, particularly in the branch dealing with parties' books. Though they have been collected here at the outset, the common-law limitations examined in the following sections must be understood to be subject to the local control of these statutes.

A. REGULAR ENTRIES IN GENERAL

1. The Necessity Principle.

§ 1521. **Death, Absence, etc., of the Entrant.** On the principle of necessity (*ante*, § 1421), this Exception sanctions the use of statements by persons whose testimony, though not necessarily the sole evidence available on the subject, is yet the only testimony now available from that person. Hence the usual rule applies that the person *must be unavailable as a witness*:

1750, *Hardwicke, L. C.*, in *Lefebvre v. Worden*, 2 Ves. Sr. 54: "On proof that the declarant was dead, such entry has been read; . . . by reason of the difficulty of making of proof in cases of this kind, the Court has gone so far."

1810, *Parker, C. J.*, in *Welsh v. Barrett*, 15 Mass. 380: "The question was thought to fall within the general rule which requires the best evidence the nature of the case admits of. . . . It is analogous to the exceptions to other general rules of evidence."

1823, *Story, J.*, in *Nicholls v. Webb*, 8 Wheat. 326: "It is the best evidence the nature of the case admits of. If the party is dead, we cannot have his personal examination upon oath, and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove facts where ordinary prudence cannot guard us against the effects of human mortality."

As is frequent in these Hearsay exceptions, the principle of unavailability has not been fully and consistently carried out. Certain specific situations have from time to time been ruled upon as sufficient or insufficient.

(1) It is of course at least necessary that the witness should be somehow unavailable. Where the absence of the desired witness is not somehow accounted for (except when a party, under the other branch of the rule), the entries cannot be used.¹

¹ To the following, add the cases *infra*, notes 2-5; 1891, *Terry v. Birmingham N. Bank*, 93 Ala. 608, 9 So. 299 (stock-exchange books excluded); 1896, *Tennessee & C. R. Co. v. Danforth*, 112 id. 80, 20 So. 502 (estimates of cost

by a constructor not accounted for, excluded); 1874, *Bartholomew v. Farwell*, 41 Conn. 109 (requiring the entrant to be produced or shown to be unavailable; on this point overrules *Butler v. Iron Co.*, 1853, 22 Conn. 360, an anomalous

(2) Of the various facts sufficiently excusing from production, *death*, as in other Hearsay exceptions, is the common and universally conceded instance.³ *Insanity* should be equally sufficient.⁴ *Illness* effectively preventing the attendance of the witness should suffice.⁵ *Absence from the jurisdiction* should admit the statements, and this is generally conceded; ⁶ the offeror might in a particular case be required to show the witness' unwillingness to return and testify, or perhaps the inability to obtain a deposition; but this requirement is not sanctioned. The other cases of unavailability may no doubt be presented; to all of them applies the broad language of Chief Justice Shaw: ⁷ "The ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial." In some of the statutes (quoted *ante*, § 1519), other grounds of unavailability are expressly named; occasionally the broad principle is laid down that the statements are usable "if sufficient reason is given" for the entrant's non-production.⁷

The practical impossibility, on grounds of *mercantile inconvenience*, of pro-

ducing) : 1862, *Barnes v. Simmons*, 27 Ill. 512; 1901, *State Bank of Pike v. Brown*, 165 N. Y. 216, 59 N. E. 1 (bank-books excluded, the makers not being accounted for); 1899, *Baird v. Reilly*, 35 C. C. A. 78, 65 U. S. App. 157, 92 Fed. 884 (hospital record by person not called, excluded). The following cases should have been placed on this ground: 1884, *Watrous v. Cunningham*, 65 Cal. 410, 4 Pac. 406 (here the books of account of one L. N., called as a witness, were rejected, but on the absurd ground that "the entries in this book did not bind defendants"; no authority cited).

If the entrant is present in court, he should use the entries to assist his recollection (*post*, §§ 1530, 1560).

³ *Aia.*: 1895, *Sands v. Hammel*, 108 Ala. 624, 18 So. 489; *Conn.*: 1842, *Livingston v. Tyler*, 14 Conn. 498; 1852, *Stiles v. Homer*, 21 id. 511; 1857, *Ashmead v. Colby*, 26 id. 310; 1874, *Bartholomew v. Farwell*, 41 id. 109; *Md.*: 1807, *Clarke v. Magruder*, 2 H. & J. 77; *Mass.*: 1838, *Washington Bank v. Prescott*, 20 Pick. 342; *N. M.*: 1885, *Price v. Garland*, 3 N. M. 289, 6 Pac. 472; *N. Y.*: 1843, *Sheldon v. Benham*, 4 Hill 131; 1865, *Leland v. Cameron*, 31 N. Y. 121; 1876, *Fisher v. Mavor*, 67 id. 77; *Pa.*: 1808, *Sterrett v. Bull*, 1 Bin. 237; 1821, *Patton's Adm'rs v. Ash*, 7 S. & R. 125.

⁴ 1888, *Bridgewater v. Roxbury*, 54 Conn. 217, 6 Atl. 415 (books of a physician, who "had become mentally incompetent to testify," admitted; "it is the same as if he were dead"); 1825, *Union Bank v. Knapp*, 3 Pick. 109.

⁵ In *Taylor v. R. Co.*, 80 Ia. 435, 46 N. W. 64 (1890), where it was a railroad-employee's duty to make an entry of certain things and the entrant was kept away by illness, the entries were rejected; but the opinion does not indicate an apprehension of the real points involved.

⁶ 1833, *North Bank v. Abbot*, 13 Pick. 471; *Shaw, C. J.*: "It was satisfactorily proved, not merely that the witness was out of the jurisdiction of the Court, but that it had become impossible to procure his testimony. We cannot

distinguish this, in principle, from the case of death or alienation of mind. The ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial." *Accord*: 1837, *Moore v. Andrews*, 6 Port. 106 (permanent absence); 1884, *Elliot v. Dycke*, 78 Ala. 157; 1890, *McDonald v. Carnes*, 90 id. 147, 7 So. 919 ("indefinite absence from the State" suffices); 1893, *St. Louis, I. M. & S. R. Co. v. Henderson*, 57 Ark. 402, 21 S. W. 878 (absence from jurisdiction, sufficient; but here no effort had been made to find him, and the entries were excluded); *Cal. C. C. P.* 1872, as amended 1901, § 1947 (regular entries made admissible, "though the person making such entries is not deceased"; see the quotation *ante*, § 1519); 1874, *Bartholomew v. Farwell*, 41 Conn. 109; 1889, *Oliver v. Marks*, 122 Ind. 565, 23 N. E. 1096; 1871, *Karr v. Stivers*, 34 Ia. 125; 1877, *Poor v. Robinson*, 13 Bush 290, 294 ("died or absconded" suffices); 1902, *Cameron Lumber Co. v. Somerville*, 129 Mich. 552, 89 N. W. 346; 1808, *Sterrett v. Bull*, 1 Bin. 237; 1823, *Eims v. Cheirs*, 2 McC. 349; 1896, *Right v. Logan*, 45 S. C. 651, 24 S. E. 56; 1865, *Fennerstein's Champagne*, 3 Wall. 149, *semble*; 1883, *Vinal v. Green*, 21 W. Va. 313 (temporary absence does not suffice). *Contra*: 1793, *Cooper v. Marden*, 1 Esp. 1; 1849, *Browning v. Flanagan*, 22 N. J. L. 567, 572; 1826, *Wilbur v. Selden*, 6 Cow. 163; 1902, *McKeen v. Bank*, — R. I. —, 54 Atl. 49 (account-books of a third person out of the State, excluded; but the Court proceeds also on the ground that the entries must be against interest; this radical misconception of the whole principle of this Exception is scarcely palliated by the circumstance that it rests on a further misunderstanding of Mr. Greenleaf's original language on this point); 1894, *Little Rock Granite Co. v. Dallas Co.*, 13 C. C. A. 620, 66 Fed. 522, *semble*.

⁷ Quoted in note 5, *supra*.

⁸ Applied in *Volker v. Bank*, 26 Nebr. 605, 42 N. W. 732.

ducing all the clerks, salesmen, teamsters, &c. like, who have contributed their knowledge in making up the items. The common accounts is by some Courts recognized as a sufficient ground for non-production; but this ground can better be examined in considering the use of entries resting on the combined knowledge of two or more persons (*post*, § 1530). The policy of these rulings, so far as it exempts from the production of all but one verifying person, on the ground of mercantile convenience, is deserving of common adoption. The general principle should recognize practical inconvenience as an excuse, subject to the judge's discretion to require the entrant's production for cross-examination where the nature of the dispute renders it desirable.

2. The Circumstantial Guarantee of Trustworthiness.

§ 1522. *Reasons of the Principle.* The reasons justifying the admission of this class of statements, untested as they are by cross-examination, have not been as clearly defined by the judges as in other Hearsay exceptions; but they seem fairly clear. They fall within the second general type already described (*ante*, § 1422), *i. e.* the situation is one where, even though a desire to state falsely may casually have subsisted, more powerful motives to accuracy overpower and supplant it. In the typical case of entries made systematically and habitually for the recording of a course of business dealings, experience of human nature indicates three distinct though related motives which operate to secure in the long run a sufficient degree of probable trustworthiness and make the statements fairly trustworthy:

(1) The habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant; and the influence of habit may be relied on, by very inertia, to prevent casual inaccuracies and to counteract the casual temptation to mis-statements. This reason has been referred to in the following passage:

1835, *Tindal*, C. J., in *Poole v. Dicus*, 1 Bing. N. C. 649: "It is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred."

(2) Since the entries record a regular course of business transactions, an error or mis-statement is almost certain to be detected and the result disputed by those dealing with the entrant; mis-statements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification. As a rule, this fact (if no motive of honesty obtained) would deter all but the most daring and unscrupulous from attempting the task; the ordinary man may be assumed to decline to undertake it. In the long run it operates with fair effect to secure accuracy.

(3) If, in addition to this, the entrant makes the record under a duty to an employer or other superior, there is the additional risk of censure and disgrace from the superior, in case of inaccuracies,—a motive on the whole the most powerful and most probable of the three. This reason has been more than once mentioned:

1835, *Tindal, C. J.*, in *Poole v. Dicus*, 1 Bing. N. C. 649: "The clerk had no interest to make a false entry; if he had any interest, it was rather to make a true entry; . . . a false entry would be likely to bring him into disgrace with his employer. Again, the book in which the entry was made was open to all the clerks in the office, so that an entry if false would be exposed to speedy discovery."

1819, *Parker, C. J.*, in *Welsh v. Barrett*, 15 Mass. 380: "What a man has said when not under oath may not in general be given in evidence when he is dead. . . . But what a man has actually done and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury."

1865, *Swayne, J.*, in *Fennerstein's Champagne*, 3 Wall. 149: "The rule rests upon the consideration that the entry, other writing, or parol declaration of the author, was within his ordinary business. . . . In all [the cases] he has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath."

This last motive was most highly thought of in the earlier stages of the exception's history, and in England it has come to be regarded as indispensable.

From these general motives and reasons, forming the policy on which the principle rests, are developed certain specific requirements and limitations.

§ 1523. **Regular Course of Business; (1) Business or Occupation.** The first general requirement is that the entry must have been made in the regular course of business. The judicial phrasings of this requirement vary in terms.¹

The entry must have been, therefore, in the way of *business*. This may be defined to mean a course of transactions performed in one's habitual relations with others and as a natural part of one's mode of obtaining a livelihood. It would probably exclude, for instance, a diary of doings kept merely for one's personal satisfaction; but it would not exclude any regular record that was helpful, though not essential nor usual in the same occupation as followed by others.² There is, therefore, no special limitation as to the *nature of the occupation*.³ Since it is thus not essential that the occupation should be a

¹ 1832, *Doe v. Turford*, 3 B. & Ad. 690 (Parke, J., and Taunton, J.: "in the ordinary course of business"); 1835, *Poole v. Dicus*, 1 Bing. N. C. 649 (Tindal, C. J., "made in the usual course and routine of business"); 1860, *Rawlins v. Rickards*, 28 Beav. 375 (Romilly, M. R., admitting a solicitor's books: "in the exercise of his business and duty, . . . and in the regular course of his business"); 1823, *Nicholls v. Webb*, 8 Wheat. 326 (Story, J., of a notary's book of protests: ". . . an employment in which he was usually engaged; . . . memorandum in the ordinary discharge of their duty and employment; . . . memorandums, made by a person in the ordinary course of his business, of acts which his duty in such business requires him to do for others"); 1844, *Watts v. Howard*, 7 Metc. 481 (Shaw, C. J.: "in the usual and ordinary course of their business, in relation to acts coming within the scope of their authority and duty"); 1848, *Dow v. Sawyer*, 29 Me. 119 ("as he had occasion to make them in the course of his business"); 1865, *Kennedy v. Doyle*, 10 All. 161 ("in the ordinary course of his business

occupation"); 1875, *State v. Phair*, 48 Vt. 378 (Royce, J., "made by him in the regular course of business and it was his business to make them").

² 1876, *Fisher v. Mayor*, 67 N. Y. 77 (Andrews, J.: "It is sufficient if the entry was the natural concomitant of the transaction to which it relates, and usually accompanies it").

³ The following have been admitted: 1816, *Champneys v. Peck*, 1 Stark. 326 (memorandum of delivery of copy of a bill by a clerk who usually made such a memorandum upon the copy kept); 1835, *R. v. Cope*, 7 C. & P. 726 (indorsement of service on an order of the aldermen, the writer's duty being to serve orders and indorse them when served); 1886, *Bridgewater v. Roxbury*, 54 Conn. 217, 6 Atl. 415 (physician's entries of services rendered); 1853, *Sasscar v. Farmers' Bank*, 4 Md. 418 (notary's entries); 1858, *Perkins v. Augusta Co.*, 10 Gray, 324 (certificates of a marine inspector as to a vessel's condition); 1875, *De Armond v. Neasmith*, 52 Mich. 233 (weather-record at an insane asylum); 1894, *Hart v. Walker*, 100 Mich. 406, 410, 59 N. W.

mercantile or industrial one, nor even that it should be a secular one, it follows that a *register of marriages* or the like, kept by a priest or minister, is admissible.⁴ The admission of a non-official marriage-register, however, is not recognized in England, partly because of another principle (*post*, § 1524), nor in some of the American courts; and such books are therefore admissible in those courts so far only as they are made under a legal duty, *i. e.* on the principle of Official Statements.⁵ A *ship's log-book* is admissible under the present exception; but as it is in some jurisdictions required by statute to be kept, it is thus also admissible as an Official Statement.⁶

§ 1524. **Same: English Rule; Duty to a Third Person.** The further limitation exists in England and Canada that there should have been a duty to a third person, in the course of which the report or record was made.¹ A suggestion of this appears in the language of the early American cases;² but, though it did not with us survive, it was in England later emphasized and insisted upon. Its requirements are strict. First, there must have been a *duty to do the very thing recorded*.³ Secondly, there must have been a *duty to record or otherwise report the very thing*.⁴ Thirdly, the duty must have been to record or otherwise report it *at the time*.⁵ This limitation is a reminiscence of the early history (*ante*, § 1517), and is needlessly strict.

§ 1525. **Same: (2) Regularity.** The entry offered must of course be a part of a system of entries, not a casual or isolated one. This is necessarily in-

174 (weather-records kept at an asylum, received); 1899, *Roberts v. Rice*, 69 N. H. 472, 45 Atl. 237 (insurance-agent's register of policies); 1822, *Halliday v. Martinet*, 20 John. 172 (notary's record of protests); 1831, *Nichols v. Goldsmith*, 7 Wend. 161 (cashier's notice of non-payment of note); 1865, *Leland v. Cameron*, 31 N. Y. 121 (entry in a lawyer's record-book of the proceedings in a cause); 1874, *Livingston v. Arnoux*, 56 id. 518 (receipt by a sheriff for money paid by a judgment-debtor in redemption of land sold on execution); 1876, *Fisher v. Mayor*, 67 id. 77 (attorney's books); 1895, *Dickens v. Winter*, 169 1'a. 126, 32 Atl. 292 (time-book of teaming done).

For a notary's entries, see further *post*, §§ 1525, 1675.

For prices current, see *post*, § 1704.

For corporation-books, see *ante*, § 1074.

For surveyors' notes, see further *post*, § 1524, 1566, 1665.

¹ 1865, *Gray, J.*, in *Kennedy v. Doyle*, 10 All. 161 ("An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger, or notary, an attorney or solicitor, or a physician, in the course of his secular occupation").

² The cases are collected *post*, § 1644.

³ The cases are collected *post*, § 1641.

⁴ *England*: 1831, *Chambers v. Bernasconi*, 1 C. & J. 451; on app. 1 C. M. & R. 347; 1843, *R. v. Worth*, 4 Q. B. 132 (rejecting a farmer's book of his farm-laborers' work done, because not "made in the discharge of some duty for which he is responsible"; "actually in the discharge of a duty to another person"); 1887,

Lyell v. Kennedy, 35 W. R. 725; *Canada*: 1877, *O'Connor v. Dunn*, 2 Out. App. 247 (deceased surveyor's notes made as a part of his regular entries, not admitted on the facts); 1883, *Canada C. R. Co. v. McLaren*, 8 id. 564 (engineer's entry in a repairs-book, made in the course of duty after a fire; opinions inconclusive).

⁵ *E. g.* *Story, J.*, in *Nicolls v. Webb*, quoted *ante*, § 1523.

⁶ 1867, *Smith v. Blakey*, L. R. 2 Q. B. 332 (*Blackburn, J.*: "The duty must be to do the very thing to which the entry relates, and then to make a report or record of it"); 1879, *Polini v. Gray*, L. R. 12 Ch. D. 431; 1887, *Lyell v. Kennedy*, *supra*, per *Bowen, L. J.*; 1885, *McGregor v. Keiller*, 9 Out. 677 (deceased surveyor's field notes, not made in execution of a specific duty, excluded).

⁷ 1831, *Chambers v. Bernasconi*, *supra* (rejecting a deputy's return of the place of arrest, because "it may be the duty of the sheriff's officer to make a return to the sheriff that he has made the arrest, but it is not a necessary part of that duty that he should state the particular place of the arrest"; "the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances"); 1867, *Smith v. Blakey*, *supra*; 1879, *Polini v. Gray*, L. R. 12 Ch. D. 420, 426, 431; 1879, *Trotter v. McLean*, L. R. 13 id. 579; 1879, *Massey v. Allen*, ib. 558; 1887, *Lyell v. Kennedy*, *supra*.

⁸ 1867, *Smith v. Blakey*, *supra*; 1879, *Polini v. Gray*, *supra*.

volved in the reasons (*ante*, § 1522) on which the rule is founded. Thus, a single entry in a book, made after it has been closed or put away, or without using it again, or a memorandum casually made, would not answer this requirement.¹ This regularity of the record may be evidenced by inspection of the book; and the fulfilment of this requirement is for the Court to pass upon in each case.²

§ 1526. **Contemporaneous with the Transaction.** The entry should have been made at or near the time of the transaction recorded,¹—not merely because this is necessary in order to assure a fairly accurate recollection of the matter, but because any trustworthy habit of making regular business records will ordinarily involve the making of the record contemporaneously. The rule fixes no precise time; each case must depend on its own circumstances.

§ 1527. **No Motive to Misrepresent.** It is often added that there must have been no motive to misrepresent.¹ This does not mean that the offeror must show an absence of all such motives; but merely that if the existence of a fairly positive counter-motive to misrepresent is made to appear in a particular instance the entry would be excluded. This limitation is a fair one, provided it be not interpreted with over-strictness. The exclusion of the notorious Fleet registers of marriage (*post*, § 1642) illustrates the kind of circumstances that call for the application of this requirement.

§ 1528. **Written or Oral Statement.** That the statement admissible under the present exception must be a written statement has been generally assumed in this country in the judicial phrasings of the rule.¹ In England, however, it seems to be settled that an oral statement is equally admissible.² Since in that jurisdiction the third motive of trustworthiness (*ante*, § 1522) is regarded as most important, and the statement must be made under a duty to a third person (*ante*, § 1524), it may be conceded that an oral statement

¹ 1816, *Dickson v. Lodge*, 1 Stark. 226 (bill of lading signed by a captain, not received to show the shipping of goods for the plaintiff); 1865, *Barton v. Dundas*, 24 U. C. Q. B. 275 (excluding a notice sent in unusual course); 1880, *Lilly v. Larkin*, 66 Ala. 115 (admitting an attorney's indorsement to a note among an administrator's papers, stating the date of the account-settlement); 1893, *Conver v. R. Co.*, 108 id. 330, 18 So. 827 (written report on a railroad accident by an employee to his employer, the maker not being accounted for, excluded); 1873, *Kibbe v. Bancroft*, 77 Ill. 19 (entry made in an account-book not used for ten years, and laid aside in the meantime, excluded); 1874, *Walker v. Curtis*, 116 Mass. 101 (memoranda by a surveyor in the course of his employment on a particular enterprise, admitted); 1901, *Sexton v. Perrigo*, 126 Mich. 542, 85 N. W. 1096 (under Comp. L. § 2635, a deceased notary's certificate of protest is not admissible as a regular entry, when the fact of notice is denied by affidavit); 1897, *Barley v. Byrd*, 95 Va. 316, 28 S. E. 329 (memorandum by Bushrod Washington, as agent for James Wilson, receipting for the possession of a deed; excluded, because not found in a book of "entries

of the daily business regularly made"); 1901, *Kelley v. Crawford*, 112 Wis. 368, 38 N. W. 296 (Stats. § 4189 applied, to exclude entries not shown to be in the usual course of business, etc.).

For stenographic reports of testimony, see *post*, § 1669.

² 1848, *Dow v. Sawyer*, 22 Me. 119.

¹ 1816, *Champneys v. Peck*, 1 Stark. 326; 1832, *Doe v. Turford*, 3 B. & Ad. 890. Compare the citations *post*, § 1550, under the other branch of the exception; 1878, *Ray v. Castle*, 79 N. C. 580.

¹ 1835, *Poole v. Dicus*, 1 Bing. N. C. 649; 1839, *Malone v. L'Estrange*, 2 Ir. Eq. 16; 1879, *Polini v. Gray*, L. R. 12 Ch. D. 430, per Brett, L. J.; 1854, *Lord v. Moore*, 37 Me. 220; 1865, *Kennedy v. Doyle*, 10 All. 161; 1890, *Laasone v. R. Co.*, 66 N. H. 345, 354, 24 Atl. 902.

¹ But see the passage from Swayne, J., in *Fennerstein's Champagne*, *ante*, § 1522.

² 1844, *Lord Campbell*, in *Sussex Peerage Case*, 11 Cl. & F. 113 ("a declaration by word of mouth or by writing made in the course of the business"); 1873, *R. v. Buckley*, 13 Cox Cr. 293 (oral report of a constable).

would be scarcely inferior to a written one in trustworthiness. In this country, however, where that limitation does not obtain, the trustworthiness of an oral statement would seem to be far inferior to that of a written one, especially as affected by the second reason for the rule (*ante*, § 1522). Nevertheless, in the actual conduct of business by subordinates in mercantile or industrial houses (practically the only class of persons by whom oral reports are regularly made), the element of duty (as required in England) does in fact exist; and where it does exist, the case seems a proper one for the adoption of the broader English rule admitting oral statements. Apart from the above considerations, there is no reason for distinguishing between oral and written statements to the disadvantage of the former; no such distinction is made in most of the other Exceptions. In those Courts admitting entries based on joint knowledge (*post*, § 1530) there is in effect an acceptance of oral reports.

3. Testimonial Qualifications, and Other Independent Rules of Evidence.

§ 1530. **Personal Knowledge of Entrant; Entries by Bookkeeper, etc., on report of Salesman, Teamster, etc.** (1) There can be no doubt that the general principle of testimonial evidence (*ante*, § 657) should apply here as elsewhere, namely, that the person whose statement is received as testimony should speak from personal observation or knowledge. This principle has often been invoked in excluding entries made by a person who had no personal knowledge of the supposed facts recorded.¹

(2) But does this principle necessarily exclude all entries made by persons not having personal knowledge of the facts entered? May not this lack of personal knowledge on the part of the entrant be supplemented by the personal knowledge of some other person whose knowledge is in fact represented in the entry? In other words, if the element of personal knowledge can somehow be adequately supplied by a *third person*, it is material that the *entrant himself did not have this personal knowledge*? In order to work out this problem, it is necessary to keep in mind the results already established in connection with the doctrine about memoranda of past recollection (*ante*, § 751). It was there noticed that a memorandum whose correctness was established by composite testimony could be used; for example, if S has made a written memorandum of a transaction done by him, and has

¹ 1873, *Avery's Ex'rs v. Avery*, 49 Ala. 195. Peters, J.: "Such a book must contain the registration of some fact . . . by one who would at the time have been a competent witness to the fact which he registered." *Accord*: 1842, *Batre v. Simpson*, 4 Ala. 312; 1880, *Davis v. Tarver*, 65 id. 102 (entries by a clerk of an alleged lunatic were not admitted to show that the goods received were necessities and were the consideration of a note); 1890, *McDonald v. Carnes*, 90 id. 148, 7 So. 919 ("all matters within the knowledge of the person making the entries"); 1900, *Walling v. Morgan Co.*, 126 id. 326, 28 So. 433 (bank-book containing an account

with W., not admitted on the mere testimony of a cashier who did not keep it or receive or pay the money); 1842, *Livingston v. Tyler*, 14 Conn. 498; 1854, *Lord v. Moore*, 37 Me. 220; 1873, *Chaffee v. U. S.*, 18 Wall. 542 (entries excluded of a collector of freight noting arrivals of whiskey, but made merely on a perusal of the B. L. offered by the ship-captain, who themselves had no personal knowledge that the freight had even been shipped); 1876, *Connecticut M. L. I. Co. v. Schwenk*, 94 U. S. 598 (entry by a lodge secretary of the age of a member, in a minute-book of an Odd Fellows' Lodge, excluded).

given the writing to B, who has copied it and destroyed the original, then if S swears the original to have been accurately made, and if B swears the copy to be correct, the copy produced is thus by their joint testimony rendered an accurate record of the transaction, although B alone has no personal knowledge of the transaction and although S alone does not know the copy to be correct. Furthermore, it was seen to be the generally and properly accepted extension of that doctrine that the same result ensues where S's original statement to B was an oral report, not a written memorandum, as in the typical case of a salesman and a bookkeeper; because in this case S swears that his report of the transaction to B was an accurate statement of what he did, and B swears that his entry was a correct record of what B reported to him; B's written entry thus being in truth a copy of S's report, as effectually as it would have been a copy of a memorandum. Now this doctrine suffices only for cases where both S and B are produced, and by their joint testimony on the stand verify the writing as a memorandum of past recollection (under § 751, *ante*). If either S or B does not come to the stand, then the offer contains an element of hearsay assertion, and therefore the writing can be admissible, if at all, only under the present Exception. Is there any fatal objection in the way of this? By no means. There are three possible situations:

- (1) Suppose B, the *entrant*, to be *deceased*; here, if S, the actor in the transaction, swears to the correctness of his original memorandum or oral report, the element of personal knowledge is sufficiently supplied; and the entry of B is then admissible if it was made in the regular course of business.
- (2) Suppose S, the *transactor*, to be *deceased*, but B, the *entrant*, to swear to the entry as correctly representing B's memorandum or oral report; here B's entry, if based on a memorandum, would be sufficient, as supplying the element of S's personal knowledge, if made in the regular course of business; its production being impossible by destruction, and S being unavailable by decease. If S's statement were an oral report (as often in the case of salesmen, teamsters, foremen, tallymen, and the like), it would be none the less made in the regular course of business; but here, although, as already seen (*ante*, § 1528), the Exception does not ordinarily in the United States cover oral statements, nevertheless the reasons of the Exception (*ante*, § 1522) apply to admit it. In the first place, it is made in the course of a duty to a third person, which in England suffices to admit oral statements; secondly, the immediate reduction to writing by B removes in the main the objections which might otherwise exist to admitting merely oral statements, and brings into play with practically full effect the two reasons already mentioned (*ante*, § 1522) as obtaining for written entries. In short, there is every reason for taking as admissible these oral reports of a deceased person in the regular course of business and duty, supplying the element of personal knowledge, and correctly recorded in the entry sworn to by B.
- (3) Suppose both B and S, *entrant* and *transactor*, to be *deceased*; here

there is presented merely the first and the second cases combined; if we concede admissibility for those two cases, it must be conceded for this also.

One more consideration remains to be noted. The supposition in the above cases was that B or S or both were deceased. But suppose, instead, that S, the salesman, teamster, or the like, is otherwise unavailable; is the result to be any different? It need not be. In the language of Chief Justice Shaw, already quoted (*ante*, § 1521): "The ground is the impossibility of obtaining the testimony, and the cause of such impossibility seems immaterial." Now the ordinary conditions of mercantile and industrial life in some offices do in fact constantly present just such a case of practical impossibility. Suppose an offer of books representing transactions during several months in a large establishment. In the first place, the employees have in many cases changed and the former ones cannot be found; in the next place, it cannot always be ascertained accurately which employee was concerned in each one of the transactions represented by the hundreds of entries; in the third place, even if they could be ascertained, the production of the scores of employees, to attend court and identify in tedious succession the detailed items of transactions would interrupt and derange the work of the establishment, and the evidence would be obtained at a cost practically prohibitory; and finally, the memory of such persons, when summoned, would usually afford little real aid. If unavailability or impossibility is the general principle that controls (*ante*, § 1521), is not this a real case of unavailability? Having regard to the facts of mercantile and industrial life, it cannot be doubted that it is. In such a case, it should be sufficient if the books were verified on the stand by a supervising officer who knew them to be the books of regular entries kept in that establishment, and the production on the stand of a regiment of bookkeepers, salesmen, shipping-clerks, teamsters, foremen, or other subordinate employees, should be dispensed with. No doubt much should be left to the discretion of the trial Court; production may be required for cross-examination, where the nature of the controversy seems to require it. But the important thing is to realize that upon principle there is no objection to regarding this situation as rendering in a given case the production of all the persons practically as impossible as in the case of death.

The conclusion is, then, that *where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present Exception, provided the practical inconvenience of producing on the stand the numerous persons thus concerned would in the particular case outweigh the probable utility of doing so.* Why should not this conclusion be accepted by the courts? Such entries are dealt with in that way in the most important undertakings of mercantile and industrial life. They are the ultimate basis of calculation, investment, and general confidence in every business enterprise; nor does the practical impossibility of obtaining constantly and permanently the verification of every employee affect the

trust that is given to such books. It would seem that expedients which the entire commercial world recognizes as safe could be sanctioned, and not discredited, by Courts of justice. When it is a mere question of whether provisional confidence can be placed in a certain class of statements, there cannot profitably and sensibly be one rule for the business world and another for the court-room. The merchant and the manufacturer must not be turned away remediless because methods in which the entire community places a just confidence are a little difficult to reconcile with technical judicial scruples on the part of the same persons who as attorneys have already employed and relied upon the same methods. In short, Courts must here cease to be pedantic and endeavor to be practical.

In the following judicial passages are expounded some of the reasons that have led Courts to sanction the principles here involved :

1853, *Lumpkin, J.*, in *Fielder v. Collier*, 13 Ga. 499: " Shall the plaintiffs be compelled to go behind the books thus verified by the clerks who kept them, and resort to each of the sub-agents who participated in the transaction and sale of this produce? Are not the entries thus made in the usual course of the business of this extensive trading establishment, and as a part of the proper employment of the witnesses who prove them, not only the best, but the only reliable evidence which it is practicable to secure? We have no hesitation in holding that propriety, justice, and convenience require it to be admitted. The weighers, wharfingers, and numerous subordinates who handled this cotton kept no books. They report to the clerks who keep the books of the concern, and their functions are performed. It is not reasonable to suppose that they can remember the multitude of transactions thus occurring every day. . . . To impose a different rule upon these establishments, whether at home or abroad, and to require them at all times, within the statutory period of limitations, to be prepared with original *aliunde* evidence to prove the terms of sale of all the property consigned to them, each item of expense, etc., would trammel commerce and amount to a denial of justice."

1895, *Thayer, J.*, in *Nelson v. Bank*, 16 C. C. A. 425, 69 Fed. 805 (books of camp-scalers; the scalers measured the logs and entered the amounts on cards; each day these cards were copied into the scale-book; inspectors periodically verified them by measuring a portion of the logs sufficient to test the book's accuracy; the scale-book was sent to the log-owner, and payment made by him on the faith of it to the log-cutters; the inspectors testified to the book's correctness; the opinion quotes from the Court below): " It is said that the camp-scalers should have been hunted up and their testimony introduced. . . . When the scalers made the count and measurement, two records thereof were made, — one in the memory of the scaler, the other in the scale-book. Which is now the best evidence? Years have elapsed. The entries on the scale-book remain unchanged; they are now just what they were when originally made. Can the same be said of the record made upon the memory of the scalers? If the scalers had been produced and had testified that . . . as they now remembered it the number and quantity were so and so, but upon the production of the scale-books they showed a different quantity and measurement, which should control? . . . It cannot be maintained that there is more reliable evidence than the scale-book.' For the reasons so well stated by the trial judge, we entertain no doubt that the scale-books in question were properly received in evidence. They appear to have been kept under conditions that were calculated to prevent mistakes therein, and to ensure a high degree of accuracy. They were also identified by witnesses who were familiar with their contents, and whose special duty it was to see that they were properly and accurately kept."

1902, *Wilkes, J.*, in *Continental National Bank v. First National Bank*, 108 Tenn. 374, 68 S. W. 497 (holding a bank's books sufficiently verified by the cashier, without

calling the bookkeeper): "We think it not necessary that the bookkeeper who made the entries should be examined as to their correctness. At most he could only testify that the entries made by him are true entries of transactions reported to him by others. In other words, he could only testify that he wrote down what others told him. The Court knows, as a matter of common information, that there are many persons in the employ of banks, and each has his different department, and each transaction passes through the hands of several — it may be, of many — persons. We take a deposit, for instance. It goes into the hands of the receiving teller, thence into the hands of a journal clerk, thence to the individual bookkeeper, or such other officials as perform the functions of these officers. When it reaches the hands of the bookkeeper, who makes the final entry, which stands as the true statement between the bank and depositor, it has gone through the hands of a dozen parties, perhaps; and the last party only records what comes to him through so many hands, and knows nothing, it may be, of the actual transaction. It would seem that the cashier, whose function it is to overlook all transactions at the counter and over the books, and test each transaction through all its stages, would be the person most competent to produce the books and vouch for their accuracy."

The rulings upon the subject are, as may be imagined, not harmonious.

(a) There are, first, a number of decisions accepting with practical completeness the conclusion above reached, *i. e.* in given cases admitting verified regular entries without requiring the salesman, time-keeper, or other original observer having personal knowledge, to be produced or accounted for.²

(b) There are rulings admitting verified regular entries after a showing that the original observer was deceased; possibly absence from the jurisdiction, insanity, or the like, would equally have sufficed.³ (c) There are rulings

² 1892, *U. S. v. Cross*, 20 D. C. 379 (the marshal's office kept a record of measurements of convicted persons, the clerk writing down the measurement as called out by the subordinate taking it; the clerk C. alone was called; Cox, J.: "It was said that it was hearsay on the part of Carroll, because he did not take the measurement. . . . In a complicated transaction in which two persons participate, we do not think it is essential that each one should have personal knowledge of all the steps in the transaction. For example, a merchant in his store selling goods calls out the price and the character of his goods, and his clerk writes them down; that is in the regular course of business; and it would not be necessary that the clerk should follow the merchant around and have a personal knowledge of all that passed between him and his customer"); 1853, *Fielder v. Collier*, 13 Ga. 496, 499 (see quotation *supra*); 1880, *Schaefer v. R. Co.*, 66 id. 39, 43 (witness making records of receipts and shipments of cotton by his subordinates in the office; admitted, without accounting for the others, on the ground of public convenience; following *Fielder v. Collier*); 1896, *Chisholm v. Machine Co.*, 160 Ill. 101, 43 N. E. 796 (workmen made out time-slips of work done, foreman examined and checked them, and bookkeepers entered them in time-books, errors being checked and corrected throughout; the bookkeepers testified to the correctness of the books, and the foreman the slips, but not the workmen; the books were held admissible); 1893, *Donovan v. R. Co.*, 158 Mass. 450, 452, 33 N. E. 583 (train-

sheet, made up by combined reports of operators at various stations, and showing whereabouts of trains; received on verification by the collector, without accounting for operators); 1895, *Neison v. Bank*, 16 C. C. A. 425, 69 Fed. 805 (see quotation *supra*); 1898, *Northern P. R. Co. v. Keyes, C. C.*, 91 Fed. 47 (tables of railroad business prepared under direction of general officers by 40 or 50 clerks; officers called, but clerks not called, though available and willing to testify; admitted; good opinion); 1902, *Continental Nat'l Bank v. First Nat'l Bank*, 108 Tenn. 374, 68 S. W. 497 (bank account-books held to be sufficiently verified by the cashier, without calling the bookkeeper; see quotation *supra*); 1903, *United States v. Venable C. Co.*, C. C., 124 Fed. 267 (a constructing engineer's tables of work and materials, based chiefly on the regular written reports of numerous subordinates, admitted, without calling the latter); 1897, *Dohmeu Co. v. Ins. Co.*, 96 Wis. 38, 71 N. W. 69 (to show the amount of goods on hand, a set of books properly verified by the bookkeeper and the manager of the business, held admissible, though neither has actual knowledge of the specific transactions; the opinion specifies in full certain conditions, and is worth careful reading); Wis. Stats. 1898, § 4189 (quoted *ante*, § 1519).

³ 1897, *Stanley v. Wilkerson*, 63 Ark. 556, 39 S. W. 1043 (salesmen's books were burned and the salesman deceased; journal and ledger copies, verified by the bookkeepers, were admitted); 1902, *Meyer v. Brown*, 130 Mich. 449, 90 N. W. 285 (record of car-weights, testified to

excluding such entries because the original observer was in no way accounted for, or declaring that he must be produced, without deciding what excuse, if any, for non-production would suffice.⁴ (d) Finally, a few rulings inexorably exclude such entries even where the original observer is accounted for as absent from the jurisdiction, or the like, *i. e.* declining to excuse his non-production on such grounds, and thus inconsistent with the general principle (*ante*, § 1521).⁵

§ 1531. *Form or Language of the Entry; Impeaching the Entrant's Credit.* Apart from the general rule, already dealt with (*ante*, § 1528), that the statement must be in writing, there is no limitation as to the mode of written expression. Any *mark* or sign that is interpretable as having a definite meaning will suffice.¹ The *absence of an entry*, where an entry would naturally have been made if a transaction had occurred, should ordinarily be equivalent to an assertion that no such transaction occurred, and therefore should be admissible in evidence for that purpose;² the same question arises for other kinds of evidence (*post*, §§ 1556, 1639).

by the weighmaster, admitted without calling the weigher, the original card being lost and the weigher's identity impossible to ascertain); 1823, *McNeill v. Elam*, Peck Tenn. 268 (deceased notary made protests and notices, and his daughter entered them under his instructions; admitted; whether the daughter was called does not appear); 1896, *American Surety Co. v. Pauly*, 18 C. C. A. 344, 72 Fed. 470 (a ledger of receipts and payments kept by the bookkeeper of a bank, from checks and deposit-tags handed him by the teller, and representing the moneys received and paid out by the teller; the teller being dead, the bookkeeper verified his entries, which were received to show the amounts received and paid out by the teller).

⁴ 1869, *Leslie v. Hanson*, 1 Han. N. Br. 263 (book made from numbers marked by different persons on logs sawn, not admitted, in the absence of satisfactory testimony from all the persons who had measured and marked the logs); 1899, *Butler v. Estrella R. V. Co.*, 124 Cal. 239, 56 Pac. 1040 (salesbooks kept by witness from report of manager not called, excluded); 1902, *Whitley Grocery Co. v. Roach*, 115 Ga. 918, 42 S. E. 282 (an inventory made by three persons, one or two examining the articles and one or two entering the items, but only two of the three testifying, held not admissible); 1902, *Meadows v. Frost*, 110 Ill. 1002, 42 S. E. 390 (books kept by one who merely copied slips handed to her by another person not called, held inadmissible); 1898, *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 Ill. E. 713 (book kept by a desk-sergeant of police made from reports of accidents by other policemen based on hearsay, excluded; properly correctly, because the policemen themselves had not personal knowledge); 1857, *White v. Wilkinson*, 12 La. An. 360 (bookkeeper and salesman; apparently oral reports by the latter); 1897, *Swan v. Thurman*, 112 Mich. 416, 70 N. W. 1023 (books testified to by a bookkeeper, who made the entries upon the salesman's reports; excluded, as not founded upon personal knowl-

edge); 1901, *Carlton v. Carey*, 83 Minn. 232, 86 N. W. 85 (book made up by A on information furnished by memoranda from a workman B, excluded, as not based on personal knowledge; but here neither A nor B was called or shown to be unavailable); 1903, *Price v. Standard L. & A. Ins. Co.*, — id. —, 95 N. W. 1118 (hospital register, with entries by a superintendent based on reports of a physician, but verified by the former only, without calling the latter, excluded); 1896, *New Jersey Zinc & I. Co. v. L. Z. & I. Co.*, 59 N. J. L. 189, 35 Atl. 915 (bookkeeper's entries of deliveries of which he knew nothing, excluded); 1886, *Mayor of New York v. R. Co.*, 102 N. Y. 572, 7 N. E. 905 (sub-foreman's oral reports to foreman); 1894, *The Norma*, 15 C. C. A. 553, 68 Fed. 509 (foreman and bookkeeper); 1894, *Tingley v. Land Co.*, 9 Wash. 34, 42, 36 Pac. 1098 (entries in book made by witness from memoranda partly by scalers of logs, excluded).

⁵ 1854, *Kent v. Garvin*, 1 Gray 150 (drayman orally reporting to clerk, the former being in California); 1894, *Chicago Lumber Co. v. Hewitt*, 12 C. C. A. 129, 64 Fed. 314 (tallies of logs reported in writing by F., copied by M.; F. had disappeared, through what the Court considered the negligence of the party offering the books).

For the same question arising for *parties'* books, see *post*, § 1555; the cases are not usually discriminated, and indeed involve the same principle.

² 1833, *North Bank v. Abbot*, 13 Pick. 471. Compare the same principle applied to *parties'* books, *post*, § 1556.

³ 1886, *Bridgewater v. Roxbury*, 54 Conn. 217, 6 Atl. 415 (*said obiter*); 1896, *State v. McCormick*, 57 Kan. 440, 46 Pac. 777 (a book of depositors, admitted to show that J. was not a depositor); 1901, *Bastrop State Bank v. Levy*, 106 La. 586, 31 So. 164 (bank's deposit-entries, held evidence that no other sums than there recorded had been received by it). *Contra*: 1903, *Vandyke v. R. Co.*, — Ky. —, 71 S. W.

The rules for *impeaching the credit* of the entrant would presumably be those accepted for parties' books (*post*, § 1557).

§ 1532. **Production of Original Book.** The general rule requiring the production of the original of a writing (*ante*, § 1179), applies no less to entries offered under this Exception than to other writings;¹ but the rule is of course satisfied where the original is accounted for as lost or otherwise unavailable.² As between different kinds of account-books, — a ledger, a journal, and the like —, the question will arise which of them is to be considered as the original; and upon this point the rules developed for parties' books (*post*, § 1558) would presumably be regarded as here applicable.

§ 1533. **Opinion Rule.** The Opinion rule (*post*, § 1917) doubtless applies in theory to this class of testimonial evidence as to others. But as the entrant is not before the Court, being deceased or otherwise unavailable, the rule will usually not properly exclude the entry, since (as already noted for Dying Declarations, *ante*, § 1447, there is no opportunity by questions to obtain from the witness the data of bare facts separated from his inference or opinion thereon. To apply the much misused Opinion rule in this connection can hardly ever be justified.³

B. PARTIES' ACCOUNT-BOOKS.

§ 1536. **In General.** The history (*ante*, § 1518) of that branch of the Exception which admits parties' account-books or shop-books gave to it a development and a series of precedents distinct from that of the general Exception. Nevertheless, the principles upon which this branch was developed in the Courts of the United States show equally a recognition of the two traditional features of hearsay exceptions in general, namely, the Necessity principle (*ante*, 1431), and the Circumstantial Guarantee of Trustworthiness (*ante*, § 1422). The application of the principle of necessity lay in this, that since a party was disqualified as a witness for himself, and since in certain classes of transactions he was thus totally without evidence obtainable from others, certain past statements of his must be admitted by very necessity. Moreover, his own shop-books were regarded as being more or less trustworthy, for reasons analogous to those already examined (*ante*, § 1522). Thus, the principle of necessity and the principle of a circumstantial guarantee were both recognized; and the case stood on the ordinary footing of an exception to the Hearsay rule, without reference to other specific exceptions. When parties were made competent, on their own behalf, a main reason —

441 ("usually admitted only as affirmative evidence"); 1860, *Sanborn v. Ins. Co.*, 18 Gray 448, 452, 455 (absence of an entry in a risk-book regularly kept, not received to show that the contract was not made).

¹ 1859, *Churchill v. Fulliam*, 8 Ia 45; 1879, *Peck v. Parchen*, 52 id. 46, 54, 2 N. W. 597; 1828, *Herring v. Levy*, 4 Mart. n. s. 336.

² 1831, *Holmes v. Marden*, 12 Pick. 171 (original burned); 1896, *Rigby v. Logan*, 45

S. C. 851, 24 S. E. 58 (ledger admitted, the original entry being burned); 1873, *Barton v. Driggs*, 20 Wall. 135 (original out of the jurisdiction).

Consult the rules and citations *ante*, §§ 1192-1230.

³ 1888, *Bradford v. S. S. Co.*, 147 Mass. 57, 16 N. E. 719 (report of an appraiser, made in the regular course of employment, stating the amount of damage, excluded).

the necessity — disappeared ; but the form of the rule was established before this change was made ; and its limitations can therefore be understood only by keeping in mind that the original attitude of the Courts in establishing it was precisely analogous to their attitude towards other Hearsay exceptions.

It may be noted here that in a few jurisdictions this branch of the Exception was never judicially recognized,¹ apart from modern statutes.

1. The Necessity Principle.

§ 1537. *Nature of the Necessity.* The foundation of the admission of parties' shop-books or account-books in the United States was a necessity, resting in two circumstances ; first, the disqualification of the party to take the stand as a witness, and, secondly, the conditions of mercantile and industrial life in the early days, which left the party generally without other evidence than his own statements in the books. This appears in the language of the judges in all the jurisdictions and epochs ; and the specific rules of limitation grew directly out of this living principle :

1808, *Tilghman, C. J.*, in *Starrett v. Bull*, 1 Binn. 237 : " In consideration of the mode of doing business in the infancy of the country, when many people kept their own books, it has been permitted from the necessity of the case to offer these books in evidence. . . . No such necessity exists when the fact is that clerks have been employed and the entries made by them."

1810, *Swift, C. J.*, Conn., Evidence, 81 : " This provision of the statute is grounded on the necessity of the thing ; for in many instances it would be very difficult to obtain other or better proof."

1816, *Parker, C. J.*, in *Faxon v. Hollis*, 13 Mass. 427 : " [The exception] is necessary for the security of tradesmen and small dealers, who are generally unable to support clerks on whose testimony they might establish their claims."

1838, *Hitchcock, J.*, in *Cram v. Spear*, 8 Hamm. 497 : " The mischief to be remedied was the extreme difficulty, and in many cases the utter impossibility of proving the quantity, quality, or delivery of articles passing from one person to another upon credit and which are ordinarily charged upon book. The merchant does not always keep a clerk by whom this proof could be made ; the farmer or mechanic rarely if ever. Hence the necessity of the statute."

1882, *Devens, J.*, in *Pratt v. White*, 132 Mass. 477 : " It has been sanctioned as an exception to the general rule of law, as it formerly existed, that a party should not be a witness in his own cause, and from supposed necessity in order to prevent a failure of justice, that he shall be allowed to produce the record of his daily transactions, to many of which, on account of their variety and minuteness, it cannot be expected there will be witnesses."

1892, *Andrews, J.*, in *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54 : " It was founded upon a supposed necessity, and was intended for small traders who kept no clerks."¹

What, then, were the specific rules of limitation growing out of this principle of necessity ?

¹ *Ala.* : 1842, *Nolley v. Holmes*, 3 Ala. 642 ; 1845, *Grant v. Cole*, 8 id. 521 ; 1846, *Turnipseed v. Goodwin*, 9 id. 378 ; 1873, *Avery's Ex'rs v. Avery*, 49 id. 195 ; *Fla.* : 1852, *Higgs v. Shehee*, 4 Fla. 385 ; *Ind.* : 1836, *De Camp v. Vandegrift*, 4 Blackf. 272 ; *La.* : 1844, *Martinstein v. Creditors*, 8 Rob. 8 ; *Md.* : 1833, *Owings v. Low*, 5

G. & J. 142 ; *Mo.* : 1855, *Hisarick v. McPherson*, 20 Mo. 310.

² *Accord* : 1860, *Landis v. Turner*, 14 Cal. 575 ; 1825, *Beach v. Mills*, 5 Conn. 496 ; 1832, *Terrill v. Beecher*, 9 id. 348 ; 1833, *Dunn v. Whitney*, 10 Me. 14 ; 1852, *Cole v. Dial*, 8 Tex. 349.

§ 1538. **Not admissible where a Clerk was Kept.** The party must have been his own bookkeeper;¹ moreover he must have had no clerk helping him;² for if he had, the clerk could be called if living, or, if deceased, his book-entry could be used.

This limitation has been enforced even in recent times. But the tendency has been to lose sight of it,—a result partly due to the legislation on the subject (*ante*, § 1519), which in many jurisdictions has expressly provided in the same statutory passage for the admission of a party's books and also of books kept by a deceased clerk. Now the entries of a clerk were already admissible at common law, either as memoranda of a past recollection verified by the clerk on the stand (*ante*, § 745), or, the clerk being deceased or otherwise unavailable, as regular entries in the course of business, under the main Exception just treated (*ante*, §§ 1521-1529). The result, then, of the statutory enactments, so far as entries by a clerk are effected, is left uncertain. Either it may be thought that the statute merely sanctioned in part the common-law exception for regular entries by a deceased person; or it may be thought that the statute abolished for parties' books the limitation to persons having no clerk and acting as their own bookkeepers. The latter would be the more natural inference, and would involve less doubt and confusion as to the effect of the change.³ Nevertheless, the limitation in some statutes to clerks deceased or absent is inconsistent with this interpretation. The truth is that the statutory enactments often leave it impossible to say what is the precise significance of the change. It hardly matters, for the books of the clerk, living or dead, are available in any event, in the modes above noted.

§ 1539. **Not admissible for Cash Payments or Loans.** On the same principle of necessity, it was usually held that entries of cash payments or loans could not be used; because notes or receipts would have been or ought to have been taken, and thus other evidence would be extant:

1852, *Potts, J.*, in *Instee v. Prall's Executor*, 23 N. J. L. 463; *Potts, J.* (rejecting a series of cash entries): "We must endeavor to solve the question by a resort to first principles. . . . The consideration of necessity introduced the rule in reference to the

¹ 1871, *Kerr v. Silvers*, 34 Ia. 125. *Contra*: 1882, *McGoldrick v. Traphagen*, 88 N. Y. 334, 338 (lack of a "clerk" does not mean lack of a mere bookkeeper, but of "one who had something to do with and had knowledge generally of the business of his employer with reference to goods sold or work done, so that he could testify on that subject. . . . and thus is able to prove an account"; two judges diss.).

² *Cal.*: 1860, *Landis v. Turner*, 14 Cal. 576; 1886, *Watrous v. Cunningham*, 71 id. 32, 11 Pac. 811; *Mich.*: 1860, *Jackson v. Evans*, 8 Mich. 476, 481; *Ill.*: 1841, *Boyer v. Sweet*, 3 Scam. 122; 1859, *Waggoman v. Peters*, 22 id. 42, *semble*: 1869, *Ruggles v. Gattou*, 50 Ill. 416; *Me.*: 1833, *Dunn v. Whitney*, 10 Me. 14; *N. Y.*: 1815, *Vosburgh v. Thayer*, 12 John. 461; 1834, *Linnell v. Sutherland*, 11 Wend. 568; 1838, *Sickles v. Mather*, 20 id. 74; 1900, *Smith v.*

Smith, 163 N. Y. 168, 57 N. E. 300 (but a wife is not a clerk). *Contra, semble*: 1831, *Martin v. Effe*, *Dudley Ga.* 16.

In the following cases entries actually made by clerks were treated as the party's: 1845, *Littlefield v. Rice*, 10 Metc. 209; 1854, *Rhoads v. Ganl*, 4 Rawle 307; 1841, *Cummings v. Fulam*, 13 Vt. 439.

Of course if there is a clerk, who made the entries, he may take the stand and use them as his own memoranda of recollection; 1853, *Humphreys v. Spear*, 15 Ill. 275; and cases cited *post*, § 1561.

³ 1892, *House v. Beak*, 141 Ill. 290, 297, 30 N. E. 1063 ("It was not the intention of the statute to prohibit the introduction in evidence of books of account kept by a clerk," if living in the State and able to testify). Compare § 1561, *post*.

admission of books of account. . . . I hold, first, that there is not and never was a necessity for making books of entry evidence of the payment or the lending of money. There is no such great and overruling amount of inconvenience in requiring that men should take a receipt for money when they pay it, or a note or memorandum for money when they lend it, as that the safe, sound principle of legal evidence should be overturned on account of it. It is the ordinary mode in which all careful, prudent men transact such business."¹

Nevertheless, a few Courts, while applying the same principle, have regarded it as leading to the opposite result, *i. e.* they have thought that there is as much necessity for admitting cash entries as for admitting others:

1858, *Lumpkin, J., in Ganahl v. Shore*, 24 Ga. 24: "In the nature of things no such principle can be maintained. . . . The business of banking is confined almost entirely to money items; so of the books of factors and commission merchants; so of brokers. Large pecuniary advances are made by commission houses to planters, in anticipation of crops; the customer sends an order for a thousand dollars; it is forwarded and charged to the planter's account; true, the factor has the written order, but the cash advanced depends upon the evidence of his books. Whatever doctrine may have obtained formerly upon this subject, the world is too much in a whirl, there is too much to be done in the twenty-four hours now, to allow of the partiality and consequent delay in the obtaining of receipts, etc. . . . He that so affirms [the rejection of money items] is half a century behind the age in which he lives; and to get up with it, he must forget the things that are behind, and press forward, for it will never stop or come back to him."

1822, *Kirkpatrick, C. J., in Wilson v. Wilson*, 1 Halst. 99: "Upon principle I can see no reason why a book should be lawful evidence of one item and not of another; why it should be evidence of goods sold and delivered, and not of money paid or advanced. Why should there be witnesses called or receipts taken in the one case more than in the other? If necessity be pleaded for the one, may it not for the other also? For they are both transactions in the common course of business, equally necessary and, I should think, equally frequent or nearly so."²

In many Courts, the use of cash entries is commonly considered, not from the present point of view, but from that of the principle of regularity in the course of business; and cash entries are admitted or excluded according as they are thought to fulfil that principle or not (*post*, § 1549).

§ 1540. **Not admissible for Goods delivered to Others on the Defendant's Credit.** Entries of goods delivered to third persons but charged to the

¹ *Accord*: 1861, *Bank v. Plannett*, 37 Ala. 222, 226 (excluded, where the bank's custom was "to pay out moneys on the checks of its depositors, and not otherwise"); 1699, *Harrold v. Smith*, 107 Ga. 849, 33 S. E. 640; 1851, *Brannin v. Foree's Adm'rs*, 12 B. Monr. 509; 1901, *Waldron v. Priest*, 96 Me. 36, 51 Atl. 235 (lawyer's office docket, with entry of payment); 1667, *Oberg v. Breen*, 50 N. J. L. 145, 12 Atl. 203; 1898, *Hauser v. Levine*, 62 id. 518, 41 Atl. 725; 1892, *Smith v. Rentz*, 131 N. Y. 169, 30 N. E. 54; 1794, *Ducoign v. Schreppel*, 1 Yeates 347; 1819, *Juniata Bank v. Brown*, 5 S. & R. 231. *Accord*, without giving a reason: 1857, *Le Franc v. Hewitt*, 7 Cal. 186; 1841, *Boyer v. Sweet*, 3 Scam. 122; 1669, *Ruggles v. Gutton*, 50 Ill. 416; 1862, *Maine v. Harper*, 4 All. 115. In Massachusetts, Maine, and New

Hampshire, cash entries of amounts above 40s. or \$6.66 are excluded: 1901, *Waldron v. Priest*, 96 Me. 36, 51 Atl. 235; 1825, *Union Bank v. Knapp*, 3 Pick. 109; 1833, *Burns v. Fay*, 14 Pk. 12; 1840, *Bassett v. Spofford*, 11 N. H. 267; 1860, *Rich v. Eldredge*, 42 id. 156; so too in Wisconsin, for amounts over \$5: 1903, *Brown v. Warner*, 116 Wis. 358, 93 N. W. 17.

² *Admitted*: 1867, *Hancock v. Kelly*, 61 Ala. 368, 2 So. 261 (entries of the drawing of a bill of exchange and its payment, admitted); 1693, *Peck v. Pierce*, 63 Conn. 310, 313, 26 Atl. 524; 1869, *Taliaferro v. Ives*, 51 Ill. 247 (books admitted to show "how he had paid the notes"); 1902, *Stephen v. Metzger*, 95 Mo. App. 609, 69 S. W. 625; 1893, *Gleason v. Kinney*, 65 Vt. 560, 563, 27 Atl. 206; 1896, *Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1073.

defendant as the guarantor or the principal, and, in general, entries of a guaranty by the defendant, cannot be used; for the third person's evidence is available and there is no necessity for a resort to the books.¹

§ 1541. **Not admissible for Terms of Special Contract.** Where there were special terms to the contract, the entry cannot be used, because there would usually be a writing between the parties, containing the terms of the special contract, and the book-entry would be unnecessary.¹

§ 1542. **Not admissible in Certain Occupations.** The principle of necessity may, by the nature of the occupation, exclude entirely books in certain occupations. Thus, a schoolmaster's books have been excluded:

1823, *Colcock, J.*, in *Pelton v. Crofton*, 2 McC. 128: "The Court have always kept in view the necessity of the evidence. Now there are few persons in business who are furnished with as many witnesses as a schoolmaster; my command, and there is no necessity for admitting his books to be produced in evidence."

Yet the books of an attorney have been admitted:

1850, *Wells, J.*, in *Wells v. Hatch*, 43 N. H. 243: "One objection . . . is that from the nature of the case there must be better evidence [in existence]. But the book and oath of a party are often received to prove sales or services known to other persons and provable by them. . . . The demands of attorneys are sustainable by any mode of proof applicable to other descriptions of persons."¹

§ 1543. **Not admissible for Large Items, or for Immoral Transactions.** The foregoing are the chief limitations generally acknowledged. But sundry different transactions have been from time to time ruled upon as exemplifying the necessity or non-necessity of using the entries.¹ So far as any further

¹ *Conn.*: 1836, *Green v. Pratt*, 11 Conn. 205; *Mass.*: 1808, *Prince v. Smith*, 4 Mass. 458; 1838, *Faunce v. Gray*, 21 Pick. 247; 1852, *Keith v. Kihbe*, 10 Cush. 36; 1861, *Gorman v. Montgomery*, 1 All. 416; 1873, *Somers v. Wright*, 114 Mass. 174; 1875, *Fiehl v. Thompson*, 119 id. 151; 1887, *Kaiser v. Alexander*, 144 id. 71, 78, 12 N. E. 209; *Pa.*: 1788, *Poultney v. Ross*, 1 Dall. 298; 1795, *Teubroke v. Johnson, Coxe* 288; 1819, *Juniata Bank v. Brown*, 5 S. & R. 231; *Tenn.*: 1872, *Black v. Fizer*, 66 Tenn. 50; *Vt.*: 1830, *Skiuner v. Conant*, 2 Vt. 454; *Wis.*: 1903, *Brown v. Warner*, 116 Wis. 358, 93 N. W. 17 (money paid to third persons). *Contra*: 1899, *Coleman v. Ins. Ass'n*, 77 Minn. 31, 79 N. W. 589 (plaintiff's books of purchases and sales from and to third persons, admitted under statute to show the amount of stock on hand); 1897, *Richmond U. P. R. Co. v. R. Co.*, 95 Va. 386, 28 S. E. 573 (to whom credit was furnished; admitted).

In general, the transaction must have been with the defendants: 1819, *Rogers v. Old*, 5 S. & R. 408; 1869, *Wall v. Dovey*, 60 Pa. 212. Compare the cases cited *post*, § 1544.

¹ 1901, *Snow Hardware Co. v. Loveman*, 131 Ala. 221, 31 So. 19; 1832, *Terrill v. Beecher*, 9 Conn. 348; 1870, *Hart v. Livingston*, 29 Ia. 221; 1833, *Dunn v. Whitney*, 10 Me. 15; 1869, *Ward's Estate*, 73 Mich. 225, 41 N. W. 431; 1900, *Collins v. Shaw*, 124 id. 474, 83 N. W.

146; 1838, *Dauser v. Boyle*, 16 N. J. L. 395; 1896, *Wait v. Krewson*, 59 id. 71, 35 Atl. 742; 1841, *Lonegan v. Whitehead*, 10 Watts 249; 1842, *Nickle v. Baldwin*, 4 W. & S. 290; 1898, *Hall v. Woolen Co.*, 187 Pa. 18, 40 Atl. 986, *semble* (treated as secondary evidence to the contract's terms); 1896, *Hazer v. Streich*, 92 Wis. 505, 66 N. W. 720. But this does not forbid using the entry to show the delivery of goods, under a special contract otherwise proved: 1843, *Cummings v. Nichols*, 13 N. H. 425; 1860, *Swain v. Cheuey*, 41 id. 236.

¹ *Accord*: 1861, *Wells v. Hatch*, 43 N. H. 243, *semble*. *Contra, semble*: 1864, *Hale's Ex'rs v. Ard's Ex'rs*, 48 Pa. 22. Books in the following occupations have been ruled on: 1820, *Frazier v. Drayton*, 2 Nott & McC. 472 (a ferryman; admitted); 1896, *Fulton's Estate*, 178 Pa. 78, 35 Atl. 880 (physician; left undecided). Compare the rulings upon the kind of occupation as affected by the principle of regularity, *post*, § 1547. For corporation books, see *ante*, § 1074.

¹ Excluded: 1856, *Lynch v. Cronan*, 6 Gray 532 (mechanic's lien); 1851, *Batchelder v. Sanborn*, 22 N. H. 328 (collateral purposes generally); 1823, *Swing v. Sparks*, 2 Halst. 61 (loss by injury to property); 1811, *Wilmer v. Israel*, 1 Browne Pa. 257 (wharfage dues); 1871, *Godding v. Orcutt*, 50 Vt. 56 (sundries).

generalizations can be made, two may be noticed: (1) Where the item involves so large an amount of goods sold that other evidence of its delivery must have existed, the entry cannot be used;² (2) Where the transaction is one not to be encouraged on general grounds of *morality* or policy, there is no necessity for helping to the recovery of the charge by admitting the entry.³ But it cannot be said that these applications of the principle are generally accepted.

§ 1544. **Rules not Flexible; Existence of Other Testimony in Specific Instance does not exclude Books.** The principle of necessity leading to these limitations naturally suggests the question whether the principle is to be applied as an open one outside of the above accepted applications, and whether in those classes it is to be regarded as a fixed rule of thumb or whether the question of necessity may be raised anew in a given case under its particular circumstances. The answer to both questions is in the negative; the rules are no longer flexible; in certain classes the entries are once for all excluded, in others admitted:

1836, *Williams, C. J., in Peck v. Abbe*, 11 Conn. 210: "This necessity is not the necessity of the individual case on trial, but of the class of cases to which it belongs. One man sells a bushel of corn to his neighbor, no other being present; he charges it on his book; and could never recover, unless his book or his oath or both were sufficient evidence. Necessity, therefore, requires this evidence. Another sells corn to his neighbor, surrounded with his family; of course, the same necessity of his oath or book does not exist. Still the charge is of the same class with the other, and may be supported in the same way. . . . The enquiry is not whether the party in that case could not have other testimony, but whether the case itself is of the class or character which will support the action."

It follows that it is immaterial, in a given case in the admissible classes, that *other witnesses* of the transaction are actually available, or that, in a case in the excluded classes, other witnesses were in fact not available.¹ There are contrary rulings;² but the general judicial attitude seems to be plain.

¹ 1876, *Petit v. Teal*, 57 Ga. 145 (rejected for large items, e. g. \$50, except where usage authorizes, as in banking); 1882, *Carr v. Sellers*, 100 Pa. 170 (*Mercur, J.*: "We will not now designate the maximum sum for which a book may be received in evidence. . . . Much more depends on the nature and character of the subject matter of the item, and on the evidence, outside of the book, which naturally exists to prove the items"); 1872, *Winner v. Banman*, 28 Wis. 563, 566 (statute applied to exclude large items).

² 1897, *Frank v. Pennie*, 117 Cal. 254, 49 Pac. 208 (a gambler's "hooker Book" of accounts, excluded); 1826, *Boyd v. Ladson*, 4 McC. 76 (billiard-games; excluded); this case probably overrules *Herlock's Adm'r v. Riser*, 1821, 1 McC. 481 (whiskey sales; admitted).

³ 1844, *Mathes v. Robinson*, 8 Metc. 271; 1825, *Katman v. Moulton*, 3 N. H. 156; 1838, *Sickles v. Mather*, 20 Wend. 75.

⁴ On each occasion the absence of other evidence must be sworn to: 1869, *Neville v. Northcott*, 47 Teun. 296. In particular cases, entries

of a guaranty of credit may be received: 1847, *Ball v. Gates*, 12 Metc. 493; 1851, *Tremain v. Edwards*, 7 Cash. 415.

It has also been ruled that if the work was done by a servant of the plaintiff, the entry was inadmissible; but this would probably not be followed in other jurisdictions: 1811, *Wright v. Sharp*, 1 Browne 344 ("It is from necessity that a book of original entries, proved by a plaintiff's oath, is admitted in evidence at all; and where the work has been done by a third person, this necessity does not exist"); 1840, *Louergon v. Whitehead*, 10 Watts 249 (entries of delivery of goods, as performance of prior contract, excluded; "the reasons on which the cases cited are ruled do not apply, for there is no necessity to resort to such proofs, and it is not according to the usual course of business; the delivery is a matter of notoriety, done through the agency of others, and therefore easily proved through disinterested witnesses"); 1842, *Nickle v. Bahlwin*, 4 W. & S. 290 (same); 1898, *Hall v. Woolen Co.*, 187 Pa. 18, 40 Atl. 966 (delivery

Usually, it may be added, this sort of attitude is to be deprecated; it results in deadening and mutilating the living principles of evidence, and serves no good purpose. But here the general principle itself is a mere survival, without any living function in the law of evidence; and there can be no object in attempting to develop further that which has no reason for development, and no harm in accepting it, so long as it survives, in its fixed and traditional limitations.

2. The Circumstantial Guarantee of Trustworthiness.

§ 1546. **General Principle; Regularity of Entry in Course of Business.** The general principle which suffices to admit parties' books as fairly trustworthy is the same as that recognized for the main Exception for regular entries. The motives and results by which that principle is supposed to operate have already been sufficiently considered (*ante*, § 1522).¹ In general, it is thought that the regularity of habit, the difficulty of falsification, and the fair certainty of ultimate detection, give in a sufficient degree a probability of trustworthiness. The particular element of self-interest and partisanship that might be supposed to diminish trustworthiness in the case of a party himself is supposed to be balanced by certain additional requirements here made for this class of books, — for example, the existence of a reputation for honest bookkeeping, the fair appearance of the books, and the like.

In applying the general principle of Regularity of Entry, different circumstances may come into question, — the kind of occupation, the kind of book, the kind of item. These circumstances may now be taken in order.

§ 1547. **Regularity, as affecting Kind of Occupation or Business.** There can be no definite limitations as to the business or occupation of the entrant. The Court should decide, for each occupation, whether it involves the regular keeping of books:

1858, *Lumpkin, J.*, in *Ganahl v. Shore*, 24 Ga. 17: "We hold that any occupation which makes it necessary for books to be kept as the record of its transactions, the monuments of its daily business, — as factories, foundries, forges, gas-works, banks, factorage, no matter what, — if books are required *ex necessitate rei* to be kept, these books are to be let in under the law . . . for the same purpose and to the same extent that a merchant or shop-keeper's books are received in evidence; and that is, to prove those matters which appertain to the ordinary business of the concern, which require to be charged, and which in fact constitute its *res gestae*."¹

Courts have ruled from time to time in the different jurisdictions upon

of large quantities of goods; books rejected; "*Lonergha v. Whitehead* has been followed ever since it was decided").

¹ Compare additionally the following: 1822, *Kirkpatrick, C. J.*, in *Wilson v. Wilson*, 1 Halst. 98 ("The credit to which a book of the sort last mentioned is entitled as matter of evidence is derived from the presumption that though a man in the warmth of controversy or the heat of passion, might be disposed to raise up false

charges against his adversaries, yet that no one is so abandoned as in his cooler moments, without such excitement and in the course of his daily business, deliberately to contrive and meditate a fraud against his neighbor").

² *Accord*: 1846, *Taylor v. Tucker*, 1 Kelly 233, per *Nisbet, J.*; 1838, *Sickles v. Mather*, 20 Wend. 78 (*Cowen, J.*: ". . . whether he be a merchant or engaged in any other business").

various occupations.² In general, a mere casual rendering of services is not enough; there must be a regular occupation.³ The principle of Necessity, it must be noted, may also affect the kind of occupation in which books are allowed to be used (*ante*, § 1542). Moreover, statutes have in many instances (*ante*, § 1519) expressly defined the kinds of occupation.

§ 1548. **Regularity, as affecting the Kind of Book; Ledger or Daybook.** Any form of book, if regularly kept, is sufficient. A mere individual memorandum does not satisfy this principle; but obviously there may be separate books for separate classes of transactions, and of these a regularity can be predicated. It is thus often difficult to distinguish between books which are properly admissible because, though not comprehensive, they are nevertheless a complete and regular record of an integral series of transactions, and books which are inadmissible because they appear to have been kept apart from the general course of bookkeeping and thus are not likely to be affected by the considerations (*ante*, § 1522) that give trustworthiness to the ordinary records of transactions.¹

The fact that the book is kept in *ledger-form*, with each person's account separate, or in daybook form, with the items in the actual order of the transactions, is immaterial; though it may perhaps lessen the credit to be given to the book.² But a ledger-book may be open to the independent objection that it is not the original book, and may on that ground be excluded (*post*,

² *Admitted*: 1856, *Richards v. Dorman's Ex'r*, 28 Ala. 681 (physician; under the Code); *Excluded*: 1899, *Remick v. Rumery*, 69 N. H. 601, 45 Atl. 574 (diary of services performed, expenses paid, etc., by plaintiff as employee of defendant's intestate); 1790, *Spence v. Sanders*, 1 Bay 119 (physician); 1818, *Thomas v. Dyott*, 1 Nott & McC. 186 (printer); 1901, *Bass v. Gohert*, 113 Ga. 262, 38 S. E. 834 (books of a party not doing any "regular business"); 1835, *Thayer v. Deen*, 2 Hill S. C. 677 (peculiar).

³ 1871, *Karr v. Stivers*, 34 La. 127; 1898, *Atkins v. Seeley*, 54 Nebr. 688, 74 N. W. 1100 (continuous dealing, etc., not shown); 1839, *Walter v. Bullman*, 8 Watts 544.

¹ 1901, *Thompson v. Raiz*, 134 Cal. 26, 66 Pac. 24 ("private memorandum-book" of money collections, excluded); 1893, *Barber's Appeal*, 63 Conn. 393, 410, 412, 27 Atl. 973 (ordinary diary, excluded); 1868, *Ward v. Leitch*, 30 Md. 326, 333 (entries made by one casually employed for the purpose and doing it "once a week and sometimes once a fortnight," not admissible; unsound); 1844, *Mathes v. Robinson*, 8 Metc. 270 (a time-book of work done by laborers, admitted); 1885, *Costello v. Crowell*, 139 Mass. 592, 2 N. E. 693 (memorandum-book, excluded); 1895, *Riley v. Boehm*, 167 id. 183, 45 N. E. 84 (small pocket-memorandum-book used for sundry memoranda, held not improperly excluded); 1894, *Countryman v. Bunker*, 101 Mich. 218, 59 N. W. 422 (book not covering all transactions with the opponent, excluded); 1897, *Anderson v. Beeman*, 52 Nebr. 387, 72 N. W. 361 (there must be "a continuous dealing with persons generally"); 1851, *Richardson v. Emery*, 23

N. H. 223 (excluding separate books kept for different lots of wood sold, thus "not affording security against interpolations" that a single book would give); 1896, *Fulton's Estate*, 178 Pa. 78, 35 Atl. 890 (a separate book from the regular books, containing charges against one person only, excluded); 1872, *Callaway v. McMillian*, 11 Heisk. 557, 560 (entries in a private memorandum-book, excluded); 1886, *Barber v. Bennett*, 58 Vt. 483, 4 Atl. 231 (entries of account upon "a loose strip of paper" found in a desk, excluded); 1893, *Gleason v. Kinney*, 65 id. 560, 563, 27 Atl. 208 (entry in a diary, of money paid, there being a separate book of accounts, admitted; the nature of the item, not of the book, being material; this seems erroneous); 1896, *Re Diggins' Estate*, 68 id. 198, 34 Atl. 696 (a small book dealing with a special stock of goods, admitted); 1900, *Post v. Kenerson*, 72 id. 341, 47 Atl. 1072 (entries held to form a regular book, on the facts); 1896, *Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1073 (a calendar containing two entries of payment, excluded, because not a regular account-book, and because the entries were not continuous). Compare the cases cited *ante*, § 1525.

² 1806, *Cogswell v. Dolliver*, 2 Mass. 221 (per Sewall, J.: "though the one method leaves a greater opening to fraud and falsehood than the other"); 1860, *Swain v. Cheney*, 41 N. H. 234; 1861, *Wells v. Hatch*, 43 id. 248; 1869, *Hoover v. Gehr*, 62 Pa. 136; 1850, *Toomer v. Gadaden*, 4 Strobb. L. 195. But a general account drawn up at a later date is inadmissible: 1808, *Prince v. Smith*, 4 Mass. 458.

§ 1558). Finally, the record offered being a collected series of entries, it does not matter of what material the record is made, nor whether it is a record to which in ordinary parlance the word "book" would be applied.³

§ 1549. **Regularity, as affecting the Kind of Item or Entry; Cash Entry.** In the first place, the entry must have been a part of a *regular series* of entries, — not, for example, a casual sale of an article not regularly dealt in, nor a casual entry at the beginning of a blank book or at the end of a book already finished and laid aside.¹ Again, the entry is not usable if it shows that it embraces in one item a number of *separate transactions*, or is in any other way so loosely made that regularity of entry cannot be predicated.²

The question already examined, from the point of view of the principle of Necessity, namely, whether entries of *cash payments* are admissible (*ante*, § 1539), is often by some Courts discussed instead from this point of view; and here, as before, opinions differ in the application of the principle. The better opinion is that while as a general rule such entries are not to be regarded as admissible, yet in particular cases the ordinary course of business may involve cash entries and they may then be used:

1838, *Hitchcock, J., Cram v. Spear*, 8 Hammond 497: "Money lent or paid is not ordinarily charged upon book. The person lending or paying usually takes a note or receipt. An individual, it is true, might be engaged in a business that would seem to justify such charges, and in such case I am not prepared to say that he might not be examined as a witness."

1859, *Stockton, J., in Veiths v. Hagee*, 8 Ia. 187: "The general rule is clearly established by these authorities that a charge for money paid or money lent cannot be proved by a party's book of accounts, that such transactions are not usually the subject of a charge in account, and that charges of that nature are not such as are made in the ordinary course of business by one party against another. . . . An individual might be engaged in business that would seem to justify such charges, as where one's ordinary business may be said to consist in receiving money on deposit and paying it out for others. . . . This would not, however, apply to the case of a party engaged in the mere business of keeping a retail store, whose customers purchase goods of him on credit, which are charged to them in a running account. . . . They would not ordinarily expect to find themselves charged in their accounts with sums of money lent or paid. . . . Yet if the jury should judge that small money-charges were legitimately made in the ordinary course of business, we should not be inclined to hold that they might not so determine."*

* 1846, *Taylor v. Tucker*, 1 Kelly 331 (slips of paper); 1856, *Kendall v. Field*, 14 Me. 30 (shingle).

¹ 1825, *Beach v. Mills*, 5 Conn. 496 (receipt of rent); 1864, *Davis v. Sanford*, 9 All. 216; 1822, *Wilson v. Wilson*, 1 Halst. 95; 1886, *Stuckalager v. Neel*, 123 Pa. 60, 16 Atl. 94; 1786, *Lynch v. M'Hugo*, 1 Bay 33; 1835, *Thayer v. Dees*, 2 Hill S. C. 677; 1901, *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544 (book made up "several years after the business").

² 1842, *Winsor v. Dilloway*, 4 Mete. 322; 1849, *Henshaw v. Davis*, 5 Cash. 146 (three months' services in one item, excluded); 1853, *Bustin v. Rogers*, 11 id. 346; 1882, *Pratt v. White*, 132 Mass. 477 (measure, weight, and quantity lacking; but admitted); 1889, *Woolsey*

v. Bohn, 41 Minn. 238, 42 N. W. 1003; 1840, *Bassett v. Spofford*, 11 N. H. 267; 1825, *Sawyer v. Miller*, 3 Halst. 139; 1794, *Ducoin v. Schrepel*, 1 Yeates 347; 1882, *Carr v. Sellers*, 100 Pa. 171; 1893, *Cargill v. Atwood*, 16 R. I. 303, 306 ("lump" charges, excluded); 1818, *Lynch's Adm'r v. Petrie*, 1 Nott & McC. 731; 1859, *Johnson v. Price*, 49 Tenn. 549; 1887, *Baldrige v. Penland*, 68 Tex. 441, 4 N. W. 565.

³ *Accord*: 1902, *Harmon v. Decker*, 41 Or. 587, 68 Pac. 11, 1111 (large cash items, held not provable by the party's books, unless custom sanctions such entries in a particular business); 1893, *Cargill v. Atwood*, 16 R. I. 303, 304 (admissible, provided such transactions formed part of the ordinary course of business).

But the general tendency of Courts is to regard such entries as absolutely excluded, without any allowance for exceptional cases in special occupations.⁴ On the same principle, an entry of payment by note given would seem to be inadmissible.⁵

§ 1550. **Contemporaneity.** Not merely regularity is required; the entry must have been fairly contemporaneous with the transaction entered.¹ This is another circumstance very properly required as tending to accuracy, and is similar to the requirement in the general Exception (*ante*, § 1526) as to entries by deceased persons. But no unvarying limitation need be fixed; the entry must merely have been made near enough to indicate a likelihood of accuracy; and thus each ruling must depend chiefly on the circumstances of the case:

1834, *Sergeant, J.*, in *Jones v. Long*, 3 Watts 326: "The entry need not be made exactly at the time of the occurrence; it suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived, unimpaired. The law fixes no precise instant when the entry should be made."

1852, *Bigelow, J.*, in *Barker v. Haskell*, 9 Cush. 221: "The rule does not fix any precise time within which they must be made. There is no inflexible rule requiring them to be made on the same day. In this particular, every case must be made to depend upon its own peculiar circumstances, having regard to the situation of the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. Upon questions of this sort much must be left to the judgment and discretion of the judge who presides at the trial."

§ 1551. **Book must bear an Honest Appearance.**¹ The appearance of the

⁴ *Conn.*: 1803, *Bradley v. Goodyear*, 1 Day 104; *Id.*: 1859, *Young v. Jones*, 8 Ia. 222; 1859, *Sloan v. Ault*, *ib.* 230; 1859, *Snell v. Eckerson*, *ib.* 284; 1892, *Security Co. v. Graybeal*, 85 *id.* 543, 545, 52 N. W. 497 (register of loans); 1894, *M. S. Bank v. Barson*, 90 *id.* 191, 193, 57 N. W. 705; 1894, *Shaffer v. McCracken*, *ib.* 575, 580, 58 N. W. 910 (payment to attorney); *N. H.*: 1825, *Eastman v. Moulton*, 3 N. H. 156; 1851, *Richardson v. Emery*, 23 *id.* 223; *N. J.*: 1830, *Carman v. Dunham*, 6 Halst. 191 (single entry of cash lent in a regular book of entries containing no other dealings with the alleged debtor); *N. Y.*: 1811, *Case v. Potter*, 8 John. 212; *Pa.*: 1898, *Fifth Mut. B. Soc. v. Holt*, 184 Pa. 572, 39 Atl. 293 (entry of consideration received); *Tex.*: 1852, *Cole v. Deal*, 8 Tex. 349; 1872, *Kotwitz v. Wright*, 37 *id.* 83. Compare the cases cited *ante*, § 1539.

⁵ 1899, *Estes v. Jackson*, — Ky. —, 53 S. W. 271 (entry that an account was settled by note, excluded). *Contra*: 1898, *Borgess Inv. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754 (admitting an entry of a note secured by deed of trust).

¹ 1899, *Lane v. M. & T. Hardware Co.*, 121 Ala. 296, 25 So. 809; 1895, *St. Louis, I. M. & S. R. Co. v. Murphy*, 60 Ark. 333, 30 S. W. 419; 1860, *Landis v. Turner*, 14 Cal. 575 (admitted, where the transfer from a slate to the book was made irregularly, but generally in from one to three days afterwards); 1881, *Redlick v. Banerlee*, 98 Ill. 134, 138 ("the authorities do not

establish any precise length of time"; here entries transferred monthly from memoranda at the time of manufacture were admitted); 1858, *Anderson v. Ames*, 6 Ia. 488; 1887, *Rumsey v. Telephone Co.*, 49 N. J. L. 325, 8 Atl. 290; 1818, *Curran v. Crawford*, 4 S. & R. 3; 1829, *Kessler v. McConachy*, 1 Rawie 441; 1839, *Walter v. Bollman*, 8 Watts 544; 1865, *Yeareley's Appeal*, 48 Pa. 535.

² 1861, *Caldwell v. McDermit*, 17 Cal. 466 (excluded, "when suspicious circumstances exist upon the face of the entries, and these circumstances are not explained by disinterested persons"); 1810, *Swift, Evidence*, *Conn.*, 81; 1880, *Robinson v. Dibble's Adm'r*, 17 Fla. 462; 1899, *Harrold v. Smith*, 107 Ga. 849, 33 S. E. 640 (unfastened portion of a book, with leaves mutilated or missing, excluded); 1896, *Griherless v. Ripley*, 98 Ia. 290, 67 N. W. 109; 1806, *Cogswell v. Dolliver*, 2 Mass. 221, *per* Sewall, *J.*; 1844, *Mathes v. Robinson*, 8 Metc. 270; 1882, *Pratt v. White*, 132 Mass. 477; 1878, *Robinson v. Hoyt*, 39 Mich. 405 (entries all on the last page of a book having many pages blank and many torn out, held "insufficient" for proof); 1896, *Levine v. Ins. Co.*, 66 Minn. 138, 68 N. W. 855; 1825, *Eastman v. Moulton*, 3 N. H. 156; 1863, *Frank v. Ely*, 45 Pa. 444, 448 ("The Court examines it to see if it appears *prima facie* to be what it purports to be. If there are erasures and interlineations, and false or impossible dates, touching points that are

book of entries must be honest; no suspicion of false dealing must be apparent. But the trial Court's determination of this ought to be final.²

§ 1552. **Reputation of Correct and Honest Bookkeeping.** The tradition requires also that preliminary testimony be offered as to the good reputation of the party for correct and honest accounting.¹ Whether this would always be required is in some jurisdictions doubtful to-day, apart from express statute.²

3. Testimonial Qualifications, and Other Independent Rules of Evidence.

§ 1554. **Party's Suppletory Oath; Cross-examination of Party; Use of Books by or against Surviving Party.** (1) Since the preliminary facts rendering evidence admissible must of course always be proved somehow in advance of its admission, the identity and character of parties' books, as fulfilling the foregoing conditions, must first be shown. But if the books were, by hypothesis, kept by the party himself, and without a clerk, it is obvious that they cannot be satisfactorily shown to be his books without calling in the aid of his own testimony. By very necessity, therefore, and for the purpose of identifying the books, the party, though otherwise disqualified (under the older law) as a witness, was allowed¹ to make a so-called *suppletory oath* of identification.² Moreover, this oath, by way of precaution,

material, or if for any reason it clearly appears not to be a legal book of entries, the Court may reject it"). But a mere *error* need not exclude: 1866, Schettler v. Jones, 20 Wis. 412, 415 (entries charged against a person not the opponent are admissible "if such mistake is fairly and satisfactorily explained by other competent evidence").

¹ 1806, Cogswell v. Dolliver, 2 Mass. 223 (Sedgwick, J.: "The true ground . . . is that the judge or court before whom the case is tried, should on inspection, determine that the book was proper for that purpose, and that such determination renders it competent evidence. . . . To snuff our inquiries to go behind that decision would be throwing things into too loose a state").

² The precise tenor of this requirement varies; some Courts hold that the proof must be by persons who have settled with the party, and that, too, directly upon his books; *Ark.*: 1898, Atkinson v. Burt, 65 Ark. 316, 46 S. W. 986, 53 S. W. 404 (must be shown correctly and contemporaneously kept); 1895, St. Louis, I. M. & S. R. Co. v. Murphy, 60 id. 333, 30 S. W. 419; *Cal.*: 1860, Landis v. Turner, 14 Cal. 576; 1886, Watrous v. Cunningham, 71 id. 32, 11 Pac. 811; 1894, Webster v. Lumber Co., 101 id. 326, 329, 35 Pac. 871 (absconding of the party's bookkeeper, who had falsified the books to defraud him, not sufficient to exclude); *Ill.*: 1841, Bayer v. Sweet, 3 Seam. 122; 1869, Ruggles v. Gatton, 50 Ill. 416; 1876, Patrick v. Jack, 82 id. 82; 1892, House v. Beak, 141 id. 290, 299, 30 N. E. 1065 (held here not essential, where the opponent had admitted the correctness of the account); *Mich.*: 1860, Jackson v. Evans, 8 Mich. 476, 487 (the rule is "to require evidence

of the correctness and fairness of the books offered, founded on information gained by an actual inspection of and settlement by them," and not merely of "the character of the party whose books they are"); 1893, Seventh D. A. P. A. v. Fisher, 95 id. 274, 276, 54 N. W. 759 (may be shown by himself, without calling others); *N. Y.*: 1815, Vosburg v. Thayer, 12 John. 461; 1834, Linnell v. Sutherland, 18 Wend. 568; 1855, Morrill v. Whitehead, 4 E. D. Smith 241; 1882, McGoldrick v. Traphagen, 88 N. Y. 334, 336 (proof by several witnesses testifying to settlement by bills, and by another witness to settlement by the books themselves, held sufficient, the last witness being the bookkeeper of the party himself; two judges diss.); 1900, Smith v. Smith, 163 id. 168, 57 N. E. 300; *Tex.*: 1868, Werbiskie v. McManus, 31 Tex. 116, 124 (proof required that "his reputation as an honest man and correct bookkeeper is untarnished").

³ 1888, Montague v. Dongan, 68 Mich. 98, 100, 35 N. W. 840 (proof by other persons, held not necessary "since the statute allows parties to testify generally in the case"). This amounts to no more than a verification of correctness on oath (*post*, § 1554).

⁴ Except in New York and New Jersey, where perhaps the Dutch tradition (*ante*, § 1518) accounts for the omission; 1838, Sickles v. Mather, 20 Wend. 75; 1859, Conklin v. Stainler, 8 Ahh. Pr. 395.

⁵ 1824, 3 Dane's Abr., Mass., Hutchinson's ed., 318; 1860, Lamlis v. Turner, 14 Cal. 573; 1886, Roche v. Ware, 71 id. 379, 12 Pac. 284; 1869, Neville v. Northcutt, 47 Teun. 296; 1872, Marsh v. Case, 30 Wis. 531.

was made to involve an assertion that the books were correctly kept, and from this point of view the oath was not only allowed but required; it could only be dispensed with where the party was dead, or insane, or out of the jurisdiction.³ In many of the statutes (*ante*, § 1519) that have dealt with the subject, this suppletory oath is still retained as a requirement.

(2) As a necessary concession to the allowance of the suppletory oath, it was thought proper in a few jurisdictions by statute to allow a *cross-examination* of the party upon the transactions represented in the entries.⁴

(3) The modern statutory exception to a party's qualification, namely, the exclusion of a *survivor* from testifying to a *transaction with a deceased opponent* (*ante*, § 578) is commonly not thought to apply to the use of a party's books of account under the present Exception, for reasons elsewhere explained (*post*, § 1559). It follows that the surviving party may offer his books as against a deceased opponent;⁵ and also that the use of a deceased party's books by his representative is not such a "testifying" by the representative as amounts to a waiver under the statute and permits the surviving opponent to take the stand against them.⁶

§ 1555. **Personal Knowledge of Entrant; Party and Salesman verifying jointly.** The use of a party's entries, like that of all the Hearsay exceptions, must be subject to the ordinary principles of testimonial qualifications (*ante*, § 1424). When the party is the entrant, then, he must have the elementary qualification, a *personal knowledge of the transaction* recorded (*ante*, § 657). This he would ordinarily have, in the situations for which the exception was peculiarly adapted and to which he is restricted in the ways just noticed. But it will often happen, even where the party is his own bookkeeper, that the goods are delivered or the services rendered by salesmen or workmen in his employ, and that thus the party, though the recorder, has no personal knowledge of the consummation of the transaction. This situation can be met in the way already examined (*ante*, § 751), in cases where a witness on the stand swears to the accuracy of a record but has no knowledge of the transaction recorded; *i. e.*, by calling the other person, whose knowledge thus supplies the missing element and completes the testimony. This is a proceeding which, though correct on principle, has only with difficulty ob-

³ See *post*, § 1561.

⁴ In addition to the statutes, *ante*, § 1519, see the following rulings: 1873, *New Haven & H. Co. v. Goodwin*, 42 Conn. 231; 1857, *Betts v. Stevens*, 6 Wis. 400 (no questions are to be asked the party except those authorized by the statute). In South Carolina the rulings varied: 1786, *Foster v. Sinkler*, 1 Bay 40; 1790, *Spence v. Sanders*, ib. 117; *Douglass v. Hart*, 4 McCord 257; 1850, *Thomson v. Porter*, 4 Strobb. Eq. 65.

⁵ 1886, *Roche v. Ware*, 71 Cal. 378, 12 Pac. 284, *semble*; 1901, *Haines v. Christie*, 28 Colo. 502, 66 Pac. 883; 1902, *Chapin v. Mitchell*. — Fla. —, 32 So. 875; 1894, *Dyaart v. Furrow*, 90 Ia. 59, 37 N. W. 644; 1867, *Anthony v. Stinson*, 4 Kan. 230; 1861, *Dexter v. Booth*, 2 All. 559, 561 (but not admissible "for other

purposes." *e. g.* to prove to whom credit was given); 1862, *Green v. Gould*, 3 id. 465, 467 (similar principles); 1893, *Cargill v. Atwood*, 18 R. I. 303, 304. *Contra*: 1899, *Nance v. Callender*, — Tenn. —, 51 S. W. 1025; 1893, *Wyman v. Wilcox*, 66 Vt. 26, 30, 28 Atl. 321 (plaintiff's entries made after decease of opponent's intestate, excluded).

⁶ 1870, *Kelton v. Hill*, 53 Me. 116; 1889, *Sheehan v. Hennessy*, 65 N. H. 101, 18 Atl. 652; 1895, *Stevens v. Moulton*, 68 id. 254, 38 Atl. 732 (since the amendment of 1889, there is still no "election" to testify where an administrator offers and identifies the deceased's account-books).

As already stated (*ante*, § 578), there is here no attempt to collect fully the rulings interpreting this particular class of statutes.

tained recognition in the case of ordinary memoranda of a past recollection (*ante*, § 751). But, long before that recognition, it was perceived and adopted in the case of parties' entries. Where, then, the party has made the record but has not personal knowledge of the delivery of the goods or the rendering of the services charged, he may call the person having knowledge and use the latter's supplementary testimony.¹ If the salesman or teamster is deceased, or otherwise unavailable, or if the party is, or if both are, or if the conditions of the business make it impolitic to require the calling of every person concerned, still this need not prevent the use of the entry-book. The reasons for this conclusion have already been examined in considering the same problem for the main Exception for Regular Entries (*ante*, § 1530); here, as there, the rulings are not harmonious.²

§ 1556. **Form and Language of the Entry; Absence of Entry.** The general principles already examined (*ante*, §§ 766-812) as to the mode of testimonial communication, or narration, have here also a certain application. First, the entry must purport to record the whole of the transaction as alleged; in other words, a mere *order-book* or an *entry of an order*, not showing the delivery of the alleged goods or the rendering of the alleged services, could not be

¹ 1857, *Harwood v. Mnlry*, 8 Gray 250 (one partner delivered the goods, the other made the charge in the books; Dewey, J.: "It is proper to introduce as witnesses all those persons who are thus connected with the transaction and whose testimony is necessary to establish those facts which would require to be proved by a single person"). *Accord*: 1880, *Smith v. Law*, 47 Conn. 431, 435 (entries made by the plaintiff's bookkeeper on report by a salesman, the salesman also testifying); 1892, *House v. Beak*, 141 Ill. 290, 299, 30 N. E. 1065 (entries by H., on reports of sales, etc., by B., H. and B. testifying); 1902, *Place v. Bangher*, 159 Ind. 232, 64 N. E. 852 (books of log-measurement, kept by plaintiff, the measurements being made by plaintiff and M., and both testifying thereto); 1831, *Smith v. Sanford*, 12 Pick. 140 (one partner sold and made a note, the other entered; both testified); 1900, *Smith v. Smith*, 163 N. Y. 168, 57 N. E. 300 (husband-party making deliveries, wife entering from his memoranda, and both testifying); 1823, *Ingraham v. Bockius*, 9 S. & R. 285 (clerk delivered and party entered; both testified); 1831, *Clough v. Little*, 3 Rich. L. 353 (same); 1850, *Thomson v. Porter*, Strobb. Eq. 65 (same); 1892, *Taylor v. Davle*, 22 Wis. 455, 459, 52 N. W. 756 (shipping-book of lumber, entered by the bookkeeper from scale-bills handed to him, the bookkeeper and the scaler testifying).

² 1844, *Mathes v. Robinson*, 8 Metc. 269 (time-book kept by plaintiff for labor of himself and apprentice; held not necessary to call the apprentice); 1849, *Morris v. Briggs*, 3 Cash. 343 (workmen made memoranda and plaintiff copied them into the book; workmen not required to be called); 1852, *Barker v. Haskell*, 9 id. 218 (plaintiffs, partners, made entries of work done by workmen; plaintiffs both gave

the suppletory oath; workmen not required to be called); 1887, *Miller v. Shay*, 145 Mass. 162, 13 N. E. 468 (plaintiff kept a book of loads of sand delivered; teamster and plaintiff testify to items; said *obiter* that the teamster's testimony was "necessary"); 1860, *Jackson v. Evans*, 8 Mich. 476, 484 (entries of brick delivered, made by the party on reports from a foreman-teamster, the foreman-teamster who tallied the loading, being called, but not all the individual teamsters who hauled; held, that on the facts all the teamsters should be called or accounted for); 1901, *Taylor-Woolfenden Co. v. Atkinson*, 127 id. 633, 87 N. W. 89 (ledger made up from sale slips; admitted on certain conditions); 1903, *Union Central L. Ins. Co. v. Prigge*, — Minn. —, 96 N. W. 917 (plaintiffs' entries based on memoranda furnished by the defendant, excluded; probably erroneous); 1892, *Anchor Milling Co. v. Walsh*, 108 Mo. 284, 18 S. W. 904 (plaintiff's manager kept a shipping-book, in which most of the entries of deliveries were made on the knowledge of a shipping-clerk; the clerk had left the plaintiff's employment and was not called; admitted); 1901, *Diamant v. Collopy*, 66 N. J. L. 295, 49 Atl. 455, 808 (books founded on slips containing reports from workmen, admitted, together with the slips, apparently without calling the workmen); 1834, *Jones v. Long*, 3 Watts 326 (like *Morris v. Briggs*, Mass.); 1897, *Union Electric Co. v. Theatre Co.*, 18 Wash. 213, 51 Pac. 366 (books of an electric light company, recording the light furnished a theatre, made up from newspaper reports of number of performances per week and from collectors' reports, excluded); 1862, *Lynch v. State*, 15 Wis. 40, 44 (certain voluminous accounts, testified to by the bookkeeper and a party, who had personal knowledge of most of the transactions, admitted).

received.¹ Next, as to the mode of recording, any material or means will suffice.² The entry must, however, be fairly intelligible; it must distinctly communicate the fact alleged; this requirement being satisfied, any kind of marks, capable of being interpreted, will suffice.³

The *absence* of a debit-entry, in a book containing both debits and credits, should be regarded as in effect a statement that no such goods or services had been received, and should therefore be admissible;⁴ but some Courts, as also under the main Exception (*ante*, § 1531), take the opposite view.⁵ Where however, the book is offered by the opponent (*post*, § 1557), the absence of an entry of the transaction as claimed may properly be regarded as an admission that there was no such transaction (*ante*, § 1072).

§ 1557. **Impeaching the Book; Opponent's Use of the Book as containing Admissions.** (1) The party's book being virtually his testimonial assertions (*ante*, § 1361), the rules for impeaching testimonial evidence (*ante*, §§ 875-1037), so far as applicable, may be invoked. In particular, the party's *general character* for veracity (*ante*, § 920) may be impeached;¹ and the untrustworthiness of the book may be evidenced by demonstrating *specific errors* (*ante*, § 1000) in the entries.²

(2) A party's own statements may always be used against him as *admissions* (*ante*, § 1048); hence the opponent may always offer the party's books as containing admissions favoring the opponent's claim of facts.³ In such a

¹ 1882, *Hancock v. Hintrager*, 60 Ia. 376, 14 N. W. 725; 1834, *Rhoads v. Gani*, 4 Rawle 467; 1835, *Fairchild v. Dennison*, 4 Watts 258; 1841, *Parker v. Donaldson*, 2 W. & S. 19; 1882, *Laird v. Campbell*, 100 Pa. 165. This rests perhaps equally on the principle of § 1541, *ante*.

The price need not be entered: 1835, *Jones v. Orton*, 65 Wis. 9, 14, 12 N. W. 172.

² That the entry need not be on paper or with ink has been noticed *ante*, § 1548.

³ 1863, *Barton v. Dundas*, 24 U. C. Q. B. 275; 1887, *Miller v. Shay*, 145 Mass. 162, 13 N. E. 468; 1843, *Cummings v. Nichols*, 13 N. H. 425; 1872, *Marsh v. Case*, 30 Wis. 531.

⁴ 1893, *Peck v. Pierce*, 63 Conn. 310, 314, 28 Atl. 524 (issue as to payment of interest on note; deceased's book contained entries of interest-payments to others, though not all; lack of entry of payment to P., admissible); 1903, *Volusia Co. Bank v. Bigelow*, — Fla. —, 33 So. 704; 1901, *Waldron v. Priest*, 96 Me. 38, 51 Atl. 235; 1902, *Huelener v. Childs*, 180 Mass. 483, 62 N. E. 729 (passbook and ledger admitted, to show no receipt of cash; "not every book of entries, if admitted, would lead to any inference from the omission of a matter; but we must assume that this book on inspection manifestly purported to contain all C.'s receipts, and if so it was a declaration by him, only less definite than if expressed in words, that he had received no other sums"; this book was admitted without specific reference to the present Hearsay exception).

⁵ 1893, *Shaffer v. McCracken*, 90 Ia. 578, 580, 58 N. W. 910 (negative not to be proved by lack of entry in one book only out of several); 1874, *Lawhorn v. Carter*, 11 Bush 10; 1855,

Morse v. Potter, 4 Gray 292; 1896, *Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84; 1852, *Alexander v. Smoot*, 13 Ired. 462; 1901, *Scott v. Bailey*, 73 Vt. 49, 50 Atl. 537.

¹ 1823, *Cronse v. Miller*, 10 S. & R. 155, 158 ("his character was open to the same kind of animadversion that it would have been subject to if he had been a witness in the cause"); 1863, *Funk v. Ely*, 45 Pa. 444, 448 ("the plaintiff who swears to his original book of entries puts his general character for truth and veracity, and the general character of his book for honesty and accuracy, in evidence, and invites attack upon either or both"). *Contra*: 1853, *Winne v. Nickerson*, 1 Wis. 1, 6 (impeachment of the party's character "for truth and veracity," held proper at common law; but the statute making them "*prima facie*" evidence held to forbid this; absurd); 1854, *Nickerson v. Morin*, 3 id. 243 (foregoing case approved); 1872, *Winner v. Banman*, 28 id. 563, 567 (same).

² 1863, *Funk v. Ely*, 45 Pa. 444, 448 ("It is competent for the adverse party to show its [the book's] general character by pointing to charges and entries affecting other parties, and by calling witnesses to prove such entries false and fraudulent. That this investigation may not run into excessive departure from the issue on trial, the Court should limit it to the time, or year the time covered by the account in suit, and should suffer no more examination of collateral cases than would bear directly on the general character of the book").

³ 1899, *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565 (bank's account-books); 1902, *Whisler v. Whisler*, 117 Ia. 712, 89 N. W. 1110 (partition between heirs and devisees; ancestor's book-

case, none of the foregoing limitations as to the kind of book or entry stand in the way; for the book is not offered under the present exception.⁴

§ 1558. **Production of Original Book; Ledger and Day-book.** The general rule requiring the production of the original of a writing (*ante*, § 1179), here as elsewhere, must be satisfied; i. e. the entry offered must be an original; if the original cannot be had, as determined by the ordinary rules (*ante*, §§ 1192-1230), a copy may be used.¹

It therefore becomes necessary to distinguish between the different processes and the different classes of books employed in bookkeeping, in order to determine whether the one offered is or is not the first and original book of regular entries. A *ledger*, though otherwise not objectionable (*ante*, § 1548), will usually not be the first book entered up; nevertheless, if the first book be in fact kept in ledger form, it will be none the less admissible. Furthermore, the record admissible is one consisting of a regular series (*ante*, § 1548); hence, the first regular and collected record is the original one, and it is immaterial that it was made up from casual or scattered memoranda preceding it. The application of the principle must depend much on the circumstances of the particular case.²

entries of advancements); *I. A. Rev. Civ. C. 1888*, § 2248; 1888, *Ward v. Leitch*, 30 Md. 326, 333; 1902, *Globe Savings Bank v. Nat'l Bank*, 64 Nebr. 413, 89 N. W. 1030; 1903, *Gross v. Schiel*, — id. —, 93 N. W. 418; 1893, *Doolittle v. Stone*, 136 N. Y. 613, 616, 32 N. E. 639.

⁴ Compare some of the cases cited under Admissions, *ante*, §§ 1060, 1072, 1073, 1074 (corporation or partnership books), 1082 (predecessor in title). Whether the *whole of an account* may or must be offered is dealt with under Completeness (*post*, §§ 2104, 2118).

¹ 1898, *First N. Bank v. Chaffin*, 118 Ala. 248, 24 So. 80; 1879, *Peck v. Parchen*, 52 Ia. 46, 2 N. W. 597 (copy attached to a deposition, excluded); 1848, *Smiley v. Dewey*, 17 Oh. 156; 1831, *Farman v. Peay*, 2 Bail. 394; 1887, *Baldridge v. Penland*, 68 Tex. 441, 4 S. W. 565; 1845, *Downer v. Morrison*, 2 Gratt. 250, 258 (books in New York, proved by copy annexed to a deposition). *Undecided*: 1882, *Hancock v. Hintrager*, 60 Ia. 376, 14 N. W. 725. *Not clear*: 1876, *Woodbury v. Woodbury's Estate*, 50 Vt. 156. *Contra*, but clearly wrong: 1807, *Cooper v. Morrel*, 4 Yeates 341 (original in England; copy excluded).

The party's failure to produce his book, when it would be relevant, may justify an inference: 1860, *Harrison v. Doyle*, 11 Wis. 283, 285, and cases cited *ante*, § 291.

² *Admitted*: 1896, *Plummer v. Mercantile Co.*, 23 Colo. 190, 47 Pac. 294 (entries made in pencil on sheets of paper, then copied into a book); 1881, *Redlich v. Bamerlee*, 98 Ill. 134, 138 (entries transferred from a slate to the book; the book held an original); 1816, *Faxon v. Hollis*, 13 Mass. 427 (entries made on a slate and transcribed into a ledger); 1831, *Smith v. Sandford*, 12 Pick. 140 (chalking sales on a butcher-cart and then entering them on the book when the cart returned); 1852, *Barker v. Haakell*, 9 Cusb.

218 (entries on a slate, copied into a day-book); 1854, *Keut v. Garvin*, 1 Gray 148 (entries from a drayman's book into an account-book); 1887, *Miller v. Shay*, 145 Mass. 162, 13 N. E. 468 (transferred to the book from marks on a sand-cart); 1860, *Jackson v. Evans*, 8 Mich. 476, 482 (account-book of brick delivered, made up from a tally-book or slate); 1896, *Lovine v. Ins. Co.*, 66 Minn. 138, 68 N. W. 855 (books founded on temporary slips furnished by salesmen); 1853, *Winne v. Nickerson*, 1 Wis. 1, 5 (there being two books of original entries, only one was required to be produced, on the facts).

Excluded: 1881, *Fitzgerald v. M'Carthy*, 55 Ia. 702, 8 N. W. 646 (ledger not admitted to show a single item not entered in the original books; but the Court declared it allowable for counsel to use the ledger in aiding the jury "the more readily to find the items charged in the account in the books of original entry"); 1895, *Way v. Cross*, 95 Ia. 258, 63 N. W. 683 (a ledger not showing the kind of goods sold, and made up directly from sale-slips); 1854, *Bieinig v. Meizler*, 23 Pa. 159 (a journal copied from a blotter).

Further illustrations are as follows: 1861, *Canfield v. Saudera*, 17 Cal. 569, 573; 1874, *Bentley v. Ward*, 116 Mass. 337; 1889, *Woolsey v. Bohn*, 41 Minn. 339, 42 N. W. 1022; 1856, *Pillsbury v. Locke*, 33 N. H. 96; 1887, *Rumrey v. Telephone Co.*, 49 N. J. L. 325, 8 Atl. 290; 1838, *Sickles v. Mather*, 20 Wend. 76; 1882, *McGoldrick v. Traplagen*, 88 N. Y. 334, 336; 1823, *Ingraham v. Bockins*, 9 S. & R. 285; 1834, *Patron v. Ryan*, 4 Rawle 410; 1836, *Forsythe v. Norcross*, 5 Watts 432; 1869, *Hoover v. Gehr*, 2 Pa. 136. In *Prince v. Swett*, 2 Mass. 569, (1793) and *Bonnell v. Mawha*, 22 N. J. L. 198 (1874), the anomalous ruling was made that the ledger or copy-entries also must be produced, if the entries had been posted into it from another book.

4. Present Exception as affected by Parties' Statutory Competency.

§ 1559. *Theory of Use of Parties' Books as Hearsay.* That there is in modern times a new adjustment to be made arises from the fact that the party, being formerly disqualified and unavailable as a witness, and allowed only by the necessity of the case to use his extrajudicial or hearsay entries (*ante*, § 1537), has now everywhere been made competent by statute; so that the change of the law has removed the necessity for using such hearsay statements and has taken away the reason of the Exception. The question arises how far this result has been recognized by the Courts since the change of the law, and what its effects are with regard to the mode of using parties' entries.

In ascertaining this, it is necessary to keep in mind the extent to which, under the original practice, the entry was treated as hearsay. That it was so treated has already been noticed (*ante*, § 1537) and appears throughout the general tenor of this branch of the Exception. The consequences of this attitude were strictly followed out. If the party did not appear on the stand as a witness, if the entries are merely extrajudicial, hearsay statements, it followed that none of the consequences attached to a party's taking the stand could be enforced against him. This theory was so firmly implanted that when the statutes, which made parties competent, left a surviving party incompetent against a deceased opponent (*ante*, § 578), the use of parties' account-books was still not considered as a "testifying," within the statute; so that (as generally held) the surviving party's use of his books was not forbidden, on the one hand, and, on the other hand, the executor's use of the deceased opponent's books was not a testifying which amounted to a waiver and qualified the surviving party to take the stand (*ante*, § 1554). This result may well be questioned; but at least it shows the nature of the earlier theory.

Again, the suppletory or verifying oath of the party (*ante*, § 1554), by which he took the stand for the purpose of testifying the books and swearing that they contained true and just accounts, was expressly declared not to make the party a witness. It was treated as only a preliminary guarantee required as a matter of caution; and in effect it merely related back to the time of the entries and showed them to be proper for admission. His entries in the book, moreover, taken as made at a past time, were not entries made as a party; for he was not a party when he made them; and they thus could not be treated as tainted with his interest. Whatever may be thought today of the real effect of such an oath as incorporating the books into the party's infra-judicial statement and making them infra-judicial testimony, the Courts at any rate refused to take this view and accepted them as extra-judicial statements.¹

¹ 1844, *Little v. Wyatt*, 14 N. H. 26: "It is the book which is the evidence, and the party testifies in chief only to verify it. The party is not a witness who testifies to facts and then appeals to his book in corroboration of his story; but the book is the source of information."

The subjection to cross-examination (*ante*, § 1554) was a real inroad on the theory that the party was not a witness in his books; but it was made in a few States only, and by statute; and the fundamental theory was maintained as far as possible, for the liability of the party to cross-examination extended only to matters connected with the entries.

§ 1560. **Statutory Competency as Abolishing the Necessity for Parties' Books; Using the Books to aid Recollection.** Such being the consistent attitude of the Courts — that the books were used as hearsay or extrajudicial statements, and that the party did not take the stand as a witness —, how far is this branch of the Exception affected by the statutory abolition of a party's disqualification to take the stand? What has occurred is that the necessity for using his hearsay or extrajudicial statements in his books has been removed; he is free to relate as a witness all his knowledge on the subject of the transaction. Thus, the necessity having ceased, the whole basis of the Exception falls. There is now no excuse for offering his extrajudicial entries, not tested by cross-examination, while his infra-judicial testimony, given under oath and subject to cross-examination, is available.

This does not mean that the party cannot use his entries at all. As a recorded past recollection (*ante*, § 745) he may swear to the accuracy of the book and use it to the fullest extent, incorporating it with his testimony and handing it to the jury as a part thereof (*ante*, § 754). The entries are no longer hearsay; they are adopted by the witness on the stand, and he is subjected to full cross-examination on that as on all other parts of his testimony. At the present day, then, the correct view is that the Hearsay exception in favor of parties' entries has disappeared with the parties' incompetency, and that the party uses them, if at all, as records of a past recollection adopted on the stand. A few Courts have recognized this result explicitly; others have ruled more or less in harmony with it:

1850, *Daly, J.*, in *Conklin v. Stamler*, 8 Abb. Pr. 400: "The important change recently made in the law of this State, by which a party may testify the same as any other witness, has obviated the difficulty that was supposed to exist when the rule was made, and there is now no occasion for resorting to the books, unless it may be to refresh the party's memory as to the items, or in cases where there is a failure of recollection. In the latter case the books, if they contained the original entries of the transaction, would still, I apprehend, be evidence within the rule recognized in *Merrill v. I. & O. R. Co.*,¹ — that is, if the party who made the entries has entirely forgotten the facts which he recorded, but can swear that he would not have entered them if he had not known them at the time to be true, and that he believes them to be correct."

1875, *Per Curiam*, in *Nichols v. Haynes*, 78 Pa. 176: "Questions relating to books of entry as evidence, since the Act of 1869 making parties witnesses, stand upon a different footing from that on which they stood before. . . . The party now stands by force of the act on the same plane of competency as the stranger stood upon, and therefore may make the same proof as a stranger could."

1898, *Harrison, J.*, in *Bushnell v. Simpson*, 119 Cal. 658, 51 Pac. 1080: "At the time when parties to an action were not competent witnesses in their own behalf, their books of account were admitted in evidence, upon a proper showing of the mode in which they

¹ 16 Wend. 586; cited *ante*, § 736.



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had been kept, and were treated as original evidence of the matters for which they were introduced; but, since parties have been allowed to testify concerning all the facts for which the books were formerly offered, their testimony in reference thereto constitutes primary evidence of these facts, and the books of account become merely secondary or supplementary evidence. The books are not excluded as incompetent, but will be received, either in corroboration of the testimony of the parties as entries made at the time, or upon the principles by which inferior evidence is received where the party is unable to produce evidence of a higher degree."

In several other Courts the tendency seems to be to put the use of such books on their natural footing of records of past recollections.³ Yet the existence of statutes expressly sanctioning the use of parties' books (although these statutes in the older States were enacted before parties' incompetency was abolished) naturally renders it more difficult to reach the conclusion that the Hearsay exception covered by these statutes is abolished by implication from other statutes.

The important circumstance, however, is that whether or not the use of the books under the Hearsay exception is abolished, at any rate their use by the party as memoranda of recollection in connection with his testimony is now at his option, and that, when used from that point of view, the books would be *subject to none of the restrictions* of the present Exception (*ante*, §§ 1537-1552) regarding clerks, cash payments, credit guaranties, special contracts, kind of occupation, size of item, regularity of entries, reputation of correct bookkeeping, and the like. A survey of those restrictions seems to leave it certain that in no single respect is any advantage to be gained by using the book under the present Exception. Even when the book satisfies all these limitations, there appears to be no contingency in which the entry could be used under this branch of the Exception and yet could not also be used by

³ The following decisions treat the use of parties' entries from the point of view of records of past recollection, usually without complete recognition of the abolition of their use in the old manner: *Ala.*: 1880, *Dismukes v. Tolson*, 67 Ala. 386; 1886, *Hancock v. Kelly*, 81 id. 378, 2 So. 281; 1892, *Bolling v. Fannin*, 97 id. 619, 621, 12 So. 59; *Cal.*: 1886, *Roche v. Ware*, 71 Cal. 378, 12 Pac. 284, *semble*; 1898, *Bushnell v. Simpson*, 119 id. 658, 51 Pac. 1080 (action for salary and expenses as president of a corporation; plaintiff's books of account excluded as parties' books); but compare *White v. Whitney*, 1889, 82 id. 166, 22 Pac. 1138; *Conn.*: 1896, *Plumb v. Curtis*, 66 Conn. 154, 33 Atl. 998; *Ill.*: 1875, *Wolcott v. Heath*, 78 Ill. 434; *Mass.*: 1875, *Field v. Thompson*, 119 Mass. 151; *Mich.*: 1888, *Montagne v. Dongan*, 68 Mich. 98, 35 N. W. 840; 1886, *Brown v. Wightman*, 62 id. 557, 29 N. W. 98; yet compare *Lester v. Thompson*, 1892, 91 id. 250, 51 N. W. 893; *Minn.*: 1893, *Culver v. Lumber Co.*, 53 Minn. 360, 365, 55 N. W. 552; 1892, *Anchor Milling Co. v. Walsh*, 108 Mo. 284, 18 S. W. 904 (plaintiff's shipping-book, sworn to by the general manager, admitted as justified by the doctrine of memoranda of recollection); 1892, *Robinson v. Smith*, 111 id. 205, 20 S. W.

29 (bank-books of plaintiff admitted, following the preceding case); 1897, *Walsher v. Wear*, 141 id. 443, 42 S. W. 928 (books by G., a contractor guaranteed by the defendant, receivable from the defendant; following *Anchor Milling Co. v. Walsh*); 1898, *Borgess Inv. Co. v. Vette*, 142 id. 560, 44 S. W. 754; *Nebr.*: 1892, *St. Paul, F. & M. I. Co. v. Gotthelf*, 35 Nebr. 351, 356, 53 N. W. 137; *N. H.*: 1860, *Swain v. Cheney*, 41 N. H. 237; 1855, *Putnam v. Goodall*, 31 id. 425; 1883, *Pinkham v. Benton*, 62 id. 690; *N. J.*: 1887, *Rumsey v. Telephone Co.*, 49 N. J. L. 326, 8 Atl. 290; *N. M.*: 1885, *Price v. Garland*, 3 N. M. 505, 6 Pac. 472; *Pa.*: 1888, *Stuckelager v. Neel*, 123 Pa. 61, 16 Atl. 94; *Wis.*: 1866, *Schettler v. Jones*, 20 Wis. 412, 416; 1869, *Riggs v. Weise*, 24 id. 545 (preceding case approved); 1872, *Winner v. Bauman*, 28 id. 563, 567 (same); 1897, *Curran v. Witler*, 68 id. 16, 23, 31 N. W. 705 (same).

But under a statute declaring account-books to be "*prima facie* evidence," it has been held that their improper admission is a material error, even though they could have been used as memoranda to assist the memory: 1872, *Winner v. Bauman*, 28 id. 563, 567. Such a statute is anomalous and impolitic.

adoption as a record of past recollection. Under the few anomalous rulings in which a clerk's entries were admitted as the party's, and in which the party's entries were held not to need personal knowledge, and under certain of the statutory enlargements (*ante*, § 1519), this might not be true. But apart from these and taking the Exception as it is applied at common law by orthodox authority, it is always decidedly preferable to offer the entries from the modern point of view. If the party himself made them, as the common law required (*ante*, § 1538), he may now take the stand with them; if a clerk made them, as permitted by some of the statutory enlargements (*ante*, § 1519), the clerk may take the stand with them. It is perhaps singular that counsel have so frequently submitted to employ parties' books under the hampering restrictions of the present Exception. As for the Courts, their slowness in recognizing the full force of the change above judicially expounded is no doubt chiefly due to a rooted tendency to regard the books as independent or "original" evidence, distinct from the party's own testimony on the stand and thus to apply to them the only rule under which, in that view, they could be receivable.

§ 1561. **Relation of this Branch to the main Exception; Books of Deceased Party; Books of Party's Clerk.** The relation of this branch of the Exception, in favor of parties' entries, to the general Exception (*ante*, §§ 1521-1533) in favor of regular entries by persons in general, remains to be considered. (1) The question arises first in this way: How shall we treat an offer of regular entries by a *deceased party*? On principle, they should be treated from the latter point of view; *i. e.* they should be treated as the ordinary case of a regular entry by a deceased person. This seems to have become the practice in England,¹ where the special Exception for parties' entries was (except by statute) not recognized (*ante*, § 1518). But in the United States there has naturally been some confusion. One tendency is to rank them as parties' entries and to test them by the restrictions peculiar to the original practice in that branch of the Exception.² But several Courts have treated them according to the general exception in favor of regular entries by deceased persons.³ In this view, absence from the jurisdiction,⁴ as well as other circumstances (*ante*, § 1521), may suffice to admit the entries. No Court, however, seems to have declared

¹ 1812, *Pritt v. Fairclough*, 3 Camp. 305.

² 1871, *Bland v. Warren*, 65 N. C. 373; 1817, *Ash v. Patton*, 3 S. & R. 303; 1869, *Hoover v. Gehr*, 62 Pa. 136. In this view, the only difficulty is the lack of the suppletory oath (*ante*, § 1554). But in the foregoing cases the decess was regarded as a sufficient reason for dispensing with the oath. *Absence from the jurisdiction* ought equally to suffice; *Contra*: 1827, *Douglass v. Hart*, 4 McCord 257 (entries rejected; distinguishing *Foster v. Sinkler*, 1786, 1 Bay 38, and *Spence v. Saunders*, 1790, 1 Bay 119, and expressly refusing to assimilate the case to that of entries by absent clerks and other third parties; but in the later *Thompson v. Porter*, *infra*, the entries of a deceased partner were admitted).

Insanity ought equally to suffice: 1850, *Holbrook v. Gay*, 6 Cnsh. 216 (Dewey, J.: "The same necessity which justifies the introduction of the books of the party . . . alike seems to require and justify the admission of them where the party has become incapacitated to take the oath by reason of insanity").

³ 1889, *Setchel v. Keigwin*, 57 Conn. 478, 18 Atl. 594; 1837, *Leighton v. Manson*, 14 Me. 208; 1845, *Odell v. Culbert*, 9 W. & S. 67, *semble*; 1850, *Thompson v. Porter*, 4 Strobb. Eq. 65, *semble*.

⁴ 1875, *New Haven & H. Co. v. Goodwin*, 42 Conn. 231; 1786, *Foster v. Siukler*, 1 Bay 40 (but see the later *Douglass v. Hunt*, *supra*, *contra*).

with sufficient explicitness that this is the proper treatment;⁵ though there can be no doubt of it, either as a matter of principle (because the party, when he made the entries, was not then a party), or as a matter of expediency for the person wishing to encounter the fewest restrictions for the evidence. For regular entries, then, by deceased or otherwise unavailable parties, the general exception (*ante*, § 1521) is the proper one to employ. (2) Under the common law limitations of this branch of the Exception, books kept by the party's clerk were not admitted as the party's books (*ante*, § 1538). There was thus at common law no confusion, as to a clerk's books, between the two branches of the Exception; they could come in only under the main Exception, if the clerk were deceased (*ante*, §§ 1521-1533), or to aid the recollection of the clerk, if living, who must then be called to the stand.⁶ But many of the statutes dealing with parties' books (*ante*, § 1519) contain a clause admitting books kept by a clerk; sometimes the clerk is specified as the party's, sometimes as a "disinterested" person. In either case the question is presented whether the statute is to be construed as applying to the parties' books Exception and therefore as practically abolishing the exclusion of clerks' books (*ante*, § 1538), or whether it is to be construed as attempting to re-state a portion of the general Exception for deceased persons' entries and therefore as merely declaratory of the common law on that point. This question, with the few rulings on the subject, has already been considered (*ante*, §§ 1519, 1538). It is perhaps vain to attempt to construe statutes whose framers themselves seem not to have understood precisely the bearing of their enactments.

⁵ In some modern decisions, it may be added, the two branches are hopelessly confounded; *e. g.*, 1889, *Culver v. State*, 122 Ind. 562; 1883, *Vinal v. Green*, 21 W. Va. 308.

⁶ *E. g.*: 1880, *Ford v. R. Co.*, 54 Ia. 723, 730,

7 N. W. 126 (time-books kept by defendant's officers or employees; persons keeping them required to be called); and cases cited *ante*, § 1521.

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE.

TOPIC VI: SUNDRY STATEMENTS OF DECEASED PERSONS.

CHAPTER LII.

A. DECLARATIONS ABOUT PRIVATE BOUNDARIES.

- § 1563. History of the Exception.
- § 1564. General Scope of the Exception.
- § 1565. Death of Declarant.
- § 1566. No Interest to Misrepresent; Owner's Statement, excluded.
- § 1567. Massachusetts Rule: Declaration must be made (1) on the Land, and (2) by the Owner in Possession.
- § 1568. Knowledge of Declarant.
- § 1569. Opinion Rule.
- § 1570. Form of Declaration; Maps, Surveys, etc.

§ 1571. Discriminations as to Res Gestæ, Admissions, etc.

B. ANCIENT DEED-RECITALS.

- § 1573. Ancient Deed-Recitals, to prove a Lost Deed, or Boundary, or Pedigree.
- § 1574. Other Principles Discriminated.

C. STATEMENTS BY DECEASED PERSONS IN GENERAL.

- § 1576. Statutory Exception for all Statements of Deceased Persons.

At this point may be considered a few Exceptions, recognized in a limited number of jurisdictions, admitting certain kinds of statements of individuals deceased or otherwise unavailable. These Exceptions are related to the general group of the foregoing ones, in that the admissibility of the statements depends on the declarant being deceased or otherwise unavailable, and they are thus distinguished from all the ensuing Exceptions, in which the declarant need not be shown unavailable; they are distinguished from the Exception next following (Reputation), in that they involve individual statements, not reputation.

A. DECLARATIONS ABOUT PRIVATE BOUNDARIES.

§ 1563. **History of the Exception.** The use of individual declarations about private boundary must be carefully distinguished from the use of Reputation to prove boundaries, in the ensuing Exception (*post*, § 1582); historically, the former grew out of the latter, in some jurisdictions; but they now exist as separate, each with its peculiar limitations. Reputation, whether about boundaries or about other things, stands on its own ground as fulfilling the requirements of a distinct Hearsay Exception. The present Exception is concerned with ordinary individual statements, which in themselves show neither the kind of Necessity nor the kind of Circumstantial Guarantee later to be considered with reference to Reputation.

The present Exception had historically three sources, these distinct origins being now lost in one blended form. (1) In some of the Southern States, the Reputation Exception for land boundaries and customs (*post*, § 1582), as stated in early English and American treatises, was misunderstood or deliberately expanded, and came to be regarded as justifying the reception of

individual statements, taken solely on the credit of the individual declarant.¹ (2) In Massachusetts, the *res gestæ* doctrine, whether in the general and loose sense of something done (*post*, § 1795) or in some special relation to an adverse possessor's declarations (*post*, § 1778), was regarded as covering these statements.² (3) In New Hampshire, and perhaps elsewhere, the custom of periodical perambulations of town boundaries (brought over from England) was recognized as one vehicle of introducing reputation evidence (*post*, § 1592), and then statements of individuals, particularly surveyors, were taken as being of equal value with these perambulations.³

§ 1564. **General Scope of the Exception.** In the following passages from opinions in the various jurisdictions the general tenor and purpose of the Exception may be seen :

1813, *Tilghman*, C. J., in *Caufman v. Cedar Spring*, 6 Binn. 62: "Where boundary is the subject, what has been said by a deceased person is received as evidence. It forms an exception to the general rule."

1832, *Henderson*, C. J., in *Sasser v. Herring*, 3 Dev. L. 342: "We have in questions of boundary given to the single declarations of a deceased individual as to a line or corner the weight of common reputation. . . . Whether this is within the spirit and reason of the rule it is now too late to inquire."

1844, *Parker*, C. J., in *Smith v. Powers*, 15 N. H. 563: "It is true that the decisions in England seem to restrict the evidence of the declarations of deceased persons respecting boundaries . . . to what the deceased said relative to the public opinion respecting the boundary. But the testimony has not been limited in this country. . . . The declarations of a person deceased, who appeared to have had means of knowledge and no interest in making the declarations, are competent evidence upon a question of boundary, even in a case of private right."⁴

§ 1565. **Death of Declarant.** The principle of necessity (*ante*, § 1421) was found in the usual lack of other sufficient evidence for proving boundaries. The perishable nature of the landmarks, and the incompleteness of the records, rendered it necessary to resort to such statements, oral or written, as could be had from deceased persons having competent knowledge. Though the changed conditions of life in the later history of our communities have greatly diminished this necessity, it sufficed in the beginning to establish the exception in the law :

¹ See the quotations in the next section.

² See the citations in § 1567, *post*.

³ 1829, *Lawrence v. Haynes*, 5 N. H. 36 (Richardson, C. J. "It would be very singular if the circumstance that a line has been perambulated and marked as the true line by men who had the means of knowing whether it was the true line or not and whose duty and whose interests bound them to perambulate and mark no line but the true one, must be held to afford no evidence of its being the true line. It is in all cases evidence").

⁴ Besides the rulings in the following sections, naming the specific limitations, the rule is recognized in the following cases: *Ga. Code* 1895, § 5183 (quoted *post*, § 1587); *Md.*: 1735, *Howell's Lessee v. Tilden*, 1 Harr. & McH. 84; 1766, *Bladen v. Cockey*, *ib.* 230; 1770, *Redding's*

Lessee v. M'Cbbin, *ib.* 368; 1774, *Hawkins v. Hanson*, *ib.* 531; 1778, *Weems' Lessee v. Disney*, 4 *id.* 156; *N. C.*: 1835, *Harris v. Powell*, 2 *Hayw.* 349; 1837, *Hartzog v. Hubbard*, 32 *Dev. & B.* 241; 1859, *Scoggin v. Dalrymple*, 7 *Jones L.* 46; 1886, *Bethea v. Byrd*, 95 *N. C.* 310, and intervening cases cited; *Pa.*: 1815, *Hamilton v. Menor*, 2 *S. & R.* 73; 1898, *Mineral R. & M. Co. v. Auten*, 188 *Pa.* 568, 41 *Atl.* 327 (ancient survey); *S. C.*: 1825, *Spear v. Coate*, 3 *McCord* 229; 1886, *Sexton v. Hollis*, 26 *S. C.* 231, 236, 1 *S. E.* 893; *Tenn.*: 1812, *Beard's Lessee v. Talbot*, 1 *Cooke* 142; *Tex.*: 1866, *Strond v. Springfield*, 28 *Tex.* 666; 1878, *Hart v. Evans*, 49 *id.* 316; 1887, *Tucker v. Smith*, 68 *id.* 478, 3 *S. W.* 671; *Va.*: 1837, *Harriman v. Brown*, 8 *Leigh* 712; *Vt.*: 1896, *Martyn v. Curtis*, 68 *Vt.* 397, 35 *Atl.* 333.

1850, *Manly, J.*, in *Scoggin v. Dalrymple*, 7 Jones L. 46: "Traditionary evidence has long been received by the courts of North Carolina in questions of private boundaries as well as public. . . . The necessity for such a departure from the common law principle grew out of the inartificial manner in which the lands of the State were originally surveyed and marked, making it necessary, in order to fix the position of the respective parcels, to resort more frequently to tradition, and to give this kind of evidence greater efficiency by enlarging its limits."

1864, *Pierpont, J.*, in *Wood v. Willard*, 37 Vt. 387: "In many of the States, and especially in this State, the territory within their limits was first divided into townships, and these were soon after subdivided into small lots and distributed between the several proprietors. Almost the only evidence left upon the land, to indicate the location of the lines either of the townships or of the divisions between the proprietors, was marks upon the trees standing thereon, and these evidences, from lapse of time, accidental causes, and the cutting off of the timber, are almost entirely obliterated. . . . If it be said that the lines must be established by witnesses who have personal knowledge of their original location, they cannot be proved at all, as in the great majority of cases all such persons are now dead."

Nevertheless, in fulfilling this condition of necessity, it was never required that the absence of other satisfactory evidence should in a given case be shown. That absence being assumed to be a general feature commonly existing, the only requirement was that the *decease* of the specific person whose declarations were offered should be shown;¹ in other words, there was a necessity for all the evidence that could be had, and, if this person were deceased, the only evidence available from him was his hearsay statements. It would seem, however, that *insanity*, or *absence* from the jurisdiction, would here not suffice (as it does for some of the foregoing Exceptions); because the necessity in general is predicated of titles and boundaries of long standing, for which the lapse of time has operated to destroy other evidence; and hence if the matter is one of the present generation, or if the evidence in question comes from the present generation (as it would if the declarant were merely absent), this necessity could hardly be presumed to exist.

§ 1566. **No Interest to Misrepresent; Owner's Statement excluded.** The general principle of a circumstantial guarantee of trustworthiness (*ante*, § 1422) is seen in the requirement that the declarant shall have had no interest or no motive to misrepresent; the words "interest" and "motive" being here used by the Courts interchangeably. The general notion is that he must stand in such a position that the Court cannot see any reason to expect misrepresentation:

1870, *Nesmith, J.*, in *Smit's v. Forrest*, 49 N. H. 239: "The party or declarant must have no interest to misrepresent. . . . It will be for the Court and jury to determine . . . whether they had any motives to misrepresent by a statement too favorable to their own pecuniary interest. . . . The evidence tends to show that the location of the bound where the father says it was established was in disparagement of the declarant's title; therefore it conveys or implies no purpose to misrepresent."¹

¹ This is mentioned in all the cases; see the quotations in the preceding section, and the following cases: 1901, *Barrett v. Kelly*, 131 Ala. 378, 30 So. 824 (declarations of a person not shown to be deceased, excluded, the statement

of the rule is hopelessly confused); 1901, *O'Connell v. Cox*, 179 Mass. 250, 60 N. E. 580 (excluded, because the decease of the declarant was not shown).

¹ *Accord*: 1888, *Lawrence v. Tennant*, 64

In particular, a statement by an *owner himself* about his own boundaries would thus be inadmissible:

1827, *Richardson, C. J.*, in *Shepherd v. Thompson*, 1 N. H. 215: (excluding declarations as to the boundary of their own land): "It must be presumed to have been their interest to extend the boundaries of the lot, and their declarations in favor of their interest were clearly not admissible."²

Nevertheless, a few Courts will admit even an owner's declarations, provided he appears to have had at the time no motive to misrepresent.³ This feature of the general rule distinguishes it sharply from the Massachusetts variant next noticed.

§ 1567. **Massachusetts Rule; Declaration must be made (1) on the Land, and (2) by the Owner in Possession.** The general rule, as first established in the Southern States and thence widely adopted elsewhere (*ante*, § 1563) made no other limitations than the preceding. But two other limitations, one of them in conflict with the preceding, obtained originally in Massachusetts; these were due to the associated notions of *res gestæ* and verbal acts (*post*, § 1778) which in that jurisdiction, as already noticed (*ante*, § 1563), served as the parent for the present Exception.

(1) The declarant must have been, at the time of the declaration, *on the land and engaged in pointing out* the boundaries mentioned. This originally was purely a Massachusetts variant, of long standing.¹ Though it once obtained a footing in New Hampshire and Vermont, it has there since been repudiated.² But, by a not unnatural misunderstanding of the local nature of this limitation, it has since unfortunately been adopted thence

N. H. 540, 15 Atl. 543; 1886, *Betha v. Byrd*, 95 N. C. 310; 1825, *Spear v. Coate*, 3 McCord 229; 1901, *Tracy v. Eggleston*, 47 C. C. A. 357, 108 Fed. 324 (declarations as to boundary by a deceased public surveyor, made on the land while pointing out a mound, admitted; Pardee, J., diss., because the declarant was at the time interested in a controversy as to the boundaries); 1864, *Wood v. Willard*, 37 Vt. 387; 1868, *Powers v. Silsby*, 41 id. 291; 1873, *Child v. Kingsbury*, 46 id. 53; 1837, *Harriman v. Brown*, 8 Leigh 713; 1895, *Rensens v. Lawson*, 91 Va. 226, 21 S. E. 347. *semble*; 1877, *Hill v. Proctor*, 10 W. Va. 84.

¹ *Accord*: 1793, *Porter v. Warner*, 2 Root 23; 1832, *Sasser v. Herring*, 3 Dev. L. 342; 1885, *Halstead v. Mullen*, 93 N. C. 252; 1888, *Taylor v. Glenn*, 29 S. C. 292, 297, 7 S. E. 483; 1897, *State v. Crocker*, 49 id. 242, 27 S. E. 49 (lines on a plot inserted by the surveyor at the direction of a claimant, excluded); 1898, *Scalfe v. Land Co.*, 33 C. C. A. 47, 90 Fed. 238 (by an heir of the estate, excluded); 1887, *Tucker v. Smith*, 68 Tex. 478, 3 S. W. 671; 1880, *Everts v. Young*, 52 Vt. 334.

² 1895, *Robinson v. Dewhurst*, 15 C. C. A. 466, 68 Fed. 336 (but it will be noticed that this case, as cited *post*, § 1567, also follows the Massachusetts variant, and has evidently confused the two forms); 1899, *Turner F. L. Co. v. Burns*, 71 Vt. 354, 45 Atl. 896 (declarations of

owners, admitted on the facts); 1893, *Corbleys v. Ripley*, 22 W. Va. 154 (owner's declarations inadmissible, unless at the time he had no interest to misrepresent); 1897, *Hugh v. Paucake*, 42 id. 602, 26 S. E. 536.

There have also been attempts to apply the *post litem motam* restriction of other Hearsay exceptions: 1888, *Taylor v. Glenn*, 29 S. C. 292, 297; 1833, *Smith v. Chapman*, 10 Gratt. 445, 455.

³ 1832, *Van Dusen v. Turner*, 12 Pick. 532; 1842, *Daggett v. Shaw*, 5 Metc. 226; 1856, *Bartlett v. Emerson*, 7 Gray 175; 1856, *Ware v. Brookhouse*, 7 id. 454; 1857, *Flagg v. Mason*, 8 id. 556; 1857, *Whitney v. Bacon*, 9 id. 206; 1864, *Morrill v. Titcomb*, 8 All. 100; 1875, *Long v. Colton*, 116 Mass. 414; 1886, *Peck v. Clark*, 142 id. 440, 8 N. E. 335. But declarations not referring to boundaries, but merely asserting some title, are not hereunder admissible: *Ware v. Brookhouse*, *Morrill v. Titcomb*.

⁴ *N. H.*: 1870, *Smith v. Forrest*, 49 N. H. 237; overruling *Melvin v. Marshall*, 1851, 22 id. 382; 17: 1868, *Powers v. Silsby*, 41 Vt. 291, repudiating the *dictum* in *Wood v. Willard*, 1864, 37 Vt. 387; but a later case looks backward again: 1899, *Turner F. L. Co. v. Burns*, 71 id. 354, 45 Atl. 896, *semble* (must be made "upon or in the vicinity of the boundaries, and pointing them out").

in Maine,³ New Jersey,⁴ Pennsylvania,⁵ and perhaps in other jurisdictions also.⁶

(2) In Massachusetts, further, an anomalous and meaningless restriction is observed that the declarant must also have been, at the time of the declaration, *in possession as owner*;⁷ for example, a mere surveyor's statement will not be received; this doctrine, again, being due historically (*ante*, § 1563) to the parental relationship, in this jurisdiction, of the *res gestæ* rule. It will be noted that this limitation is precisely the reverse of that of the usual rule (*ante*, § 1566); *i. e.* an owner's declaration is by that rule excluded, but by the Massachusetts rule is admitted; and *vice versa* for a surveyor's statement. This element of the variant rule has apparently been adopted in only two other jurisdictions.⁸ It is to be hoped that in due time this and the preceding anomaly of the Massachusetts rule will cease to vex the legitimate course of precedent elsewhere, and that other Courts will fully appreciate that the rulings in that jurisdiction and its few followers must be wholly ignored in applying the present Exception.

§ 1568. **Knowledge of Declarant.** The declarant, upon general testimonial principles (*ante*, §§ 1424, 653) must appear to have had *knowledge of the boundary* spoken of, or to have been in a position to acquire such knowledge:

1837, *Tucker, C. J., in Harriman v. Brown*, 8 Leigh 713: "[Such declarations are admissible] provided such person had peculiar means of knowing the fact; as, for instance,

³ 1888, *Royal v. Chandler*, 81 Me. 119, 16 Atl. 410; 1899, *Wilson v. Rowe*, 93 id. 205, 44 Atl. 615.

⁴ 1886, *Curtis v. Aaronson*, 49 N. J. L. 77, 7 Atl. 886.

⁵ 1856, *Bender v. Pitzer*, 27 Pa. 335 (Knox, J.: "Nor was the boundary actually shown to the witness when the declaration was made"); followed in *Kennedy v. Lubold*, 88 id. 255 (1878); *Kramer v. Goodlander*, 98 id. 369 (1881).

⁶ *U. S.*: By a misunderstanding of the Texas rule, which has no such limitation (*ante*, § 1566), this element was required in *Hannicutt v. Peyton*, 1880, 102 U. S. 364; but it is doubtful since *Clement v. Packer*, 1887, 125 U. S. 325, 8 Sup. 907, whether this requirement would be insisted on where the law of the State did not prescribe it; in *Ayres v. Watson*, 1890, 137 U. S. 596, 11 Sup. 201, the doubt was left unsolved; in *Robinson v. Dewhurst*, 1895, 15 C. C. A. 466, 68 Fed. 336, it was held, thinking of this doctrine, that the declaration must be made while on the land and pointing out, or at least must be not a mere casual recital; so also *Martin v. Hughes*, 1898, 33 C. C. A. 198, 90 Fed. 632 (for Pennsylvania; declarant must be on the land; here a deceased surveyor).

Ala.: 1902, *Southern Iron Works v. Central of G. R. Co.*, 131 Ala. 649, 31 So. 723 (declarations as to private boundaries, held inadmissible, except when made by persons in possession and pointing out boundaries; following *Hannicutt v. Peyton*, U. S., and adopting the Massachusetts rule); 1900, *Smith v. Glenn*, 129 Cal. 18, 62 Pac. 180 (owner's declarations while in possession and surveying, admitted).

It is regrettable that this abnormal Massachusetts rule should be given such notice by other Courts to the confusion of the simple and settled rule of orthodox tradition.

⁷ The full statement of the Massachusetts rule is as follows: 1842, *Hubbard, J., in Daggett v. Shaw*, 5 Metc. 226: "Declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial, are admissible in evidence, where nothing appears to show that they were interested in thus pointing out their boundaries." *Accord*: 1856, *Bartlett v. Emerson*, 7 Gray 175; 1857, *Whitney v. Bacon*, 9 id. 206; 1882, *Boston Water P. Co. v. Haulon*, 132 Mass. 483 (deceased surveyor's field notes and plottings, excluded); 1886, *Peck v. Clark*, 142 id. 440, 8 N. E. 335, and cases *ante*, par. 1. Compare the cases cited *post*, § 1573, which rest on a different doctrine.

⁸ 1891, *Royal v. Chandler*, 83 Me. 152, 21 Atl. 842; 1899, *Wilson v. Rowe*, 93 id. 205, 44 Atl. 615; 1886, *Curtis v. Aaronson*, 49 N. J. L. 77, 7 Atl. 886.

In *Canada*, no certain rule appears in the cases: 1847, *Doe v. Murray*, 3 Kerr N. Br. 335 (declarations of a deceased surveyor while pointing out boundaries, admitted, "as part of the *res gestæ*"); 1864, *Sartell v. Scott*, 6 All. N. Br. 166 (declarations of an owner in possession while pointing out the boundary of land he was selling, excluded); 1877, *O'Connor v. Dunn*, 2 Ont. App. 247 (deceased surveyor's notes, not admitted).

the surveyor or chain carrier who were engaged upon the original survey; or owner of the tract, or of an adjoining tract calling for the same boundaries; and so of tenants, processions, and others whose duty or interest would lead them to diligent inquiry and accurate information of the fact."

1850, *Lec. J.*, in *Clements v. Kyles*, 13 Gratt. 478 (rejecting hearsay statements): "It is said that the declarant was living on the land at the time, but in what character is not stated. . . . That his living within the bounds of the survey gave him the opportunity to see trees marked as corners of some survey, found accidentally or otherwise, would surely not be sufficient, unless some duty or interest can be traced to him by which he would have been prompted to make diligent inquiry and to obtain accurate information, within the meaning of the rule as propounded in *Harriman v. Brown*."¹

§ 1569. **Opinion Rule.** The Opinion rule (*post*, § 1956), for the reasons already indicated under the Exception for Dying Declarations (*ante*, § 1447), can hardly be thought to apply to these extrajudicial statements of deceased persons. Nevertheless, it is occasionally invoked.¹

§ 1570. **Form of the Declaration; Maps, Surveys, etc.** The declaration may be either oral or written; and statements in the form of maps, plans, surveys, and the like, have been constantly admitted under the present Exception.¹ From this is to be distinguished the use of surveys or maps under the Exception for Reputation (*post*, § 1592), and under the Exception for Official Statements (*post*, § 1665).

§ 1571. **Discriminations as to Res Gestæ, Admissions, etc.** From the use, under this Exception, of a deceased person's declarations as to boundaries, are to be discriminated other kinds of declarations about land, coming under other principles; these are chiefly (1) declarations by deceased persons offered as the *vehicle of reputation* (*post*, § 1584); (2) declarations by deceased persons of facts *against* their *proprietary interest* (*ante*, § 1458); (3) declarations by a party or privy constituting *admissions* of title (*ante*, § 1082); (4) declarations made as *verbal acts*, coloring the nature of possession of land (*post*, §§ 1778-1780). The practical differences in the operation of these distinct principles are elsewhere more fully pointed out (*ante*, §§ 1459, 1087, *post*, § 1780).

¹ *Accord*: 1860, *Morton v. Folger*, 15 Cal. 279; 1870, *Smith v. Forrest*, 49 N. H. 237; 1902, *Westfelt v. Adams*, 131 N. C. 379, 42 S. E. 823 (declarations, as to a corner tree, not in view at the time of the declaration, admissible, if identification is practicable); 1856, *Bender v. Pitzer*, 27 Pa. 335 ("It was no part of the offer that A. J. had made the boundary, or that he was present when it was made, or that he had subsequently examined it, or had run the lines of either survey. . . . It was the mere declaration of one who did not appear to have correct information on the subject"); 1888, *Taylor v. Glenn*, 29 S. C. 292, 297 (declarations of a neighbor, not having special knowledge, excluded); 1900, *Montgomery v. Lipscomb*, 105 Tenn. 144, 58 S. W. 306 (declaration of former owner or surveyor, admissible; obscure); 1887, *Tucker v. Smith*, 68 Tex. 478, 3 S. W. 671; 1880, *Hannicutt v. Peyton*, 102 U. S. 364; 1895, *Robinson v. Dewhurst*, 15 C. C. A. 466, 68 Fed.

336; 1864, *Wood v. Willard*, 37 Vt. 387; 1868, *Powers v. Sibley*, 41 id. 291; 1873, *Halley v. Howe* 46 id. 142; 1895, *Fry v. Stowers*, 92 Va. 13, 32 S. E. 500 (the son of an adjacent owner and a chain-bearer upon a different survey, excluded); 1877, *Hill v. Proctor*, 10 W. Va. 84.

¹ 1853, *Smith v. Chapman*, 10 Gratt. 445, 455 (chain-carrier's statement as to "the waters on which the P. survey should lie," excluded, as opinion); 1897, *Hugh v. Pancake*, 42 W. Va. 602, 26 S. E. 536 ("We must have a declaration establishing a fact, as a corner tree or particular marked line, not simply a statement that the land is within his boundary or the same conveyed in a certain deed, or that a line would cross a creek at a certain point, without more"). Compare the cases cited *post*, § 1956.

¹ *Examples*: 1860, *Morton v. Folger*, 15 Cal. 279; 1870, *Smith v. Forrest*, 49 N. H. 239; 1866, *Stroud v. Springfield*, 28 Tex. 665; 1867, *Welder v. Carroll*, 29 id. 333.

B. ANCIENT DEED-RECITALS.

§ 1573. **Ancient Deed-Recitals, to prove Lost Deed, or Boundary, or Pedigree.** There is a limited use of deed-recitals, by way of exception to the Hearsay rule, which has its root in orthodox and ancient tradition, and yet has never received great encouragement, and finds recognition in only a small number of precedents. This use of deed-recitals seems to have been recognized for three different purposes.

(1) Where in one deed the *contents of another deed* are recited, the rule requiring production of the original (*ante*, § 1179) must of course first be satisfied; but, supposing it to be satisfied by proof that the other deed once existed and was lost, then the recital, according to an early and unquestioned ruling, is admissible as evidence of the contents and the execution of the lost deed.¹ This precedent has been justified by eminent American judges in the following language:

1811, *Tilghman, C. J.*, in *Garwood v. Dennis*, 4 Binn. 314, 327 (admitting recitals, in an ancient deed, of the existence and contents of another deed, afterwards lost, by a predecessor in title *ante item motam*, the reciter being a trustee to make partition): "The assertion of such persons must make a strong impression. But it is objected that, however impressive the declaration of a man of character may be, even without his oath, yet the law admits the word of no one in evidence without oath. The general rule certainly is so; but subject to relaxation in cases of necessity or extreme inconvenience. How is it expected that a deed like the present is to be proved, when the subscribing witnesses have been dead eight and twenty years and the deed itself is not to be found? . . . Is it not necessary to resort to secondary evidence without oath?"

1830, *Story, J.*, in *Carver v. Jackson*, 4 Pet. 1, 83: "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 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 transaction be an ancient one and possession has been long held under such release and is not otherwise to be accounted for, there the recital will of itself materially fortify the presumption from lapse of time and length of possession of the original existence of the lease."²

¹ 1704, *Ford v. Grey*, 6 Mod. 44, 1 Salk. 285 ("A fine was produced, but no deed declaring the uses; but a deed was offered in evidence which did recite a deed of limitation of the uses; and the question was whether that was evidence. And the Court said, that the bare recital of a deed was not evidence, but that if it could be proved that such a deed had been, and [was] lost, it would do if it were recited in another").

² *Accord*: 1900, *Norris v. Hall*, 124 Mich. 170, 82 N. W. 832 (recitals in a deed, a power of attorney, and a court order, of 1846, that title passed on S.'s death to survivors, etc., admitted); N. J. Gen. St. 1896, Conveyances, § 194 (recital of a letter of attorney in a deed recorded for ten years, admissible to prove its existence, on oath

by the claimant that he has seen the letter); 1811, *Garwood v. Dennis*, 4 Binn. 314, 327, 332, 340 (but *Tilghman, C. J.*, alone takes this reason; *Brackenridge, J.*, seems to take another reason, noted *ante*, § 1133; and *Yeates, J.*, dissents); 1900, *Dorff v. Schmunk*, 197 Pa. 298, 47 Atl. 113 (after evidence of loss, a recital in a deed of 1860 was admitted to prove the lost deed); 1830, *Carver v. Jackson*, 4 Pet. 1, 83 (admissible to show contents, if the original's existence is otherwise shown, and loss proved; see quotation *supra*); 1832, *Crane v. Morris*, 6 id. 598, 610 (same; lapse of time may be sufficient evidence of execution and loss); 1866, *Deery v. Cray*, 5 Wall. 795, 797, 805 (recital of a will, of seisin, etc., admitted; *Carver v. Jackson* followed).

It would seem to be implied in this doctrine that the lost deed must be an ancient one (*post*, § 2137), or at least that no other evidence of execution or contents is available. Moreover, a few cases seem to impose the additional condition, analogous to that required for authenticating ancient deeds (*post*, § 2141), that the premises claimed should have been in possession of the claimant, as a necessary corroborative circumstance.³ That such a recital is not admissible where the original deed recited is not accounted for as lost or the like, seems unquestioned.⁴

(2) In Massachusetts, a series of precedents admits a recital in an ancient deed to show the *location of a boundary or monument*,⁵ though possibly the scope of the exception may prove to be somewhat larger. But the basis of the rule is the probability of the recital's truth by reason of its having been acted upon in contemporaneous transactions; and this limitation is strictly applied.⁶

(3) A recital, in an ancient deed, of a *pedigree of inheritance* is by some Courts treated as admissible to show the state of the relationship.⁷ Here also

³ 1860, *McFannon v. Bliss*, 21 N. Y. 206, 211 (recitals in a will of the plaintiff's predecessor, excluded; "assertions of title or claims of ownership made in deeds or wills may in some rare cases be evidence, . . . but only in connection with other proof of a long continued and undisturbed possession in accordance with the right or title claimed"); 1798, *Frost v. Brown*, 2 Bay 135, 138 (recital, in a deed by the offeror's ancestor W., of a lost deed from S. to W., offered in corroboration, to show the latter deed's existence; the offeror not being in possession; the Court equally divided); 1331, *Slims v. Meacham*, 2 Hall 101 (recitals in an old deed of a State grant of a certain date, the public records of that year being lost, held "insufficient" to raise a presumption of such grant).

⁴ 1885, *Calloway v. Cossart*, 45 Ark. 81, 85 (recitals of payment and receipt of patent, excluded); 1823, *Ilite v. Shrader*, 3 Litt. 443, 447; 1810, *Bonnet v. Devebaugh*, 4 Binn. 173, 178, 190 (recitals in warrant dated 1763, of survey on proprietaries' order, excluded, apparently because loss of original was not shown); 1856, *Watrons v. McGrew*, 16 Tex. 305, 313.

The following case stands on peculiar grounds: 1837, *Jones v. Inge*, 5 Port. 327, 335 (grantee of fee-patent from the U. S., the patent reciting that it was given to the grantee as purchaser from an Indian reservee; evidence of the Indian's incapacity to reserve and his infancy when selling was offered; held, (1) that recitals in general are not evidential against strangers; (2) that under the Indian treaties, the U. S. patent-recitals were intended to be admissible and indisputable as against strangers; (3) but that nevertheless the deed from the Indian to the patentee must be accounted for).

Compare the rules about *grantor's admissions* (*ante*, § 1082) and *oral admissions of a deed's contents* (*ante*, § 1256).

⁵ 1840, *Sparhawk v. Bullard*, 1 Metc. 95, 101 ("recitals in ancient deeds are always competent evidence"; here, of a boundary); 1870,

Morris v. Callanan, 105 Mass. 129 (description of boundary in a deed more than 50 years old, admitted); 1879, *Drury v. R. Co.*, 127 Hl. 571, 581 (plans of 1805 and 1816, showing the position of a creek, admitted); 1882, *Randall v. Chase*, 133 Hl. 210 (deed of 1839 admitted, reciting location of a way).

⁶ 1882, *Boston Water Power Co. v. Hanlon*, 152 Mass. 483 (the document must be "of such a character as usually accompany transfers of title or acts of possession, and purport to form a part of actual transactions referring to coexisting subjects by which their truth can be tested, and there is deemed to be a presumption that they are not fabricated"; here excluding a deceased surveyor's field-notes and plottings, because not "acted on"); 1896, *Whitman v. Shaw*, 166 Hl. 451, 44 N. E. 333 (a plan and field-notes, made in 1818, by a surveyor under the direction of the predecessors in title of either plaintiff or defendant, the latter claiming by adverse possession, as well as by deed, and the dispute involving a boundary line, admitted, as representing "actual transactions").

⁷ *How.*: 1901, *Mist v. Kapiolani Estate*, 13 Haw. 523 (deceased grantor's recitals of relationship, in a deed later than 1853; "after a relationship and the death had been established by evidence *alibi*, the recitals were properly admitted"); N. Y.: 1830, *Jackson v. Russell*, 4 Wend. 543, 548 (recitals in an old deed, used to show death of persons in interest); 1901, *Yong v. Shulenberg*, 163 N. Y. 385, 59 N. E. 135 (recitals in an ancient deed, admitted to prove relationship; but the Court inconsistently proceeded to apply the limitations of the pedigree exception, *ante*, § 1480); Pa.: 1782, *Morris v. Vanderen*, 1 Dall. 64, 67 (recital "with respect to a pedigree," but not recital of another deed, admissible); 1795, *Paxton v. Price*, 1 Yeates 500 ("recitals in a conveyance are evidence of pedigree, the rules in general being much relaxed in this particular"); 1844, *James v. Letzier*, 8 W. & S. 192 ("There is an exception in the case of

the antiquity of the deed depends upon the rules of Authentication (*post*, § 2137). Moreover, in most of the precedents, the analogous requirement is mentioned (*post*, § 2141) that possession of the premises under the deed must also have existed as a corroborative circumstance.

§ 1574. **Other Principles Discriminated.** From the foregoing use of deed-recitals as a hearsay exception, the application of certain other principles must be discriminated,

(1) From the hearsay use of ancient deed-recitals to prove the contents of another deed must be distinguished (a) the use of deed-recitals as admissions of the other deed's contents (*ante*, § 1082). The practical differences in the rules' limitations are three; by the former the deed must be ancient, but not by the latter; by the former the deed must be lost or destroyed, but probably not by the latter, though here there is much controversy (*ante*, § 1257); by the former the recitals are usable for or against any one, as is all evidence under hearsay exceptions, while by the latter they are usable only against the party whose predecessor or privy in title made the deed. (b) The use of recitals of other deeds in the deed of a sheriff, trustee, or other official (*post*, § 1664) must also be distinguished; for the latter are admissible under the Exception for Official Statements, and very different conditions of admissibility there apply. (c) The use of a party's self-serving statements as explaining away his admissions (*ante*, § 1133) may also serve to admit deed-recitals which would not be admissible under the present Exception.

an ancient deed containing a recital, where the possession has accompanied such deed; . . . in deeds there are often recitals of marriages, births, or deaths without issue, and other facts incident to the conveyance," which thus become admissible; here, a recital of one P.'s attainder and forfeiture); 1867, *Bowser v. Craveuer*, 56 Pa. 132, 142 (approving *Paxton v. Price*); 1870, *Scharff v. Keener*, 64 id. 376, 378 (recitals of pedigree in an ancient deed accompanied by possession, admitted); *Tex.*: 1863, *Chambiee v. Tarbox*, 27 Tex. 139, 145 (marriage); *U. S.*: 1826, *Stokes v. Dawes*, 4 Mason 268, *Story, J.* ("after 60 years, it is not too much to say that a fact of heirship, stated in a deed under which possession was held without question for 30 years, may well be admitted"); 1866, *Deery v. Cray*, 5 Wall. 795, 805 (heirship); 1866, *Fulkerson v. Holmes*, 117 U. S. 389, 399, 6 Sup. 780 (preceding case approved; but the rule is treated as if governed by the pedigree exception); 1902, *Stockley v. Cissna*, 56 C. C. A. 324, 119 Fed. 812, 824 (recitals of heirship in a deed of 1897, not admitted against a stranger; *Carver v. Jackson*, *supra*, approved); *Vt.*: 1841, *Potter v. Washburn*, 13 Vt. 558, 564 (mere recital of heirship in a deed, not receivable, "especially where the deed is of recent date"); 1842, *Bell v. Porter*, 14 id. 307, 309 ("However it may be with such a recital uncorroborated," the sequence of 30 or 40 years' possession by subsequent grantees here sufficed for admission); *Wis.*: St. 1901, c. 28 ("Whenever any deed, mortgage, land contract, or other convey-

ance, shall contain a recital in respect to pedigree, consanguinity, marriage, celibacy, adoption, or descent, and shall have been recorded in the proper register's office for 20 years," and is otherwise admissible, it shall be received as evidence of the facts recited; so also a recital in "any will of real estate, or a copy thereof, foreign or domestic," if duly probated); 1885, *Watts v. Owens*, 62 Wis. 512, 524, 22 N. W. 720, *semble* (admissible). *Contr.*: *Eng.*: 1826, *Fort v. Clarke*, 1 Russ. 601 (recitals of pedigree in a deed of 1793, excluded; *semble*, admissible if possession had been shown in the predecessors thus named); 1836, *Slaney v. Wade*, 1 Myl. & Cr. 338, 345, 358, per *Eldon*, L. C. (recitals of pedigree in an old deed, excluded); *Ga.*: 1900, *Dixon v. Monroe*, 112 Ga. 158, 37 S. E. 180 (recital of heirship, excluded); *Pa.*: 1838, *Murphy v. Loyd*, 3 Whart. 538, 549 (recitals by a grantor of his own pedigree in an ancient deed, excluded); *Tex.*: 1898, *Wintkins v. Smith*, 91 Tex. 589, 45 S. W. 560 (recitals of heirship in predecessors' deeds, not admissible).

Compare the rule for hearsay statements of a deceased member of a family (*ante*, §§ 1480-1503).

A Canadian statute seems to introduce an exception of large and indefinite scope: (Ont. Rev. St. 1897, c. 134, § 2 (in completing contracts for sale of land, "recitals, statements and description of facts, matters and parties, contained in deeds, instruments, acts of Parliament or statutory declarations 20 years old at the date of the contract" are evidence).

(d) The use of *copies of ancient deeds* not verified by a witness on the stand (*ante*, § 1281, *post*, § 2143) must also be distinguished. (e) The use of *recitals of a power of attorney in an ancient deed*, as sufficient evidence of the power's existence, falls under another head (*post*, § 2144).

(2) From the use under the present Exception of *ancient deed-recitals to prove boundary* (as in Massachusetts) must be distinguished (a) the use, under the foregoing branch of the Exception, of *declarations by deceased persons about private boundary*, particularly the Massachusetts form of the rule (*ante*, §§ 1564, 1567); and also (b) the use of *reputation to prove boundary*, under the next Exception (*post*, §§ 1587, 1592), by which ancient deeds, leases, maps, and the like, become admissible so far as they can be construed as the vehicle of reputation. (c) Moreover, where adverse possession is relied upon, the ancestor's making of a deed, reciting the extent of his claim, may be admissible as a *verbal act coloring possession* (*post*, § 1778). (d) Finally, in proving acts of adverse possession, the question may arise whether the mere *making of a deed or lease is evidence of possession* (*ante*, § 157).

(3) From the use of *deed-recitals of pedigree*, under the present Exception, must be distinguished the use of *declarations of relationship by a member of the family*, under the Family History Exception (*ante*, §§ 1480, 1497). The difference is that under the present Exception it is not necessary that the reciter should be related to the persons mentioned. Nevertheless, most of the recitals admitted under the present Exception would have been admissible under the former; and it is possible that the present one grew out of passages in earlier writers stating the former in loose language.

C. STATEMENTS BY DECEASED PERSONS IN GENERAL.

§ 1576. **Statutory Exception for all Statements of Deceased.** There was a time, in the early 1800s, when it came near to being settled that a general exception should exist for all statements of deceased persons who had competent knowledge and no apparent interest to deceive;¹ but this tendency was of short duration and was decisively negated.² Nevertheless, such an exception, uniting as it does the essential requirements of an exception to the Hearsay rule (*ante*, §§ 1420-1424), commends itself as a just addition to the present sharply defined exceptions, and foreshadows undoubtedly the enlightened policy of the future:

1876, *Mellish, L. J.*, in *Sugden v. St. Leonards*, L. R. 1 P. D. 154: "I have not the least hesitation in saying that I think it would be a highly desirable improvement in the law if the rule was that all statements, made by persons who are dead, respecting matters of which they had a personal knowledge, and made *ante litem motam*, should be admitted. There is no doubt that by rejecting such evidence we do reject a most valuable source of evidence. . . . [But] it appears to me that it would be better to leave it to the Legislature to make the improvement, which in my opinion ought to be made, in our present rules with regard to the admissibility of evidence of that description."

¹ Cases cited *ante*, § 1476.

² 1844, *Sussex Peerage Case*, 11 Cl. & F. 85;
1931, *Morell v. Morell*, 157 Ind. 179, 60 N. E.

1092 (statements by a deceased attesting witness, excluded).

1879, *Cockburn*, L. C. J., in *R. v. Bedingfield*, 14 Cox Cr. 342: "I regret that according to the law of England any statement made by the deceased should not be admissible."

1880, *Herschell*, L. C., in *Woodward v. Goulstone*, L. R. 11 App. Cas. 469: "No doubt there are many countries, and indeed Scotland is one of them, where the law permits declarations of persons who are dead to be given in evidence in all cases where they were made under circumstances in which such evidence ought properly to have been admitted if the person had been living; and there is much to be said for that law as compared with our own."³

1860, *Appleton*, C. J., *Evidence*, 190: "It is equally desirable that all testimony should have all possible and conceivable securities for trustworthiness; but if from any cause the attainment of one or more of those securities becomes physically impracticable, that will not suffice for the rejection of such evidence thus obtained, if it have any the slightest probative force. . . . The best evidence, the highest securities for testimonial veracity, are required; but the best theoretic evidence, the best theoretic securities, may be unattainable. . . . If, then, these principles be adopted, it would seem to follow that when the witness is dead, his declarations in whatsoever form attainable should be received. . . . The epistles of Paul, the journal of Columbus, the letters of Washington, would not be adjudged competent to establish any fact which being in issue might be determined by their production. . . . Were Paul or Columbus or Washington living, the reasoning by which this testimony would be excluded might be considered unanswerable; dead, their evidence thus delivered, satisfactory to everybody else, to the judge alone seems without force."

Recommendations of such an enlargement had been made more than two generations ago.⁴ But no effect was given them until fairly recent times. To-day are found statutes in three jurisdictions; and these experiments have sufficiently shown that the example is safe to follow.

These statutory exceptions are found in two forms, the one being of a limited scope only. (1) In *Connecticut* a statute admits all statements of a deceased person in an action by or against his representatives or those claiming under him.⁵ The avowed purpose of this statute was merely to place the deceased party's case on an equal footing, in respect to sources of proof, with that of the surviving opponent.⁶ Regarded as a substitute for the stat-

³ "[The French lawyers] laughed, not without reason, at our strictness in excluding all hearsay evidence" (*Life of L. C. Campbell*, I, 364).

⁴ A proposal to this effect had been made in England as long ago as 1828, by Lord (then Mr.) Bringham, in his great Speech on the Courts of Common Law, 18 Hans. Parl. Deb. 2d Ser. 218, 227, who proposed that "any deceased person's books or memorandums may be received, provided it appear that they were not prepared with a view of making evidence for his successors but plainly *alio intuitu*." This proposal was probably based on Bentham's suggestion, in his *Rationale of Judicial Evidence*, b. VI, c. II, § 1, b. I, c. XIII, § 5.

⁵ Conn. Gen. St. 1887, § 1094 ("In all 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 in evidence"); § 1095 ("In all actions . . . in which the en-

tries and written memoranda of deceased persons would be admissible in favor of the representatives of such deceased persons, such entries and memoranda may be admissible in favor of any person claiming title under or from such deceased person").

⁶ 1893, *Baldwin*, J., in *Rowland v. R. Co.*, 63 Conn. 415, 417, 28 Atl. 102 ("The act of 1848, by removing the common-law disqualification of interest, brought two important witnesses, the plaintiff and defendant, into the trial of almost every suit. Two years of practice under its provisions convinced the Legislature that, when the accident of death had withdrawn one of these witnesses, the testimony of the other gave him as a party an undue advantage. The act of 1850 [now Gen. St. § 1094] was intended to restore, so far as might be, the footing of equality between him and the representatives of the decedent which had existed at common law").

tory rule common in other jurisdictions (*ante*, § 578), whereby the survivor is disqualified as a witness, this rule deserves universal imitation. The policy of disqualifying the survivor has already been noticed (*ante*, § 578) as unenlightened and unpractical, and is so thoroughly to be condemned that there is no excuse for not employing the present rule as a more effective and rational expedient to attain the same end. The Connecticut statute has been in operation more than fifty years, and the trifling number of rulings required to interpret and apply it⁷ merely puts in a more discreditable light the thousands of quibbling decisions that have been rendered necessary by the arbitrary and complicated wording of the other group of statutes. In *Massachusetts* and *Oregon*, statutes of more limited scope have followed the Connecticut example.⁸

(2) In *Massachusetts*, a statute has gone the full length of the doctrine above mentioned as advanced in the early 1800s, by adding a general exception for statements of deceased persons.⁹ The exception has thus far been found to work well, and its general extension would confer great benefit upon litigation.

⁷ 1865, *Bissell v. Beckwith*, 32 Conn. 509, 517 (the classes of writings named include ordinary letters, and are not confined to documents of purely mercantile or legal purpose); 1893, *Barber's Appeal*, 63 id. 393, 412, 27 Atl. 973 (statute does not admit diaries of a testator in a probate appeal, this not being an "action"; unsound; such a ruling tends to reintroduce technicalities of enumeration); 1893, *Rowland v. R. Co.*, 63 id. 415, 417, 28 Atl. 102 (where an injured plaintiff's deposition has been taken in action begun before his death, the exception for these extrajudicial statements fails); 1899, *Brown v. Butler*, 71 id. 576, 42 Atl. 654 (statute applied); 1900, *St. Regis Lumber Co. v. Hotchkiss*, — id. —, 44 Atl. 11 (statute applied).

⁸ *Mass. St.* 1896, c. 445 ("In the trial of an action against an executor or against an administrator of a deceased person in which the cause of action is supported by oral testimony of a promise or statement made by said deceased person, evidence of statements written or oral made by said deceased person, memoranda and entries written by him, and evidence of his acts and habits of dealing, tending to disprove or to show the improbability of such statement or promise having been made, shall be admissible"); 1901, *National Granite Bank v. Whicher*, 179 *Mass.* 390, 60 N. E. 927 (statute applied); 1902, *Huebener v. Childs*, 180 id. 483, 63 N. E. 729 (statute applied to evidence adduced on re-examination); *Or. St.* 1893, p. 134 (amends Code § 711, quoted *ante*, § 488, by add-

ing to par. 2: "provided that when a party to an action or suit by or against an executor or administrator appears as a witness in his own behalf, statements of the deceased concerning the same subject in his own favor may also be proven"); 1894, *Grubbe v. Grubbe*, 26 *Or.* 368, 38 *Pac.* 182 (statute applied).

⁹ *Mass. St.* 1898, c. 535, Rev. L. 1902, c. 175, § 66 ("No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay, if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant"); 1900, *Brooks v. Holden*, 175 *Mass.* 137, 55 N. E. 802 (statute does not apply in restriction of any other exceptions to the rule); 1901, *Stocker v. Foster*, 178 id. 591, 60 N. E. 407 (grantor's declaration as to intent of executing deed, admitted); 1901, *Dixon v. R. Co.*, 179 id. 242, 60 N. E. 581 (deceased officer's statement admitted); 1902, *O'Driscoll v. R. Co.*, 180 id. 187, 62 N. E. 3 (written report of deceased physician to the defendant, admitted); 1902, *Green v. Crapo*, 181 id. 55, 62 N. E. 956 (deceased's copying of letters in a press, said to "import a declaration that they are in the course of transmission," and *semble* to be within the statute as such); 1902, *Boyle v. Columbian F. Co.*, 182 id. 93, 64 N. E. 726 (statute applied); 1903, *Hayes v. Pitts-Kimball Co.*, 183 id. 262, 67 N. E. 249 (statute applied; see citation *post*, § 2099).

SUB-TITLE II (*continued*): EXCEPTIONS TO THE HEARSAY RULE.

TOPIC VII: REPUTATION.

CHAPTER LIII.

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§ 1624. Reputation to prove Partnership.

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§ 1626. Reputation to prove Sundry Facts.

§ 1580. In General. At the time of the definite emergence of the Hearsay rule (*ante*, § 1364) — that is, by the end of the 1600s —, there remained in existence a practice, more or less loose, of receiving the repute of the community on various matters. At that time, the jury's traditional right to resort to common repute as a source of its knowledge was still a real part of trial-practice. It can be easily understood that the exclusion, when offered in court as evidence, of a repute which the jury could in any case have con-

sidered, had they otherwise known of it, would be unnatural and improbable.¹ But with the final shaping of the Hearsay rule's limits, and the conscious statement of specific exceptions, in the first half of the 1700s, and with the progress and final settlement, in the same century, of the doctrine that the jury could consider no information not presented to them as evidence in court (*post*, § 1800), the use of common repute came to be limited to specific excepted cases. The excepted cases thus surviving from the older loose practice included at that time (1) land-boundaries and land-customary-rights and verdicts in other litigation, (2) events of general history, (3) personal character, and (4) marriage, and other facts of family history. Since that time a few other isolated classes of facts — for example, insolvency — have in various jurisdictions been treated as properly provable by reputation; these instances, however, do not represent historically a continuous survival of earlier practice, but a reasoned application of a general principle.

The precedents for these various groups of facts form for the most part separate and independent series. Nevertheless, they all rest equally on a more or less conscious recognition of a common and rationalized principle, which in a broad way is found to be satisfied alike in all of them and to justify the maintenance of the exceptions. This principle is the twofold one already indicated (*ante*, § 1420) as the basis of all the exceptions to the Hearsay rule, namely the principle of Necessity and the principle of a Circumstantial Guarantee of Trustworthiness. (a) The necessity is here to be found in the general dearth of other satisfactory evidence of the desired fact, by reason of which we are thrown back upon reputation as a source of information. In the exceptions for land boundaries and customs this necessity is found to exist where the matter is an ancient one, and thus living witnesses are not to be had. In the exceptions for character and marriage the necessity lies in the usual difficulty of obtaining other evidence than reputation. (b) The circumstances creating a fair trustworthiness are found when the topic is such that the facts are likely to have been generally inquired about and persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one. This, under different conditions, is the common ground of trustworthiness for reputation on land boundaries and customs, for events of general history, and for character and marriage. There is therefore, on the whole, a certain underlying unity of principle for all the recognized uses of reputation.

In a few jurisdictions, legislative enactments have attempted to adopt and restate the first two branches of the exception; but these statutory attempts usually fail to distinguish the limitations of the different exceptions, and can hardly be said to be successful.²

¹ "It was natural," says Professor Thayer, "that what the Courts clearly recognized as a proper basis for the jury's action, when they picked up their own information, i. e. reputation or traditional declarations in matters of prescrip-

tion, should be allowed to be offered to them by the statement of witnesses in court" (*Cases on Evidence*, 1st ed., 420).

² The statutes are collected *post*, § 1597.

A. LAND-BOUNDARIES AND LAND-CUSTOMS.

1. The Necessity Principle.

§ 1582. **Matter must be Ancient.** In the effort to put a limit to the use of reputation-evidence, and to phrase the conditions of necessity in which it could be resorted to in default of better evidence, the element of antiquity came to be made the fundamental characteristic of this branch of the Exception. When the phrase about "best evidence" began to be invoked (*ante*, § 1173), and its corollary was referred to, that the "best evidence" might be dispensed with if it could not be had, one of the specific rules sometimes associated with it was the present one; that is to say, in ancient matters of certain sorts the "best evidence" obtainable was reputation-evidence. An "ancient" matter would ordinarily be a matter upon which no living witnesses having personal knowledge were attainable; so the reputation is often predicated as coming merely from deceased persons, or deceased old persons. The phrasing varies loosely; but the common idea is the same, namely, that it is to be the reputation of a past generation, and thus is to deal with a matter of which there can be no witnesses of the present generation having a personal knowledge. The following passages illustrate the general thought:

1811, *Mansfield, C. J.*, in the *Berkeley Peerage Case*, 1 Camp. 415: "The declarations of deceased persons, who are supposed to have had a personal knowledge of the facts, and to have stood quite disinterested, are received in evidence. In cases of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time; and to supply the deficiency, the law receives the declarations of persons who are dead."

1855, *Lord Campbell, C. J.*, in *R. v. Bedfordshire*, 4 E. & B. 535: "The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted on only at distant intervals of time; direct proof of their existence therefore ought not to be required."

1810, *Swift, C. J.*, *Evidence*, 121: "The law has therefore wisely rejected all hearsay evidence, excepting where it is impossible in the nature of things to obtain any other. . . . This happens in matters of long standing, where the witnesses who were knowing to them are not in being. Such are . . . the ancient boundaries of land."

1860, *Selden, J.*, in *McKinnon v. Bliss*, 21 N. Y. 218: "The fact sought to be proved being of too ancient a date to be proved by eye-witnesses, and not of a character to be made a matter of public record, unless it could be proved by tradition there would seem to be no mode in which it could be established. It is a universal rule, founded in necessity, that the best evidence of which the nature of the case admits is always receivable."

In the United States the question came up most frequently with reference to boundaries of land, and the special necessity of reputation-evidence in such cases was often noticed:

1797, *Per Curiam*, in *Montgomery v. Dickey*, 2 Yeates 213: "It must be obvious that when the country becomes cleared and in a state of improvement, it is oftentimes difficult to trace the lines of a survey made in early times. The argument *ex necessitate rei* will therefore apply."

1837, *Tucker, C. J.*, in *Harriman v Brown*, 8 Leigh 707: "Questions of boundary, after the lapse of many years, become of necessity questions of hearsay and reputation. For boundaries are artificial, arbitrary, and often perishable; and when a generation or two have passed away, they cannot be established by the testimony of eye-witnesses."

What, then, may to-day be said to be the results of this requirement, so far as specific rules can be laid down? The authorities of modern date are few, owing perhaps in this country to the changes in the conditions of life and the methods of administration of land-records in the past half-century, and it is not easy to predict the exact form in which Courts may choose to apply the principle. But the following rules may be ventured:

(1) The *matter to be proved* must be *ancient, i. e.* of a *past* generation. The custom, boundary, etc., must either be a former one, or, if it is still in existence, its existence in a previous generation must be the subject with which the reputation is concerned:

1855, *Baltzell, C. J.*, in *Daggett v. Willey*, 6 Fla. 511: "Reputation or hearsay, taken in connection with other evidence, is entitled to respect in cases of boundary when the lapse of time is so great as to render it difficult, if not impossible, to prove the boundary by the existence of the primitive landmarks or other evidence than that of hearsay."¹

(2) The *reputation* offered must also be *ancient, i. e.* of a *past* generation.²

(3) If the reputation is shown by means of the reported statements of individuals (*post*, § 1584), the *persons* whose statements are reported must be shown to be *deceased*.³

2. The Circumstantial Guarantee of Trustworthiness.

§ 1583. **General Principle; Reputation as Trustworthy.** The element here operating to supply a fair degree of trustworthiness is the third already noticed (*ante*, § 1422), namely, the consideration that the prolonged and constant exposure of a condition of things to observation and discussion by a whole community will in certain cases sift the possible errors and will bring the resulting belief down to us in a residual form of fair trustworthiness. These conditions are usually found where the matter is one which in its nature affects the common interests of a number of persons in the same locality, and thus necessarily becomes the subject of active, general, and intelligent discussion; so that whenever a single and definite consensus has been reached in the shape of common reputation, it may be supposed to have considerable evidential value. This principle underlies the willingness of the Courts to give credit to such a reputation in all the branches of the present Exception, and has often been stated specifically for this branch, though sometimes more or less imperfectly; the passages quoted from Lord Campbell and Mr. Justice Loomis express it in a form which leaves nothing to be desired:

¹ *Accord*: 1866, *Clark v. Hills*, 67 Tex. 152, 2 S. W. 356.

² 1852, *Adams v. Stanyan*, 24 N. H. 412 (maps); 1862, *Dobson v. Finley*, 8 Jones L. 495, 499 (a call in a grant of B. in 1798, admitted; death of B. and his surveyor need not be

shown; antiquity is sufficient "without enquiring as to whether the parties . . . are living or dead"); 1872, *Shutte v. Thompson*, 15 Wall. 161.

³ 1843, *R. v. Milton*, 1 C. & K. 62.

Compare the statutes cited *post*, § 1597.

1837, *Wright v. Tatham*, 7 A. & E. 358; on appeal, in 5 Cl. & F. 720: *Coltman, J.*: "Where boundary is proved by reputation, what is the guarantee for sincerity?" *Mr. Starkie, of counsel*: "The publicity of the transaction and the general interest in the fact being rightly ascertained. . . . *Coltman, J.*: "The principle on which I conceive the exception [of reputation as to public rights] to rest is this, — that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject, and such concurrence is presumptive evidence of the existence of an ancient right, of which in most cases direct proof can no longer be given." *Alderson, B.*: "There are, no doubt, exceptions to this rule, in which hearsay evidence is admissible. One such exception is to be found in the case of public rights. There the general interest which belongs to the subject would lead to immediate contradiction from others, unless the statement proved were true; and the public nature of the right excludes the probability of individual bias and makes the sanction of an oath less necessary."

1853, *Campbell, L. C. J., in R. v. Bedfordshire*, 4 E. & B. 535: "The admissibility of the declarations of deceased persons in such cases is sanctioned . . . because in local matters in which the community are interested all persons living in the neighborhood are likely to be conversant; because, common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statements were false, and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other who are all interested in investigating the subject."

1881, *Loomis, J., in Southwest School District 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. The matters included in the class under consideration are such that many persons are deemed cognizant of them and interested in their truth, so that there is neither the ability nor the temptation to misrepresent that exists in other cases; and the matters are presumably the subject of frequent discussion and criticism, which accomplishes in a manner the purpose of a cross-examination. . . . After passing such an ordeal, it is reasonably safe to accept the result as an established fact."

This being the well-accepted foundation for receiving a common reputation as trustworthy, certain limitations are deducible as a necessary consequence.

§ 1584. *Reputation, not Individual Assertion.* What is offered must be in effect a reputation, not the mere assertion of an individual. This follows from the nature of the foregoing principle, and is the thought running through the language of all the judges. But reputation is made up of and is often learned through the assertions of individuals, and it is therefore constantly necessary to distinguish between (a) assertions involving mere individual credit and (b) assertions involving a community-reputation. The common form of question put to a reputation-witness was: "What have you heard old men, now deceased, say as to the reputation on this subject?" The judges constantly speak of "reputation from deceased persons."¹ Thus, though in form the information may be merely what deceased persons have

¹ *E. g.*, 1813, *Weeks v. Sparke*, 1 M. & S. 689 ("Evidence is to be admitted from old persons . . . of what they have heard other persons, of the same neighborhood, who are deceased, say respecting the right"); 1802, *Higham v. Ridg-*

way, 10 East 120 ("Reputation is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from one to another"); see also the quotations ante, § 1582.

been heard to say about a custom, yet in effect it comes or ought to come from them as a statement of the reputation.²

This aspect of the rule is frequently found stated in the form "the reputation must be general"; in other words, the hearsay statement "I know the right or custom to be such-and-such" is not receivable; but "I understand the general acceptance of the custom by the community to be such-and-such" is admissible. The deceased individual declarant is merely the mouthpiece of the reputation. Whenever, therefore, individual declarations are offered, they must appear to be, in the words of Baron Wood, "the result of a received reputation":

1822, *Wood, B.*, in *Moseley v. Davies*, 11 Price 180: "It must be proved that the declarations establishing the reputation, and the acts done [by the community] in consequence, were the result of a received reputation. . . . The principal use of evidence of this sort is to show that the act done or declaration made was not a new thought adapted to serve some particular occasion, but the consequence of a received notion of the existence of a custom requiring the performance of the act, and accounting for or explaining it by such declaration. Such evidence should always be general."

1837, *Denman, L. C. J.*, in *R. v. Bliss*, 7 A. & E. 550 (rejecting testimony that R., now deceased, had planted a willow in a certain spot to show where the boundary had been of a way alleged to be public): "He does not assert that he has heard old people 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 himself observed, and not from reputation."³

It follows, conversely, that the form in which the reputation is presented is immaterial; whatever form it takes—individual writings, maps, leases, or the like—suffices if in truth it represents common repute; this application of the principle is later examined (*post*, § 1592).

But this exclusion of individual assertion, whenever it does not serve as the vehicle of reputation, applies of course only where the evidence is offered under the present Exception. Under the Exception for Private Boundaries, already examined (*ante*, § 1563), such declarations are in many American jurisdictions unquestionably admissible, merely as individual statements, and not associated with reputation. That Exception, historically, was mainly derived from the present one; but each now has its separate existence and peculiar limitations.

§ 1585. *Reputation not as to Specific Acts.* Furthermore, where a custom or right is to be shown, the reputation must be as to the custom or right itself, and *not as to particular occasions of its exercise*. It is obvious that as to such particular occasions or acts of its exercise there can be no fair opportunity for a reputation to arise. It can arise only as to the exist-

² As well put by Knox, J., in *Bender v. Pitzer*, 27 Pa. 335, "The declaration did not amount to general reputation; for one man's declaration of the existence of a fact does not prove that the allegation is generally reputed to be well founded."

³ See also the following instances: *Eng.*: 1831, *Davies v. Morgan*, 1 C. & J. 590; 1835,

Drinkwater v. Porter, 2 C. & K. 182; 1844, *Earl of Carnarvon v. Villebois*, 13 M. & W. 332; 1903, *Brocklebank v. Thompson*, 2 Ch. 344, 352 (a certain memorandum, excluded); *Can.*: 1885, *Vankoughnet v. Denison*, 11 Ont. App. 699, 707 (reputation, as indicated by a city map, apparently not admitted to show the location and extent of a public square).

ence or validity of the right or custom in general. There may legitimately be a common reputation as to whether (for example) a general duty existed for the townspeople of Wilton to pay a fee at a certain tollgate; but not whether John Doe paid it on a particular occasion. It is sometimes said, misleadingly, that the reputation cannot be received as to a *particular fact*;¹ but this expression is inconclusive, because the line of a certain boundary is a "particular fact." This phrase, so far as used, has meant that, in proof of local customs, hearsay as to a particular individual act in exercise of the general custom would not be received. The latter form of phrasing is the more accurate (as used by Mr. Peake, *infra*); but, subject to explanation, the loose phrase occasionally found in judicial language need not mislead:

1801, Mr. 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."

1810, Macdonald, C. B., in *Harwood v. Sims*, Wightw. 112 (admitting evidence of reputation from deceased persons as to a tithe payment): "I take this to be the distinction as to evidence of reputation: if they confute it to the fact of payment, it would not be evidence; unless the tradition that came with it was a reputation that that had always been the case."

1800, Muter, C. J., in *Cherry v. Boyd*, Litt. Sci. Cas. 8: "Such hearsay evidence [of general customs and the common repute about them] is safe, because if not true, it can be disproved by other evidence of the same kind. But even in these cases hearsay is restricted from being evidence of particular facts; because in such instances, although the evidence should be false, yet counter evidence could not be expected."²

§ 1586. Reputation must relate only to Matters of General Interest. The question next arises, About what sorts of matters may reputation be received as trustworthy? The principle already examined (*ante*, § 1583) prescribes the answer, — that the matter must be in its nature one about which a trustworthy common reputation could fairly arise, *i. e.* about which an active, constant, and intelligent discussion by the members of a community would result in a residuum of fairly trustworthy conclusions. As a rough-and-ready test, we may thus say that the matter should be one of *public*, or *general*, or *public and general, interest*; and this is the common phrasing; though it varies thus loosely. But this is still only a rule of thumb. To decide difficult cases it is necessary still to seek the living principle, and ask anew whether the matter is of such general interest to the community that by the thorough sifting of active, constant, and intelligent discussion a fairly trustworthy reputation is likely to arise. That this is the method actually followed by the Courts in ruling upon doubtful cases, and that the application of the principle is not narrowly to be made merely by defining the set terms "public" or "general," is seen in the following passages:

¹ 1837, Coleridge, J., referring to the evidence excluded in *R. v. Bliss*, quoted *ante*, § 1584 ("It is a rule that evidence of reputation must be confined to general matters and not touch particular facts," *i. e.* the act of planting the willow).

² *Accord*: 1805, Nicholls v. Parker, 14 East 331 (evidence admitted of what old persons had said concerning the boundaries of the parishes and manors; though not as to particular facts or transactions); 1793, *Ontram v. Morewood*, 5 T. R. 122; 1836, *Ellicott v. Pearl*, 10 Pet. 437.

1835, *R. v. Antrobus*, 2 A. & E. 703 (evidence was rejected of reputation as to an exemption of the sheriffs of Chester county from executing criminals); Counsel for defendant: "The proper criterion as to the admissibility of reputation is whether the custom if it existed would be matter of public discourse." *Denman*, L. C. J.: "Reputation is admitted where a public interest is concerned; but I cannot see how the public are interested in the question which sheriff is to perform this duty."

1835, *Campbell*, L. C. J., in *R. v. Bedfordsh.*: E. & B. 335 (admitting reputation whether the county or private owners were bound to repair a bridge): "Let us now upon these principles examine whether . . . evidence of reputation ought to be admitted. It does involve matter of private right. . . . But does it not likewise relate to matters of public and general interest within the received meaning of the words? . . . [After showing the community's interest in the question, and using the language quoted *ante*, § 1581], the question therefore is almost sure to be discussed in the neighborhood, and a true reputation upon the subject is likely to prevail."

1881, *Loomis*, J., in *Southwest School District v. Williams*, 48 Conn. 507 (after stating the general reason as above, and using the language quoted *ante*, § 1583): "But if the fact to be proved is a particular date, [here, of the existence of a school-house,] though connected incidentally with a public matter, it is easy to see that it could not stand out as a salient fact for contemporaneous criticism and discussion so as to furnish any guaranty for its correctness."

In the application of this general principle the typical classes of facts regarded as provable by reputation were boundaries of public land-divisions and customs affecting the rights and liabilities of the community in some governmental subdivision, — roughly speaking, public land boundaries and customs. But these kinds of facts, as the above quotations indicate, were merely typical and representative, not definitive. Sundry other facts of various sorts were also thus provable. In the following passage is a sufficiently full and correct enumeration of the settled practice in England:

1895, *Seymour*, J., in *Robinson v. Dewhurst*, 15 C. C. A. 486, 68 Fed. 336: "The exception raises a question regarding that exception to the general rule excluding hearsay evidence which permits such evidence to be given, under certain limitations, in cases of ancient boundaries. The exception, as it originated in the English courts, was confined to such boundaries as were matters of public concern, and was part of a larger exception to the rule. On questions respecting the existence of manors; manorial customs; customs of mining in particular districts; a parochial modus; a boundary between counties, parishes, or manors; the limits of a town; a right of common; a prescriptive liability to repair bridges; the jurisdiction of certain courts, — matters in which the public is concerned, as having a community of interest, from residing in one neighborhood, or being entitled to the same privileges, or subject to the same liabilities, — common reputation and the declarations of deceased persons are received, if made, *ante litem motam*, by persons in a position to be properly cognizant of the facts."¹

¹ In the following additional cases reputation-evidence was admitted: 1899, *Evans v. Merthyr Tydfil*, 1 Ch. 241 (whether a piece of land was subject to commonable rights); 1901, *Klinkner v. Schmidt*, 114 Ia. 695, 87 N. W. 661 (street boundary); 1883, *State v. Vale Millis*, 63 N. H. 4 (the former line of the road which the plaintiff was charged with obstructing); 1874, *Cox v. State*, 41 Tex. 4 (county lines); 1824, *Ralston v. Miller*, 3 Rand. 49 (street lines). In the following cases additional reputation-evidence was rejected: 1795, *Withnell v. Gartham*,

1 Esp. 325 (right of nomination to the place of schoolmaster); 1867, *Hall v. Mayo*, 97 Mass. 417 (possession or habitation of a house); 1875, *Adams v. Swansea*, 116 id. 396 (same); 1882, *Boston Water Power Co. v. Hanlon*, 132 id. 483 (same). The applicability of an Indian name to a given white person in a grant in a treaty was held not provable by hearsay, because the fact of identity would not "be likely to excite public interest," in *Stockton v. Williams*, 1 Dougl. Mich. 368 (1845).

The following ruling is anomalous: 1900,

§ 1587. **Same: Application of the Rule to Private Boundaries, Title, or Possession.** In the application of the foregoing principle, the subject of special controversy has been the ownership — in particular, the boundaries — of private property. May reputation be admitted of the boundary-locations of private property? In *England* the answer has been in the negative:

1811, *Kenyon, L. C. J., in Morewood v. Wood*, 11 East 329: "Evidence of reputation upon general points is receivable because, all mankind being interested, 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? . . . How is it possible for strangers to know anything of what concerns only these private titles?"¹

This conclusion was reached by a reasoned consideration of the principle on which reputation-evidence rests. But the correctness of the application may be questioned; for if such evidence may be offered to show customs and boundaries of a private manor, boundaries of a parish, and tithe-duties,² the principle may well cover any other property-rights in which a number are interested in general inquiry and discussion, whether the right is in substantive law called a public or a private one. Thus, in *Weeks v. Sparke*, decided shortly after *Morewood v. Wood*, *supra*, the argument was accepted that any fixed and (for this purpose) arbitrary distinction between "public" and "private" rights should be repudiated, and a flexible test be applied in each case,—this test being whether the matter affected the interests of a large number of persons:

1813, *Weeks v. Sparke*, 1 M. & S. 600 (a right of common being in issue), *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; *Dampier, J.*: "[Reputation-evidence] has been extended to other rights which strictly cannot be called public, such as manors, parishes, and a modus, which comes the nearest to this case. That, strictly speaking, is a private right, but has been considered as public, as regards the admissibility of this species of evidence, because it affects a large number of occupiers within a district."

This reasoning might have led ultimately in England to the admission of reputation-evidence for private-property matters; but the case was practically repudiated by Baron Parke, in 1850,³ and subsequent English practice has checked all further advances. The rule may there be said to be determined by the distinction (for this purpose more or less arbitrary) between "public" and "private" property-rights;³ *i. e.* the "public interest" which is required to exist is taken as meaning the legal liability or right which is vested in each

Shepherd v. Turner, — Cal. —, 62 Pac. 106 (reputation not admitted to show a road a public way).

¹ *Accord*: 1811, *Doe v. Thomas*, 14 East 323.

² 1819, *Stell v. Prickett*, 2 Stark. 466, *Abbott, C. J.*; and cases *infra*, n. 3, and *post*, § 1592.

³ 1850, *Dunraven v. Llewellyn*, 13 Q. B. 809 (a right of common for individuals, not for the community, was involved: *Parke, B.*: "Reputation is not admissible in the case of such sepa-

rate rights, each being private, . . . unless the proposition can be supported that, because there are many such rights, the rights have a public character. We think this position cannot be maintained. It is impossible to say in such a case where the dividing point is. What is the number of rights which is to cause their nature to be changed and to give them a public character? . . . The number of these private rights does not make them to be of a public nature"); 1855, *R. v. Bedfordshire*, 4 E. & B. 535.

member of the community as such, — not as meaning merely a motive of any sort stimulating the mass of the community to a concern in the matter.

In the *United States* the result has been otherwise. The earliest English practice had clearly been to admit reputation as to private titles,⁴ and it is therefore natural to find, on questions of private boundary, that reputation was regularly admitted without question in the early American cases.⁵ Then, when the English cases of the early 1800s became known to our judges, and the question was argued on its merits as a matter of principle, the decision was reached — entirely in harmony with the conditions of life at the time — that the rule ought to admit reputation-evidence of the landmarks of private title:

1837, *Tucker, P.*, in *Harriman v. Brown*, 8 Leigh 708: "Because we have not manors, shall we therefore lose the benefit of the rule which considers boundary as matter of reputation and permits hearsay evidence of its locality? If a like state of things exists among us, if the principle will be found to apply in its utmost strictness, shall we reject the evidence because the case is not identical? By no means. . . . [After quoting Lord Kenyon's language, *supra*,] If reputation is admissible to establish the boundaries of a manor because all the tenants of a manor are interested therein and naturally conversant about the boundary, and may be presumed to discourse together about it, what shall we say in the case of our wild lands, which were covered with early adventurers whose chief concern was to make themselves acquainted with the lines and corners of all around them? . . . Every one knows that such subjects were not only the familiar topics of conversation, but that they were the all-absorbing topics. I will venture to conjecture that for one discussion in private conversation about the boundaries of an English manor, there have been a hundred animated and interested debates about the situation of a corner tree in our western counties. I take it therefore that every motive for the admission of hearsay testimony as to boundary in case of a manor applies with equal force to its admission in questions of boundary with us."

1800, *Field, C. J.*, in *Morton v. Folger*, 15 Cal. 279: "In this country the admissibility of this kind of evidence . . . has been uniformly maintained when the tract originally surveyed was large, and was subsequently subdivided into numerous farms, the boundary of the original tract serving as a boundary of the several farms. In cases of this kind, the principle upon which the evidence is received has been regarded as similar to that which relates to boundaries of a manor or parish."

1800, *Selden, J.*, in *McKinnon v. Bliss*, 21 N. Y. 218: "That hearsay or reputation is admissible as evidence . . . upon questions respecting the boundaries of lands, is a familiar doctrine. But there are no doubt other cases in which the same kind of evidence may be received for the purpose of establishing a mere private right, when the fact to be proved is one of a quasi-public nature, that is, one which interests a multitude of people, or an entire community. . . . The Royal Grant, as it is called, is an extensive tract, embracing an entire township and parts of several others; and everything relating to the original document upon which the title depended would necessarily affect the interests of every occupant of the tract"; and common report as to the disposition of the patent would be admissible.

The result has been that, except in Maine and Massachusetts,⁶ it is now

⁴ Thayer, *Cases on Evidence*, 1st ed., 421, note.

⁵ 1823, *Dane's Abr.* 111, 397 (citing some cases before 1800).

⁶ 1853, *Chapman v. Twitchell*, 37 Me. 62; 1867, *Hall v. Mayo*, 97 Mass. 417; 1875, *Long v. Colton*, 116 id. 416 (abandoning the early

Massachusetts practice). In an early case in Kentucky, no longer law, it was excluded for the unique reason that the matter did not lie in parol and could not be proved by parol: 1800, *Cherry v. Boyd*, *Litt. Sel. Cas.* 8.

everywhere accepted in the United States as a legitimate application of the general principle, that reputation, so far as it definitely exists, may be admissible to prove the location of private boundaries.⁷ But this application of the principle is confined to reputation of boundaries. That title cannot be so evidenced is generally conceded.⁸ There may however be cases in which possession should be thus provable, where adverse possession is to be shown.⁹

It must be noted that, even in those jurisdictions where public boundaries alone are thus provable, the fact that the *private boundary* is alleged to be identical with the public one does not prevent the use of reputation to prove the latter, the identity being then otherwise shown.¹⁰

⁷ To the following, add the statutes cited *post*, § 1597: 1873, *Shook v. Pata*, 50 Ala. 92; 1897, *Taylor v. Fomby*, 118 Id. 321, 22 So. 910; 1833, *filgley v. Bidwell*, 9 Conn. 431; 1839, *Wooster v. Butler*, 13 Id. 318; 1845, *Kiuney v. Farnsworth*, 17 Id. 363; 1835, *Daggett v. Willey*, 6 Fla. 311; 1861, *Holbrook v. Debo*, 99 Ill. 385; 1819, *Smith v. Prewitt*, 2 A. K. Marsh. 158; 1822, *Smith v. Nowells*, 3 Litt. 160; 1894, *Thoen v. Rocha*, 57 Minn. 135, 139, 58 N. W. 686 (allowable for U. S. survey lines; acceptance of U. S. doctrine undecided); 1827, *Shepherd v. Thompson*, 4 N. H. 215; 1864, *Curtis v. Aaronson*, 49 N. J. L. 78; 1793, *Standen v. Bains*, 1 Hayw. 336; 1820, *Tata v. Southard*, 1 Hawks 47; 1823, *Taylor v. Shafford*, 4 Id. 132; 1838, *Mendenhall v. Cassels*, 3 Dev. & B. 49, 51 (rejecting it here as too indefinite); 1898, *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154 (but where it relates not merely to landmarks or lives, but to a location being within a certain grant, evidence of "manifestations of title" must accompany it); 1896, *Sexton v. Hollis*, 26 S. C. 231, 236, 1 S. E. 893; 1866, *Stroud v. Springfield*, 26 Tex. 888; 1886, *Clark v. Hills*, 87 Id. 152, 2 S. W. 358, *semble*; 1818, *Conn v. Penn*, 1 Pet. C. C. 511; 1887, *Clement v. Packer*, 125 U. S. 321, 8 Sup. 907. The reason of Mr. J. Story in *Ellicott v. Pearl*, 10 Pet. 435 (1836), given for a contrary view, that in regard to private rights the acts of possession and assertion are capable of direct proof, but in public rights the acts of people not in privity with each other "cannot be explained to be in furtherance of a common public right," is vague, and, so far as intelligible, is without support.

⁸ 1848, *Moore v. Jones*, 13 Ala. 303 (that an occupier was a lessee only); 1889, *Ross v. Gordon*, 88 Id. 390, 393, 398, 8 So. 682 (title by prescription); 1896, *Goodson v. Brothers*, 111 Id. 589, 20 So. 443 (ejectment); 1839, *South School District v. Blakeslee*, 13 Conn. 227, 235 (reputation of a house as "J. A.'s school-house," excluded; "a man's general character may be proved by reputation, but not his title to real estate"); 1856, *Green v. Chelsea*, 24 Pick. 71, 73, 80; 1863, *Howland v. Crocker*, 7 All. 153 (title by adverse possession; that a piece of land was known as "the Barney Crocker lot," not admitted to show title in him); 1886, *Sexton v. Hollis*, 26 S. C. 231, 235, 1 S. E. 893; 1899, *Hollis v. Risher*, 54 Id. 405, 32 S. E. 509.

Contra: Cal. C. C. P. 1872, § 1693 (it is to be presumed "that a person is the owner of property, from exercising acts of ownership over it, or from common reputation of his ownership").

⁹ *Admitted*: 1895, *Vernon Irrig. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. 762 (reputation admitted to show an ancient claim of ownership and actual control by the city); 1830, *Jackson v. Miller*, 8 Wend. 226 (that a lot of land was commonly known by the name of an individual, — as "Smith's Lot," or "The Duke's Farm," or "The Queen's Farm," was admitted to show that the person in question was at the time in occupation, personally or by agent, of the property); 1847, *Bogardna v. Trinity Church*, 4 Sandf. Ch. 633, 732 (same). *Excluded*: 1832, *Benje v. Creagh*, 21 Ala. 151, 168; 1868, *Woodstock Iron Co. v. Roberts*, 87 Id. 436, 442, 8 So. 349; 1898, *Carter v. Clark*, 92 Me. 225, 42 Atl. 398.

But reputation may be otherwise admissible, in an issue of title by adverse possession, under the principle of § 254, *ante*, as evidence of the probable knowledge by the other party of the existence of the adverse claim, and therefore of acquiescence.

¹⁰ 1837, *Thomas v. Jenkins*, 8 A. & E. 525 (the boundary of a farm being in issue, and its identity with the hamlet-boundary being testified to, reputation as to the hamlet-boundary was admitted; Coleridge, J.: "The objection comes to this, that evidence shall not be given as to the boundary of a hamlet in the same mode as on other occasions because the proof is in the particular case only subsidiary. But I never heard that a fact was not to be proved in the same manner, when subsidiary, as when it is the very matter in issue"); 1893, *Mullaney v. Duffy*, 145 Ill. 559, 564, 33 N. E. 750 (where a private depends on a public boundary, the latter may be shown by reputation); 1839, *Abington v. N. Bridgewater*, 25 Pick. 174 (admitting declarations as to a boundary line with reference to proving, not a public right, but the situation of a house where a pauper lived); 1879, *Drury v. Midland R. Co.*, 127 Mass. 581 (allowing reputation as evidence of the location of a creek "notorious and public in its nature," which in one view of the case was a dividing line between counties, and in another was in issue as a private boundary). *Contra, semble*: 1894, *R. v. Berger*, 1 Q. B. 823, 827 (obstructing a highway; dispute as to boundary; old map held admissible

§ 1588. Reputation as (1) *Post Litem Motam*, or (2) from Interested Persons, or (3) Favoring a Right. Certain additional limitations have been suggested, as affecting the trustworthiness of the reputation; but only one of them has received any sanction.

(1) The limitation, already noticed as obtaining in other Hearsay exceptions, that the reputation, to be admissible, must have arisen *ante litem motam*, is well established; and its propriety cannot be doubted.¹

(2) It was once argued that one's *interest as a member of the community* would involve bias, and hence statements of reputation as to a customary right in a community, coming from a deceased member of the community, could not be received. But such a declarant speaks merely of the current and undisputed reputation, and moreover is usually not personally interested in any important degree; and the argument against admission has not prevailed.²

(3) For the same reason, it is immaterial whether the reputation *favors or disparages* the existence of the custom or boundary; because, although members of the community may be interested and biassed in favor of a public right, nevertheless there is almost invariably an equal opposite interest in many as individuals in favor of a private claim, excluding the public one; so that the reputation, as it finally settles down in a definite form, represents the result of conflicting claims, and not merely a one-sided opinion.³

2. Testimonial Qualifications, and Other Independent Principles of Evidence.

§ 1591. Reputation must come from a Competent Source; Reputation in Another District. The principle that the witness must appear to have been in a position to obtain adequate knowledge (*ante*, § 653) finds an application to the present Exception. The reputation, to be admissible, must obviously have been formed among a class of persons who were in a position to have sound sources of information and to contribute intelligently to the formation of the reputation:

1813, *LeBlanc, J.*, in *Weeks v. Sparke*, 1 M. & S. 639: "The only evidence of reputation which was received was that from persons connected with the district, . . . such evidence being confined to what old persons who were in a situation to know what these rights are have been heard to say concerning them."¹

to show that land was a highway, but not to show the boundaries; unsound).

¹ *Accord*: 1805, *Nicholls v. Parker*, 14 East 331, note; 1811, *Mausfield, C. J.*, and Lord Redesdale, in *Berkeley Peerage Case*, 4 Camp. 416, 421; 1813, *R. v. Colton*, 3 id. 44, *Dampier, J.*; 1830, *Richards v. Bassett*, 10 B. & C. 661; 1832, *Duke of Newcastle v. Broxtowe*, 4 B. & Ad. 279; 1852, *Adams v. Stanyan*, 24 N. H. 412; 1902, *Westfelt v. Adams*, 131 N. C. 379, 42 S. E. 823 (reputation after 1886, not admitted in the trial of an action begun in 1891); 1886, *Clark v. Hills*, 67 Tex. 152, 2 S. W. 356. *Contra*, for a verdict as reputation (*post*, § 1593): 1816, *Freeman v. Phillips*, 4 M. & S. 491; 1877,

Duke of Devonshire v. Neill, L. R. Ir. 2 Exch. 156.

Compare the more fully developed definition of *lis mota* under the Family History (Pedigree) exception (*ante*, § 1483).

² 1810, *Harwood v. Sims*, Wightw. 112; 1822, *Moseley v. Davies*, 11 Price 175.

³ 1835, *Drinkwater v. Porter*, 2 C. & K. 182; 1830, *Russell v. Stocking*, 8 Conn. 240.

⁴ In the following case the ruling was too strict; the knowledge might have been presumed: 1854, *Hammond v. Bradstreet*, 10 Ex. 396 (a map of county boundaries from an old survey by J. and W. K. was rejected).

In particular, the reputation must be offered from *the particular district* or the particular class of persons affected:

1835, *Parke, B.*, in *Crease v. Barrett*, 1 C. M. & R. 928: "In cases of rights or customs which are not, properly speaking, public but of a general nature and concern a multitude of persons . . . it seems that hearsay evidence is not admissible unless it is derived from persons conversant with the neighborhood. . . . But where the right is really public — a highway, for instance — in which all the King's subjects are interested, it seems difficult to say that there ought to be any such limitation. In a matter in which *all* are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless unless it came from persons who were shown to have some means of knowledge, as by living in the neighborhood or frequently using the road in dispute."²

§ 1592. **Vehicle of Reputation; Old Deeds, Leases, Maps, Surveys, etc.** It is of course immaterial what form the reputation takes. That it may come in the shape of an individual's assertions, provided they genuinely purport to represent reputation, has already been noticed (*ante*, § 1584): and many other forms are to be recognized in the precedents. For example, the official return of an assembly of the homage (or tenants of a manor), rehearsing customs, fees, and the like, was always regarded as equivalent to a reputation among the tenants, and therefore as receivable.¹ In the same way, old maps² and old surveys,³ so far as they have been used and resorted to by the community in dealing with the land, may be taken as representing, after this test of use and criticism, the settled reputation of the community as to the correctness of the tenor of the map or the survey. So also, muniments of private title, such as old deeds and leases,⁴ may, in a given case, just as effectually be the vehicle of reputation.⁵ The use of history-books in this way is elsewhere considered (*post*, § 1598).

§ 1593. **Same: Jury's Verdict as Reputation.** That the verdict of a jury may amount to a statement of reputation has often been maintained, and the

² 1849, *Duke of Beaufort v. Smith*, 4 Exch. 467, 469 (to prove a custom, an alleged survey of 1650 by a jury of the manor was excluded; *Parke, B.*: "The question is whether a jury of the manor are not presumed to be acquainted with its customs, so as to bring the case within the rule laid down in *Crease v. Barrett*"; answering in the negative); 1852, *Daniel v. Wilkin*, 7 Exch. 437; 1860, *McKinnon v. Bliss*, 21 N. Y. 218, *per Selden, J.*

³ 1786, *Goodwin v. Spray*, 1 T. R. 473, *per Ashurst, J.*; 1793, *Beebe v. Parker*, 5 T. R. 14.

⁴ 1843, *R. v. Milton*, 1 C. & K. 62 (a map of parish boundaries made from information of one old man); 1898, *Taylor v. McGonigle*, 120 Cal. 123, 52 Pac. 159; 1852, *Adams v. Stanyan*, 24 N. H. 411; 1879, *Drury v. Midland R. Co.*, 127 Mass. 581; and cases cited *passim* in the foregoing sections.

⁵ 1816, *Billen v. Michel*, 4 Dow 297; 1870, *Smith v. Earl Brownlow*, L. R. 2 Eq. 252; 1852, *Adams v. Stanyan*, 24 N. H. 411.

For maps and surveys, see also the exception for deceased surveyors (*ante*, § 1570), and the exception for official surveyors (*post*, § 1665). Most writings about maps involve merely the

question whether a deed has by reference incorporated a map, — not a question of evidence; compare §§ 1777, 1778, *post* (verbal acts), §§ 2464-2466, *post* (interpretation by usage).

⁶ 1832, *Henderson, C. J.*, in *Sawser v. Herring*, 3 Dev. L. 342: "We have also received private deeds and mesne conveyances . . . under the idea that they are common reputation. *A fortiori* should grants from the State be admitted, for they are something more than the declaration of private individuals." *Accord*: 1819, *White v. Lisle*, 4 Madd. 223; 1829, *Coombs v. Coether*, 1 M. & M. 399; 1829, *Plaxton v. Dare*, 10 B. & C. 19 (it was urged for admission that "the fact recited in the leases . . . was equivalent to declarations made by the deceased landlords and the tenants"); 1829, *Brett v. Benes*, 1 M. & M. 418 (a deed under the seals of the University and Corporation of Cambridge); 1890, *Weld v. Brooks*, 152 Mass. 297, 305, 25 N. E. 719 (deed of 1860, between parties now deceased, admitted as reputation to evidence "the existence and location of a public way"). Compare the use of old deeds as circumstantial evidence of possession (*ante*, § 157).

⁷ For perambulations as reputation-evidence, see *ante*, § 1563.

original practice, where the matter was of a public nature, was to admit verdicts upon this theory:

1801, *Laurence, J.*, in *Reed v. Jackson*, 1 East 357: "Reputation would have been evidence as to the right of way in this case; *a fortiori*, therefore, the finding of twelve men upon their oaths."

But the practice may be said not to have obtained in the United States, and has now in effect been discredited in England. The truth is that it has to-day no possible justification under the present Exception. Its allowance up to the early part of the 1800s was merely "a relic of the time when a jury's verdict was a conclusion upon their own knowledge."¹ The jury's verdict did once represent the reputation of the neighborhood.² But in the modern practice neither a jury's verdict nor a judge's decree can well be regarded as a vehicle of reputation in any true sense. In the first place, if the judge or the jury were to be brought into court and asked, "What appeared to you to be the reputation among the witnesses?", the answer might in some cases involve reputation. But even here the difficulty is that neither judge nor jury do come into court as sworn witnesses to reputation. Next, the statement involved in a verdict or a decree does not necessarily or probably involve an answer to the above question. The verdict or the decree may have gone merely upon the preponderance of testimony; or it may have taken an old deed or other document as of superior and controlling value; or there may have been no evidence at all that could amount to a reputation. No doubt a previous verdict or decree should properly have an evidential value which the present form of the Hearsay rule does not concede it; but it is certainly not to be forced into evidence under the present exception.

That its acceptance was anomalous in modern practice came to be perceived in England in the middle of the century; it was admitted on precedent and half-heartedly, as "a sort of reputation."³ Finally, when in 1882 such evidence was again received, and by the House of Lords, it was not under the Reputation exception, or as hearsay at all under any exception, but as a "verbal act" (*post*, § 1778), — *i. e.* not as testimonial assertion, but as an act of possession in the course of the exercise of a public right by the people of the neighborhood.⁴ This seems to dispose of its use under the present exception.

¹ Thayer, *Cases on Evidence*, 1st ed., 422; *Preliminary Treatise*, 90 ff., 168 ff.; *post*, § 1800.

² 1840, *Alderson, B.*, in *Pim v. Curell*, 6 M. & W. 254 (answering the citation of earlier cases): "That was when the jury was summoned *de vicineto*, and their functions were less limited than at present."

³ 1838, *Brisco v. Lomax*, 8 A. & E. 211 (*Littledale, J.*: "It is not reputation; but it is as good evidence as reputation"; *Patterson, J.*: "Now it is certainly difficult to say that a verdict can be received merely as evidence of reputation; for a jury are summoned from the body of the county at large, and are not them-

selves likely to know the matter. . . . Yet where a matter has been before a jury, the verdict is generally given in evidence as a sort of reputation, if I may so term it"; *Coleridge, J.*: "It is not precisely evidence of reputation"); 1840, *Pim v. Curell*, 6 M. & W. 266, per *Abinger, C. B.*

⁴ 1882, *Neill v. Duke of Devonshire*, L. R. 8 App. Cas. 147 (*Selborne, J. C.*: "Such evidence, admissible in cases in which evidence of reputation is received, is not itself in any proper sense evidence of reputation. It really stands upon a higher and a larger principle, especially in cases, like the present, of prescription; . . . it comes within the category of *res*

§ 1594. **Same: Judicial Order or Decree, or Arbitrator's Award, as Reputation.** In connection with the earlier doctrine, just examined, that a jury's verdict might be used as involving reputation, the attempt was sometimes made to treat a judge's or arbitrator's order or award as also admissible in the same way. But for the reasons just stated, as well as upon the principle of lack of Knowledge (*ante*, § 1591), such a use of orders or decrees has generally been repudiated.¹

§ 1595. **Negative Reputation.** It would seem, on the analogy of other instances (*ante*, §§ 1071, 1497, 1531, 1556, *post*, 1614), that an assertion may be made by silence, and that therefore the absence of a reputation (*i. e.*, the fact that no one in the region had ever heard of the right, custom, or boundary being as alleged) should be admissible as a negative reputation.¹

B. EVENTS OF GENERAL HISTORY.

The general principles of this branch of the exception do not differ materially from those of the preceding one; but the line of precedents is a separate one, and the scope of application is in some respects broader; so that it seems more profitable to regard it as a distinct branch of the exception.

§ 1597. **Matter must be Ancient; Statutory Regulation.** The principle of necessity, allowing the use of this class of evidence, is the same as that already examined (*ante*, § 1582), namely, the matter as to which the history or other treatise is offered must be an ancient one, or one as to which it would be unlikely that living witnesses could be obtained. In other words, it must be a matter concerning a former generation.¹ Statutory declaration of the

grate and of declarations accompanying acts. . . . The effect of this evidence . . . is extremely strong to establish a state of possession and enjoyment of the fisheries"; Lord O'Hagan: "I think the proceedings were admissible, not as evidence of reputation, which I agree they are not, but of something higher and better than reputation, . . . of the possession in fact at the time of the hills being filed of the several fishery. . . . Evidence of acts and proceedings with reference to the river generally—the leases, the covenants and reservations, the actions, the judgments, the licenses, and the successful assertions of right under the patents—was properly admitted"; Lord Blackburn agreed that the Court decree "is perhaps not properly evidence of reputation," but is "as strong or stronger than reputation"; 1869, *Hollister v. Young*, 42 Vt. 403, 407 (verdict in trespass or ejectment as indicating a claim of title).

¹ 1831, *Rogers v. Wood*, 2 B. & Ad. 256 (excluding a decree of court by certain judges, offered as reputation; "here the persons acting as judges had no knowledge of the fact [*i. e.* the customary rights of a city] except what they derived in the course of that proceeding); 1832, *Duke of Newcastle v. Braxtowe*, 4 id. 279 (orders of sessions made by the justices of the peace assembled in sessions were admitted as evidence of reputation as to a local custom, because, per Parke, J., "though they were not proved to be resiants in the county or hundred,

they must, from the nature and character of their offices alone, be presumed to have sufficient acquaintance with the subject to which their declarations relate"); 1839, *Evans v. Rees*, 10 A. & E. 155 (Denman, L. C. J.: "[The opinion of an arbitrator as to a boundary is] formed not upon his own knowledge, as declarations used by way of reputation commonly are").

In the following cases a chancellor's decree was thus admitted: 1838, *Laybourn v. Crisp*, 4 M. & W. 326, per Parke, B.; 1877, *Duke of Devonshire v. Neill*, L. R. Ire. 2 Exch. 153.

² 1835, *Drinkwater v. Porter*, 2 C. & K. 182; 1842, *Anglesey v. Hatherton*, 10 M. & W. 239, 244, *semble*.

³ 1833, *Morris v. Lessees*, 7 Pet. 558; 1871, *Whiton v. Insurance Cos.*, 109 Mass. 31 (Appleton's American Cyclopedia, offered to prove that a certain island was repented to be a gnano island, was rejected because the facts were of recent occurrence). The same result is reached in construing Code provisions: 1885, *Gallagher v. R. Co.*, 67 Cal. 15, 6 Pac. 869 (McKee, J., construing C. C. P. § 1936: "What are 'facts of general notoriety and interest'? We think the term stands [1] for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from [2] facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses").

rule, however, has sometimes ignored this, partly through a failure to discriminate properly between the present exception, in this and the foregoing branch, and that which has been created for Learned Treatises in general (*post*, § 1693).²

§ 1598. **Matter must be of General Interest.** When a treatise on history is offered as embodying a reputation of the community upon the fact in question, the treatise, in the first place, cannot be regarded as more than the statement of the individual author, unless it is a work so widely known, so long used, and so highly respected, that it can be said to represent the assenting belief of the community. In the next place, the facts for which such an opinion or reputation can be taken as trustworthy must (on the principle of § 1583, *ante*) be such facts as have been of interest to all members of the community as such, and therefore have been so likely to receive general and intelligent discussion and examination by competent persons, that the community's received opinion on the subject cannot be supposed to have reached the condition of definite decision until the matter had gone, in public belief, beyond the stage of controversy and had become settled with fair finality. This much of a general principle can be said to be beyond dispute. But for the application of the principle, it seems impossible to say that any more definite limitations have been accepted as law:

1696, *Steyner v. Droitwich*, Skinner 623, 1 Salk. 281: "Camden's Britannia was offered in Evidence to prove a Reputation Ninety-two years ago that Salt ought to be made only at the three Pits of the Burgesses [of Droitwich] and that all others were excluded. And it was said that the Sayings of antient Persons who are dead is always allowed, and this amounts to as much as the saying of an old Man at least, and that Camden was a publick Person, being Historiographer Royal, etc., and that a Gravestone had been allowed as Evidence. *Seil non allocatur*; for if one part of Camden be allowed, another part ought to be, and if Camden, then another Historian as well as him, and there would not be any certainty. . . . And the Court said that an History may be evidence of the general history of the Realm, but not of a particular Custom; and therefore *secundum subjectam materiam* it may be good Evidence or not."

1833, *Story, J.*, in *Morris v. Lessees*, 7 Pet. 558: "Historical facts of general and public notoriety may indeed be proved by reputation, and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined . . . to cases where from the nature of the transactions, or the remoteness of the period, or the public and general reception of the facts, a just foundation is laid for general confidence."

² Cal. C. C. P. 1872, § 1870, par. 11 ("common reputation existing previous to the controversy, respecting facts of a public or general interest more than 30 years old, and in cases of degree or boundary," is admissible); par. 12 ("monuments and inscriptions in public places, as evidence of common reputation," is admissible); § 1936 ("Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are *prima facie* evidence of facts of general notoriety and interest"); Ga. Code 1895, § 5183 ("declarations of deceased persons as to ancient rights, made before litigation arose," admissible to prove "matters of public interest in which the

whole community are supposed to take interest and to have knowledge"); § 5185 ("traditional evidence as to ancient boundaries and landmarks," admissible); *Ida. Rev. St.* 1887, § 5990 (like Cal. C. C. P. § 1936); *Ja. Code* 1897, § 4618 (like Cal. C. C. P. § 1936); *Mont. C. C. P.* 1895, § 3146 (like Cal. C. C. P. § 1870); § 3227 (like Cal. C. C. P. § 1936); *Nebr. Comp. St.* 1899, § 5916 (like Cal. C. C. P. § 1936, substituting "or" for "and" in the last clause, and "presumptive" for "*prima facie*"); *Or. C. C. P.* 1892, § 706 (like Cal. C. C. P. § 1870); § 758 (like Cal. C. C. P. § 1936); *Utah Rev. St.* 1898, § 3400 (like Cal. C. C. P. § 1936).

1847, *Sandford, V. C.*, in *Bogardus v. Trinity Church*, 4 Sandf. Ch. 724: "The statements of historians of established merit . . . are from necessity received as evidence of facts to which they relate, . . . restricted to facts of a public and general nature."

1860, *Selden, J.*, in *McKinnon v. Bliss*, 21 N. Y. 216: "Such evidence is only admissible to prove facts of a general and public nature, and not those which concern individuals and mere local communities. . . . History is admissible only to prove history, that is, such facts as being of interest to a whole people are usually incorporated in a general history of the state or nation."¹

In some instances the principle has been applied too narrowly, for example, in excluding county-histories;² for on certain matters there may be a general and settled county-reputation which will be quite as trustworthy as a national reputation upon national matters. There should therefore be no arbitrary line excluding local histories.

§ 1599. **Discriminations;** (1) **Judicial Notice;** (2) **Scientific Treatises.**

(1) The paucity of rulings upon this class of evidence is probably due to the consideration that when a fact — for example, the date of Washington's birth or of F. John's assassination — is one of such general interest as to render an accepted historical treatise admissible upon the present principle, the fact is also of such notoriety that it will be assumed as true by the Court, upon the principles of Judicial Notice (*post*, § 2565). In such a case, if the judge is actually not certain of the precise truth as to the fact alleged, but it is of a class capable of being judicially noticed, he may consult an accepted treatise as the basis of his ruling (*post*, § 2569); and thus the treatise is in fact used

¹ Other examples are as follows: *England*: 1672, *St. Katherine's Hospital*, 1 Vent. 151 ("It was shewn out of Speed's Chronicles, produced in Court, that at that Time Queen Isabel was under great Calamity and Oppression, and what was then determined against her was not so much from the Right of the Thing as the Iniquity of the Times"); 1682, *Bronnker v. Atkyns, Skinner* 14 ("Speed's Chronicle was given in Evidence to prove the Death of Isabel, Queen Dowager to E. II; and though Maynard seemed to oppose it, and Dobbins said it was done by Consent; yet the Chief Justice said he knew not what better Proof could be made. And Wallop said that in the Lords' House it was admitted by them as good evidence in the Lord Brltgewnter's Case"); 1684, *L. C. J. Jeffreys*, in *Lady Ivy's Trial*, 10 How. St. Tr. 555, 625 (rejecting a history offered to show the date of Charles V's abdication and Philip and Mary becoming king and queen of Spain, over a century before: "Instead of records, the upshot is a little lousy history . . . Is a printed history, written by I know not who, an evidence in a court of law?"); 1718, Proceedings respecting the Education, etc., of the Royal Family, 15 How. St. Tr. 1202, 1203, 1206, 1209 (the Judges drew up an opinion upon the King's prerogative in the matter, and cited precedents on the exercise of the prerogative from Rymer's *Federa*, Lord Clarendon's History, Cotton's Record, Kennett's History of England, Burnet's History of the Reformation); *United States*: 1834, *Marguerite v. Crotenu*, 3 Mo. 540, 555 (*DuPratz, Barbé Mar-*

bois and others' works, consulted as to the existence of slavery of Indians in America in the 1700s); 1836, *Com. v. Alburger*, 1 Whart. 469, 473 (a letter of William Penn confirming a certain grant; its mention "in Proud and various other historical works" treated as sufficient, the matter being ancient); 1869, *Baird v. Rice*, 63 Pa. 489, 496 (in determining the ancient plan of London's streets, etc., so as to interpret Penn's plan of Philadelphia, the following works were consulted: Maitland's History of London, 1754; Bohn's Pictorial Handbook of London, 1854; Great London Directory, 1855); 1811, *Hadfield v. Jameson*, 2 Muuf. 53, 71, per Tucker, J. (*Edwards' History of the West Indies*, used to show the government of Hispaniola).

² 1834, *Evans v. Getting*, 6 C. & P. 586 (to show the boundary between two counties, Brecon and Glamorgan, Nicholl's History of Brecknockshire was offered; Alderson, B.: "This is a history of Brecknockshire. The writer of that history probably had the same interest in enlarging the boundaries of the county as an other inhabitant of it. It is not like a general history of Wales. I shall not receive it;" the fault of this decision is that it seems to proceed upon the principle that local interest excludes reputation, — a principle seen *ante*, § 1589, to have been repudiated; the above ruling largely influenced the two ensuing); 1860, *McKinnon v. Bliss*, 21 N. Y. 216 (rejecting Bentou's History of Herkimer Co.); 1887, *Roe v. Strong*, 107 id. 356, 14 N. E. 294 (rejecting Thompson's History of Long Island).

and trusted without being offered formally in evidence to the jury. An equivalent result is by indirection attained; and it can hardly be doubted that, while in practice little inconvenience is felt, yet in theory there is a lurking inconsistency.

(2) In a few jurisdictions, by way of a special exception, the use of scientific treatises in evidence has, with certain limitations, been sanctioned (*post*, § 1690); so that an historical treatise not admissible under this exception might be receivable under that one. Nevertheless, the modern judicial tendency has been to construe the statutes in question as intended merely to re-state the present exception and not to create a new one.¹

C. MARRIAGE, AND OTHER FACTS OF FAMILY HISTORY.

§ 1602. **Reputation of Marriage; General Principle.** The use of reputation, by exception to the Hearsay rule, to evidence marriage, fulfils both of the ordinary prerequisites already noted, the necessity principle (*ante*, § 1421) and the principle of trustworthiness (*ante*, § 1422).

The *necessity*, however, here lies not, as for land-boundaries (*ante*, § 1582), in the antiquity of the matter to be proved and the consequent dearth of living testimony, but in the absence of satisfactory testimony, directly to the act of exchanging marriage consent. At common law the persons said to have been married, being usually parties or otherwise interested in the cause, would consequently have been disqualified as witnesses; and, when they were only third persons not interested (as in a contest over the inheritance of their property) would usually have been deceased and therefore unavailable. Furthermore, the procurement of the celebrant of their marriage, as a living witness, would usually not be feasible; and the use of a written record, in the shape of a certificate or a register-entry, was to a great extent not permissible by law, owing chiefly to the defective regulation of such records in English and American communities (*post*, §§ 1642-1645). Finally, the latter source of evidence was in the United States likely to be even more scanty, first, because of the constant migration of families over wide regions, and, next, because a marriage was here almost universally treated as valid without a ceremonial celebration, and therefore no record of it would exist for all such informal marriages. Practically, therefore, the chief available sources of evidence were two only. One of these was the conduct of the persons themselves as husband and wife; this was used as circumstantial evidence indicating a prior exchange of consent, and has already been examined (*ante*, § 268); it was commonly spoken of as "habit." The other was the present kind of evidence, namely, reputation in the community as married persons.

As to its *trustworthiness*, for ordinary practical purposes, there could equally be no doubt. The relation of husband and wife has important consequences, social and legal, for those who deal with persons purporting to be

¹ See the rulings cited *post*, §§ 1693, 1697-1699.

such. The community has decidedly an interest to ascertain the fact; and this interest in ascertaining the truth has been already seen to be the ground for exceptionally admitting other kinds of hearsay statements (*ante*, §§ 1482, 1486, 1586) as from persons sufficiently qualified. The adequacy of this ground in the present instance has been expounded in the following passages:

1867, Lord *Cranworth*, in the *Breadallbane Case*, L. R. 1 II. L. Sc. 199: "The great facility which the law of Scotland affords for contracting marriage has given rise to rules and principles which have been sometimes considered peculiar to that law. By the law of England, and, I presume, of all other Christian countries, where a man and woman have long lived together as man and wife, and have been so treated by their friends and neighbors, there is a *prima facie* presumption that they really are and have been what they profess to be. If after their deaths a succession should open to their children, any one claiming a share in such succession as a child would establish a good *prima facie* case by showing that his parents had always passed in society as man and wife, and that the claimant had always passed as their child. If the validity of the parents' marriage should be disputed, it might become necessary for the person claiming as their child to establish its validity, and, inasmuch as in England all marriages are solemnized in public and publicly recorded, it is reasonable to require the claimant to give positive evidence of its celebration, or else to explain why he is unable to do so. The principle is the same in Scotland; but as marriage there is not necessarily celebrated in public or recorded, it is much more probable than it would be in England that there may have been a marriage, but that there may be no means of giving direct proof of it. Those who have to decide, after the death of parents, on the legitimacy of children must much oftener than in England have to rely solely on the *prima facie* evidence afforded by the conduct of the parties towards one another and of their friends and neighbors towards them. This sort of evidence is spoken of in Scotland as *habite* and *repute*. Persons are sometimes said to be married persons by *habite* and *repute*. I agree, however, with the argument of the Appellant (speaking with deference to those who think otherwise), that this is an inaccurate mode of expression. Marriage can only exist as the result of mutual agreement. The conduct of the parties and of their friends and neighbors, in other words, *habite* and *repute*, may afford strong, and, in Scotland, attending to the laws of marriage there existing, unanswerable evidence that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I cannot, however, think it correct to say that *habite* and *repute* in any case make the marriage. *Repute* can obviously have no such effect. It is, perhaps, less inaccurate to speak of *habite* creating marriage, if by the word *habite* we are to understand the daily acts of persons living together which imply that they consider each other as husband and wife, and it may be taken as implying an agreement to be what they represent themselves as being. It seems to me, however, even here to be an improper use of the word to say that it makes marriage. The distinction is perhaps one rather of words than of substance; but I prefer to say that *habite* and *repute* afford by the law of Scotland, as indeed of all countries, evidence of marriage,—always strong, and, in Scotland, unless met by counter evidence, generally conclusive."

1844, Mr. J. *Hubback*, *Succession*, 244: "Reputation of marriage, unlike that of other matters of pedigree, may proceed from persons who are not members of the family. The reason of the distinction is to be found in the public interest which is taken in the question of the existence of a marriage between two parties; the propriety of visiting or otherwise treating them in society as husband and wife, the liability of the man for the debts of the woman, the power of the latter to act *suo jure*, and their competency to enter into new matrimonial engagements, being matters which interest not their relations alone, but every one who by coming into contact with them may have occasion to regulate his conduct according as he understands them to be married or not."

1882, *Finch, J.*, in *Badger v. Badger*, 88 N. Y. 546, 552: "The reputation attending this cohabitation in the neighborhood where it existed and was known among those brought into its presence by relationship, business, or society, was that which ordinarily attends the dwelling together of husband and wife. It has been well described as the shadow cast by their daily lives. In the general repute surrounding them, the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested, and safer to be trusted because prone to suspect, we are enabled to see the character of the cohabitation and discern its distinctive features. It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing a conclusion."¹

Accordingly, it has been universally conceded that reputation in the community is always admissible to evidence the fact of marriage; there does not seem to have been any time when this was disputed.

§ 1603. **What constitutes Reputation; Divided Reputation; Negative Reputation.** (1) It does not appear that the reputation must be such as exists in the neighborhood; *i. e.* the limitation generally laid down (*post*, § 1615) for the use of reputation to moral character is not here applied. The fact of marriage may be of interest to many others than mere neighbors. To them chiefly it may be of social interest; but to others it may be of legal interest and equally important. There seems to be no settled formula of inquiry; in general, it may be assumed that the reputation may be one existing among any persons who *know the parties* said to be married:

1832, *Evans v. Morgan*, 2 Cr. & J. 453, 456; *assumpsit on a note made by a woman before coverture; the only evidence of the marriage "was that of a person who did not appear to be related to them, or to live near them, or know them intimately; and he proved only that he knew the defendant J. M. when she was J. R. and that he had heard that she had since married M."*; this witness was not cross-examined. Counsel argued that "it has never been held that such loose evidence as this amounts to evidence of reputation"; *Bayley, B.*: "It goes to show the reputation of the neighborhood"; *Lyndhurst, L. C. B.*: "If you do not cross-examine on such point, you must take those expressions in the ordinary sense"; *Vaughan, B.*: "I think that there was *prima facie* evidence of reputation of a marriage."¹

(2) The reputation must be a consensus of opinion; it must not be a *divided* reputation:

1814, Lord *Redesdale*, in *Cunningham v. Cunningham*, 2 Dow 482, 511: "The parties must be reputed and holden to be married. It must not be an opinion of A in contradiction to an opinion of B, and of C in opposition to D; it must be founded not on singular, but on general opinion. That species of repute which consists in A, B, and C, thinking one way, D, E, F, another way, is no evidence on such a subject. . . . The conduct of the parties must be such as to make almost every one infer that they were married.

This much, in theory, may be conceded; it is analogous to the rule laid down

¹ Compare the following cases: 1874, *Lyle v. Ellwood*, L. R. 19 Eq. 107; 1876, *De Thoren v. Attorney-General*, L. R. 1 App. Cas. 686.

² 1791, *Standen v. Standen*, Peake N. P. 33 (that the deceased clerk of the parish had said

the banns were published, admitted by Lord Kenyon "as evidence of the general reputation"); 1847, *Jones v. Hunter*, 2 La. An. 254, 256, *semble* (reputation in a place where the parties had only "lately arrived," insufficient).

for reputation to moral character (*post*, § 1612).³ But the difficulty comes in applying it. If the witnesses all agree that some of the community thought the persons married while others thought them not married, there is in truth no reputation, no consensus of opinion, and the individual opinions would be inadmissible as a reputation. But if, as will usually happen, the witnesses *pro* and *con* assert each that the general opinion in the community, as observed by them, was respectively affirmative and negative of marriage, this is not a case of divided reputation; there is or is not a genuine and universal reputation according as one or the other set of witnesses is believed; and the evidence should therefore go to the jury to determine the witnesses' credibility.³ The attempt to apply any technical restriction of admissibility based on division of reputation seems therefore to be futile and unwise.⁴

(3) The reputation, assuming it to exist in definite form, may equally be a *negative* one, *i. e.* a reputation that certain persons living together are not married.⁵

§ 1604. **Sufficiency of Reputation-Evidence, distinguished.** Whether reputation is admissible at all, is the only question with which the Hearsay rule is concerned. But there are other rules which concern the sufficiency of admissible evidence, — rules of Quantity; and one of these declares reputation, or reputation together with habit, is insufficient at common law in prosecutions for *bigamy* and actions for *criminal conversation*. The testimony of an eye-witness is indispensable, *i. e.* the oral testimony of a bystander or the celebrant or a party to the marriage or the hearsay testimony of a certificate or register entry. These rules, which form a special class by themselves, are elsewhere dealt with (*post*, §§ 2082-2086).

§ 1605. **Reputation of Other Facts of Family History (Race-Ancestry, Legitimacy, Relationship, Birth, Death, etc.).** May not neighborhood-reputation be often sufficiently trustworthy to be received in evidence of certain other facts of family history likely to be notoriously canvassed and hence to become known with a sufficient degree of accuracy?¹ In communities of more

³ 1875, *Barnum v. Barnum*, 42 Md. 251, 297 ("where reputation in such case is divided, it amounts to no evidence at all"); 1877, *Jones v. Jones*, 48 id. 391, 403 (*Barnum v. Barnum* affirmed); 1899, *Williams v. Herrick*, 21 R. I. 401, 43 Atl. 1036 (must be general and uniform).

⁴ This seems to have been the view taken in the following cases: 1883, *Powers v. Charmsbury*, 35 La. An. 630, 634; 1894, *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752.

⁵ The rule should rather be that a divided reputation, though admissible, is insufficient for proof: 1902, *Heminway v. Miller*, 87 Minn. 123, 91 N. W. 428.

⁶ 1874, *Lyle v. Ellwood*, L. R. 19 Eq. 98, 106; 1868, *Boone v. Fennell*, 28 Md. 607, 629; 1842, *Re Taylor*, 9 Paige 611, 616 (reputation of non-marriage was admitted; but the Chancellor declared that reputation after certain "stories were set afloat" was "not legal evidence to rebut the presumption," "as it was not a part of

the *res geste*"; this is a confusion of thought, but at any rate does not declare the reputation inadmissible). *Contra*: 1885, *Northrop v. Knowles*, 52 Conn. 522 (title depending on legitimacy; after proof by certificate of marriage, reputation of the relation as adulterous was excluded; perhaps allowable, in proof by reputation, to show divided reputation in disproof); 1882, *Badger v. Badger*, 88 N. Y. 546, 554, *semble* (reputation of non-marriage of the man among persons with whom he lived as a bachelor, concealing his connection with the woman, held inadmissible; to be admissible "it does not and cannot go beyond the range of knowledge of the cohabitation"). *Undecided*: 1859, *Hill v. Hill's Adm'r*, 32 Pa. 511 (dower; reputation that claimant had been "called in her neighborhood" Mrs. W., not Mrs. H., excluded, as here being only individual declarations; general question reserved).

¹ Distinguish the use of declarations by indi-

primitive conditions, where social life continues stable amid constant and fixed surroundings, the neighborhood-reputation is unquestionably of some value. Such was formerly the almost universal state of things in England, on the Continent, and in the United States. Such is still the state of things in rural communities almost everywhere (except in our newly-settled regions), and notably in the small towns of New England and the South. That it has ceased to exist in the metropolitan communities does not indicate that neighborhood-reputation, where it arises, is less trustworthy; it merely indicates that amid the isolated individualism and kaleidoscopic changes of the metropolitan horde no neighborhood-reputation is likely to exist. Moreover, the frequent migrations of American life have in one respect made reputation-evidence even more necessary than in stable communities as a source of knowledge; for in countless families the only means of knowledge for them of the career of their migrated members is the reports brought back, at times, of the fate or fortune reputed to have overtaken them in the distant community where they took up a new home. In the typical cases coming before the courts, where, for example, one who was in California with John Doe, who emigrated from New England in 1850, testifies that Doe was commonly reputed in Sandy Gulch to have been killed in a brawl and to have been then and there buried, does not this serve to support belief? If it is the fear of imposition that stands in the way, would it not be equally possible to procure some perjurer to come from California and tell upon the stand a concocted story about the death of Doe as witnessed by him? It is not a question of absolute proof; it is a question of the admissibility of a single piece of evidence, which may or may not prove to be sufficient. It seems finical to exclude from any consideration whatever, in a legal investigation, a class of evidence which is not only much relied upon in practical affairs, but is also sufficiently within the general principle of two exceptions (Reputation and Family History) to the Hearsay rule. Such evidence was once in England considered orthodox enough;² and its use has been vindicated, on grounds of policy and of principle, by many American Courts, as admissible in certain classes of cases:

1821, *Mills, J.*, in *Birney v. Hann*, 3 A. K. Marsh. 326: "From the sayings of the parents or members of the family, Courts progressed at last to the admission of the general recognition or reputation of the heirship by others. It is admitted that it is difficult to lay down any precise rule on this subject. The kinds of evidence which are calculated to prove the consanguinity or affinity of one person to another are various, and all may be proper after a lapse of time. . . . Lapse of time, or distance of place, may furnish grounds for greater latitude and admit tradition, reputation, and recognition of a neigh-

viduals (friends and intimates) *not being family-relations*, under the Family History Exception (*ante*, § 1487).

² It was always admitted to show *place of birth*, as fixing nationality: 1696, *Vaughan's Trial*, 13 How. St. Tr. 485, 509, 512, 515; 1704, *Lindsay's Trial*, 14 id. 987, 996; 1717, *Francia's Trial*, 15 id. 897, 962. So also for *time of birth*: 1649, *Duke of Hamilton's Trial*, 4 How. St. Tr.

1155, 1170 ("common report" admitted that defendant was a *postnatus*, i. e. born after the accession of James I of England). The practice probably continued till the 1800s: 1792, *Grose, J.*, in *Morewood v. Wood*, 14 East 330, note: "I remember the case of a pedigree tried at Winchester, where there was a strong reputation throughout all the country one way, and a great number of persons were examined to it."

borhood, or the use of documents, records, and inscriptions, which may disclose the connexion by blood or marriage to him from whom a right is claimed."

1834, *Catron, C. J.*, in *Flowers v. Haralson*, 8 Yerg. 406: "Reputation of pedigree is the result of the public mind, founded upon actual knowledge of the whole community; and experience and knowledge in the nature and habits of man teach the unerring certainty of the public knowledge and conclusion in relation to family history. Individuals may fail in their investigations of particular facts; but where marriages, births, and deaths are the facts to be learned, human curiosity saves us the trouble and expense of proving the occurrences by witnesses present or by the hearsay of those who were, or of the family connexion. No individual investigations or testimony can generally be equal in certainty to the curious' scrutiny; and if secrecy be attempted, public curiosity sets on foot an anxious search for the truth. General reputation of such facts is not only competent, but highly credible."

1869, *Lawrence, J.*, in *Ringhouse v. Keener*, 49 Ill. 471 (admitting testimony of friends that "his death was announced in the newspapers and he was spoken of by his acquaintances as dead"); "In a population as unstable as ours, and comprising so many persons whose kindred are in distant lands, the refusal of all evidence of reputation in regard to death, unless the reputation came from family relatives, would sometimes render the proof of death impossible, though there might exist no doubt of the fact, and thus defeat the ends of justice."

1875, *Cooper, C.*, in *Carter v. Montgomery*, 2 Tenn. Ch. 227: "In England it is now well settled that hearsay evidence is resorted to in matters of pedigree . . . upon the ground of the interest of the declarants in knowing the connections of the family. The rule is consequently restricted to the declarations of deceased persons who were related by blood or marriage to the person from whom the descent is claimed, and general repute in the family proved by a surviving member. . . . It is obvious that while the English rule may be most consonant to sound principle, and may answer the ends of justice in a dense population and settled community, yet it scarcely suffices in a sparsely inhabited country with a migratory and rapidly changing population. It would be utterly inadequate in matters relating to a slave population, where the family is not legally recognized, and, for the same reason, to the settlement of the rights of illegitimates. Where would the negro have been in suits for freedom, after a few years, on a change of domicile by the master, with the presumption of slavery against them by reason of color, if the English rule had been rigidly adhered to? . . . Under our decisions so much of the testimony in this case, based upon hearsay or reputation, as relates to the pedigree of James M. Garrett is admissible, whether it comes from members of the family or third persons, to be weighed according to the sources of information, the opportunities of witnesses, and the surrounding circumstances."

This sanction of neighborhood-reputation has not been universal. It is illustrated in many rulings; but there is still in many other Courts an entire refusal to accept it. There are certain classes of facts for which it is entirely appropriate; there are others for which it may not be. The matter is one in which it should be left to the discretion of the trial Court to admit such a reputation wherever the meagreness of other evidence, or the difficulty of obtaining it, renders it desirable to accept that which is offered.

On no one point is there a general agreement in the rulings. They may be grouped according as they deal with the admissibility of reputation as evidence of *legitimacy* or the opposite;³ of *relationship*, to a family or to an

³ *England*: 1743, *Craig dem. Annesley v. t. 77* (same controversy; excluded); 1810, *Ban-*
Anglesea, 17 How. St. Tr. 1139, 1174, 1439, *et*
passim (admitted); 1744, *Heath's Trial*, 18 *id.*
bury Peerage Case, in *App. to LeMarchant's*
Gardner Peerage Case, 437, 470, 481 (Lord

individual,⁴ or of birth,⁵ or of death or its place or time,⁶ or of race-ancestry (i. e. whether slave or free, whether white, negro, or Indian),⁷ or of sundry facts of family history.⁸

D. MORAL CHARACTER (PARTY OR WITNESS).

§ 1608. *Reputation and Actual Character distinguished.* That actual character is distinct from reputation of it, and the latter is merely evidence to prove the former, ought to be a truism. But the common use of the word "character" in the senses both of actual disposition and of reputation has

Reeddale: "General reputation of legitimacy would have been evidence in favor of the legitimacy of Nicholas; so general reputation that there existed no issue of Lord Banbury was evidence against such legitimacy. . . . The reputation at home and abroad, the belief of relations, friends, and neighbors, was the evidence which ought to have been resorted to"; *United States*; 1901, *Heaton's Estate*, 135 Cal. 383, 87 Pac. 321 (reputation in the community, excluded); C. C. P. § 1870, par. 11, quoted *ante*, § 1577, "never was intended to broaden the common-law rule upon this subject"; 1857, *Richardson v. Roberts*, 23 Ga. 230 (reputation that the plaintiff's child was a bastard, etc., as alleged in an utterance charged as defamatory, excluded); 1861, *DeHaven v. DeHaven*, 77 Ind. 258, 259 (reputation as to paternity, excluded); 1899, *Watson v. Richardson*, 110 Ia. 873, 80 N. W. 407 (current reports in the community of deceased that the claimant was his illegitimate son, excluded; except so far as by statute the putative father's recognition in substantive law must be "notorious"); 1882, *Haddock v. R. Co.*, 3 All. 398 (reputation of child's illegitimacy, excluded); 1898, *Erwin v. Bailey*, 123 N. C. 628, 31 S. E. 644 (reputation to show legitimacy, excluded); 1846, *Ford v. Ford*, 7 Humph. 98 (admitted); 1875, *Carter v. Montgomery*, 2 Tenn. Ch. 227 (admitted; see quotation *supra*); 1835, *Stogall v. Stogall's Adm'r*, 2 Brockenb. 356, 263, *Marshall, C. J.* (it "cannot be entirely disregarded," but its weight "depends on the circumstances of the case"; sale of reputation to legitimacy); 1826, *Stokes v. Dawes*, 4 Mason 268, 270, *Story, J.* (admitted without question); 1896, *Flora v. Anderson*, 75 Fed. 217, 233 (neighbors' reputation as to illegitimate child, excluded).

Distinguish the use of reputation under a statute requiring a putative father's recognition to be "notorious"; here the reputation is a part of the issue under the substantive law and is admissible on that ground (*ante*, § 70); 1899, *Watson v. Richardson*, Ia., *supra*; 1901, *Alston v. Alston*, 114 Ia. 29, 86 N. W. 55.

⁴ 1899, *Elder v. State*, 123 Ala. 35, 28 So. 213 (reputation in the neighborhood to show relationship, excluded); 1899, *Lamar v. Allen*, 108 Ga. 158, 33 S. E. 958 (reputation of neighborhood to show relationship, excluded); *Me. Pub. St.* 1883, c. 27, § 49 (in action against liquor-seller for damage to family, general reputation is admissible to show plaintiff's rela-

tionship to the intoxicated person); 1811, *Jackson v. Cooley*, 8 John. 130 (cited *ante*, § 1487); 1834, *Ewell v. State*, 6 Yerg. 364, 372 (admitted).

⁵ Citations *supra*, note 3.

⁶ 1869, *Ringhouse v. Keener*, 49 Ill. 471 (admissible; see quotation *supra*); 1860, *Carnes v. Crandall*, 10 Ia. 377 (reputation among C.'s friends and neighbors in California that he had died there in 1851, excluded; no authority cited); 1883, *Blairwell v. Bickum*, 139 Mass. 330, 1 N. E. 281 (reputation of death of G. before marriage with E. Q., excluded; no authority cited); 1902, *Welch v. R. Co.*, 162 Id. 84, 84 N. E. 895 (general repn., brought home to the family, held admissible to prove death); 1826, *Jackson v. Ets*, 5 Cow. 319 (time of death; admissible); 1898, *Arerets v. R. Co.*, 156 N. Y. 1, 60 N. E. 422 (whether M. was the only surviving child of C. in 1849; reputation of the neighborhood received to show the death of certain other children); 1834, *Flowers v. Harrison*, 6 Yerg. 496 (admissible; see quotation *supra*); 1851, *Frimm v. Stewart*, 7 Tex. 178 (reputation that W. had died some years before, admitted); 1831, *Scott v. Ratcliffe*, 5 Pet. 81, 86, *seem/s* (reputation admitted); 1890, *Hurlburt v. Hurlburt*, 63 Vt. 667, 22 Atl. 850, *seem/s* (reputation in Dakota as to death of an emigrant, excluded); 1896, *Hurlburt's Estate*, 66 Id. 366, 35 Atl. 77 (reputation among friends and acquaintances, in the place of residence, as to death, excluded).

⁷ 1904, *Locklayer v. Locklayer*, — Ala. —, 35 So. 1008 (inheritance of an alleged negro); 1858, *Bryan v. Watson*, 20 Ga. 480 (freedom of a person of color); 1864, *Nave v. Williams*, 22 Ind. 368 (mixed blood; admissible); 1839, *Chancellor v. Milly*, 9 Dana 24 (colored slave ancestry; admissible); 1827, *Vaughan v. Phebe*, Mart. & Y. 19 (admissible, to show free or slave ancestry; leading opinion, by Crabb, J.); 1806, *Hudgins v. Wrights*, 1 Hen. & M. 134, 137, 142 (Indian ancestry; admissible); 1808, *Pegram v. Isabell*, 2 Id. 205 (similar).

⁸ 1851, *State v. Seawell*, 18 Ala. 816 (reputation to prove a party out of the State, excluded); 1858, *Griffin v. Wall*, 32 Id. 149, 160 (reputation to prove a voter's residence, inadmissible); 1897, *Mitchell v. State*, 114 Id. 1, 22 So. 71 (the absence of a witness from the jurisdiction, excluded); 1898, *Aibion v. Maple Lake*, 71 Minn. 503, 74 N. W. 382 (reputation as to the residence of a pauper, excluded).

led to occasional obscurity of language in judicial opinions, and has thus tended to remove the emphasis from the distinction. When we argue that a defendant probably did not commit a forgery because his disposition was honest (*ante*, § 55), or that a witness probably is speaking falsely because he is mendacious in disposition (*ante*, § 922), we are arguing from his actual moral constitution, which in its turn becomes a fact to be proved; and when we then resort to reputation or individual opinion or particular conduct, we are resorting to it as evidence from which we may make some inference to the nature of the actual trait. The distinction has already been referred to elsewhere (*ante*, §§ 52, 920); but the following passages remind us of its importance:

1851, *Caldwell, J.*, in *Bucklin v. State*, 20 Oh. 23: "The term 'character,' when more strictly applied, refers to the inherent qualities of the person, rather than to any opinion that may be formed or expressed of him by others; the term 'reputation' applies to the opinion which others may have formed and expressed of his character; so that, as has been remarked in some of the books, when treating on this subject, a man's character may really be good when his reputation is bad, and, on the other hand, his reputation may be good when his character is bad. But, as we have before intimated, the terms when used in connection with this subject are generally used in contradiction to this distinction, -- the term 'general character' being used in legal signification, as it is frequently used in common variance, to express the opinion that has generally obtained of a person's character, the estimate the community generally has formed of it. When you ask a witness, then, in this sense of the term, what a man's general character is for truth and veracity, he is called on to answer as to what opinion is generally entertained and expressed of him by those acquainted with him."

1885, *Durfee, C. J.*, in *State v. Wilson*, 15 R. I. 180, 1 Atl. 415: "Doubtless there is a distinction observed by careful writers between 'character' and 'reputation'; 'character' (where the distinction is observed) signifying the reality, and 'reputation' merely what is reported, or understood from report, to be the reality, about a person or thing."

1895, *Jordan, J.*, in *Wright v. Crawfordsville*, 142 Ind. 636, 642, 42 N. E. 227 (admitting specific acts to prove character): "Counsel seemingly confuse real character -- that which is actually impressed by nature, traits, or habits upon a person -- with what is generally termed reputed character. Reputation may be evidence of character, but it is not character itself. That which a person really is must be distinguished from that which he is reputed to be."

1885, *Mr. Richard Grant White*, *Words and their Uses*, 9th ed., p. 90: "Character, Reputation. These words are not synonyms; but they are too generally used as such. . . . We know very little of each other's characters; but reputations are well known to us (except our own). Character, meaning first a figure or letter engraved, means secondarily those traits which are peculiar to any person or thing. Reputation is, or should be, the result of character. Character is the sum of individual qualities; reputation, what is generally thought of character, so far as it is known. Character is like an inward and spiritual grace, of which reputation is, or should be, the outward and visible sign. . . . Sheridan errs in making Sir Peter Teazle say, as he leaves Lady Sneerwell's scandalous coterie, 'I leave my character behind me.' His reputation he left; but his character was always in his own keeping."

§ 1609. Reputation not a "Fact," but Hearsay Testimony. It follows, since reputation is looked to merely as evidence of the character reputed, that the reputation is *hearsay testimony*, for it is the expression of an opinion

on the part of the community, used testimonially, but uttered out of Court and not under cross-examination (*ante*, §§ 1361, 1362). It is therefore receivable, if at all, as an exception to the Hearsay rule. It has been said, in an opinion often quoted,¹ that reputation is admissible as a "fact," *i. e.* as circumstantial evidence; but this is the merest error. Reputation is testimonial evidence, *i. e.* the assertion of a number of persons used as the basis of an inference to the truth of the fact asserted (*ante*, § 25); and the true nature of this use cannot be obscured by calling it a "fact":

1815, *Tilghman, C. J.*, in *Com. v. Stewart*, 1 S. & R. 344 (rejecting neighborhood-reputation-evidence as to the character of an alleged disorderly house): "It is agreed on all hands that this is not one of those cases in which hearsay evidence can be admitted. But it is contended that the complaint of the neighborhood is a matter of fact, and therefore, when the witness proves the complaint, she only proves a fact within her own knowledge. I am not satisfied with this ingenious distinction, which gets round and avoids an important rule of evidence; in the same way all hearsay evidence may be introduced, for it is always a fact that the witness hears the other person speak, and it is a fact that the words spoken by that person were heard by the witness."

It is true that reputation is not always and necessarily used as hearsay, *i. e.* as a testimonial assertion. It may be a part of the very issue, as where the reputation of a plaintiff is in issue to determine the damages in an action for defamation, or where the reputation of a house of ill-fame is in issue; in these and similar cases (*ante*, §§ 70-79), the reputation is *the* fact to be proved, irrespective of the actual character reputed. Moreover, reputation may be evidential circumstantially, as where it is offered to show probable knowledge by a creditor of a debtor's insolvency or to show probable belief by a defendant in the violent character of the deceased on a trial for homicide; in these and similar cases (*ante*, §§ 245-261), the reputation is used merely as a circumstance from which it may be inferred that some other person obtained a knowledge or a belief. But when reputation is offered as a ground for inferring that the character affirmed by the reputation to exist does actually exist, then what we are asked to receive is testimonial evidence, precisely as it would be (by general concession) if the offer was to prove the extrajudicial belief and utterance of John Doe to the same character. Whenever the offer is to prove what Doe, or Doe and Roe, or Doe and Roe and five hundred others, think and say of J. S.'s character, as a mode of proving J. S.'s actual character, the evidence is hearsay, and must come in, if at all, under a hearsay exception.

§ 1610. **General Theory of Use of Reputation as Evidence of Character.** There was perhaps a time when reputation alone was not regarded as admis-

¹ 1877, Lord, J., in *Walker v. Moors*, 122 Mass. 504 (dealing with a witness to reputation for mercantile credit; "Was his testimony the statement of a fact, or was it simply what is ordinarily designated as hearsay evidence? The distinction between reputation and hearsay evidence is sometimes a difficult practical question. . . . General reputation is a fact. The

mere declaration of one or many is hearsay. . . . The question is a simple one of fact, Is there a general reputation?"). So also Pollock, C. B., in *R. v. Rowton*, 1865, Leigh & C. 526 ("What you pick up of a man's reputation in the neighborhood in twenty years is not hearsay").

sible to prove character. There certainly was a time when the personal knowledge and opinion of acquaintances was regarded as a superior source of evidence.¹ But at any rate, for more than two centuries, it has been settled that reputation in the community is a proper source of evidence.

(1) That there is a *necessity* for this kind of evidence, according to a fundamental principle of Hearsay exceptions (*ante*, § 1421), appears not merely from the fortuitous circumstance that the personal opinion of intimates is by the present law of most jurisdictions improperly held to be inadmissible (*post*, §§ 1983, 1985); but also from the settled rule that particular acts, as evidence of character, are not to be resorted to at all against a defendant in a criminal case (*ante*, § 194) nor against a party in most civil issues (*ante*, §§ 199-212), and not against a witness except by cross-examination or by judgment of conviction for crime (*ante*, §§ 977-981); and furthermore from the probable scantiness and indefiniteness of evidence of the latter sort as compared with the fulness and solidity of material represented in a reputation based on a person's constant and repeated exhibition of his character in conduct as daily observed by the community. The last reason has been well set forth in the following passage:

1829, *Gibson, J.*, in *Brindle v. M'Ilvaine*, 10 S. & R. 282, 285 (excluding reputation to prove intemperance): "That kind of depravity which renders a man unworthy of belief, and which is proved, not by particular instances, but by general reputation, is of a *moral* kind, and is evinced by a variety of acts and a long course of general bad conduct, the particular instances of which (if they were not inadmissible for other reasons) could not in the nature of things be expected to be treasured up in the recollection of witnesses and spoken of in detail to enable a jury to draw their own conclusions; and therefore an inference of moral destitution drawn from this source by the public at large, which is nothing else than general reputation, is not secondary but the best evidence of the fact of which the nature of the case is susceptible. But the causes of physical depravity of the mental faculties are susceptible of a particular description by those who have witnessed them, and are to be proved by the ordinary evidence of any other fact."

(2) That there is, in the community's reputation, a *circumstantial guarantee of trustworthiness*, fulfilling another fundamental requisite for Hearsay exceptions (*ante*, § 1422), is found in the same considerations already mentioned as justifying the use of reputation on matters of general interest (*ante*, § 1583). Those considerations are that, where the subject matter is one in which all or many of the members of the community have an opportunity of acquiring information and have also an interest or motive to obtain such knowledge, there is likely to be such a constant, active, and intelligent discussion and comparison that the resulting opinion, if a definite opinion does result, is likely to be fairly trustworthy. That these considerations apply to a reputation of personal character cannot be doubted. No fact is more open to general observation, no fact is of more legitimate interest to the community as an object of knowledge, and consequently no fact is more the theme of general discussion, criticism, and comparison of views, than moral character as exhibited in conduct. The community relies upon this

¹ *Post*, § 1981.
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reputation as evidence in social, commercial, and professional relations, and the law of evidence relies upon it. Erskine's description of reputation is celebrated:

1794, Mr. *Thomas Erskine*, arguing, in *Thomas Hardy's Trial*, 24 How. St. Tr. 1070: "You cannot, when asking to character, ask, What has A. B. C. told you about this man's character? No; but, what is the general opinion concerning him? Character is the slow-spreading influence of opinion, arising from the deportment of a man in society. As a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion, that general opinion is allowed to be given in evidence."

No doubt reputation is often misleading; but so are all sources of evidence. No doubt actual character is not ascertainable by reputation beyond a few broad traits grossly marked, clearly exhibited, and easily observed; but the law does not attempt to use it beyond this point. No doubt actual character does not always merit the estimation which reputation puts upon it; but, nevertheless, there is a certain inevitableness in the revelation of character by conduct, and a certain sureness of apprehension even in the rough popular judgment. Confucius said² in a warning to his disciples: "How *can* a man conceal his character! How *can* a man conceal his character!" Emerson expounded it as a cardinal truth of life:³ "A man passes for what he is worth. Very idle is all curiosity concerning other people's estimate of us; and all fear of remaining unknown is not less so. The world is full of judgment-days, and into every assembly that a man enters, in every action he attempts, he is gauged and stamped. 'What has he done?' is a divine question which searches men, and transpierces every false reputation. A fop may sit in any chair of the world, nor be distinguished for his hour from Homer and Washington; but there need never be any doubt concerning the respective ability of human beings. Human character evermore publishes itself." That was a keen answer of Murray, Lord Mansfield, when Mr. Cowper remarked, arguing about reputation-evidence:⁴ "I have heard it said, as a common profigate observation of Colonel Charteris, that he would give twenty thousand pounds to be thought an honest man, — though he would not give twenty farthings to *be* one"; upon which the great judge commented: "His money could not have been worse laid out; for he would have lost his good character in half an hour afterwards."

(3) A third element, to be regarded in all Hearsay exceptions because required of all testimonial evidence (*ante*, § 1424), is that principle which excludes testimony not founded on adequate sources of knowledge. This requirement, though an independent one, is satisfied whenever the foregoing one is satisfied; but its bearing here is particularly seen in the rule limiting reputation to that community in which the person resides (*post*, § 1615).

§ 1611. **Reputation, distinguished from Rumors.** Reputation, being the community's opinion, is distinguished from mere rumor in two respects.

² Analects, book II.

³ Essay on Spiritual Laws.

⁴ 1783, *Bembridge's Trial*, 22 How. St. Tr. 135.

On the one hand, reputation implies the definite and final formation of opinion by the community; while rumor implies merely a report that is not yet finally credited. On the other hand, a rumor is usually thought of as signifying a particular act or occurrence, while a reputation is predicated upon a general trait of character; a man's reputation, for example, may declare him honest, and yet to-day a rumor may have circulated that this reputed honest man has defaulted yesterday in his accounts. The distinction in the latter aspect has already been sufficiently illustrated (in the passages quoted *ante*, § 74). The distinction in the former aspect is the more important one to be emphasized in the present connection:

1852, *Bell, J.*, in *Dame v. Kenney*, 25 N. H. 320: "People usually form their opinions of the characters of men from what they know of them personally and from what is said of them by those who have the means of knowledge and whose opinions are entitled to confidence. . . . [Mere rumors and reports], if numerous and repeated, too often gain credit, and the general character may, in consequence of that credit, be seriously affected. The reports themselves prove nothing as to general character. They may be entirely discredited and disbelieved where the party assailed is known. The point of inquiry in relation to general character is not whether a man has been attacked; but, how does he stand now, when rumor has spent its force upon him?"¹

§ 1612. **Reputation must be General; Divided Reputation.** It is commonly said that the reputation must be "general"; that is, the community as a whole must be agreed in their opinion, in order that it may be regarded as a reputation. If the estimates vary, and public opinion has not reached the stage of definite harmony, the opinion cannot yet be treated as sufficiently trustworthy. On the other hand, it must be impossible to exact unanimity; for there are always dissenters. To define precisely that quality of public opinion thus commonly described as "general" is therefore a difficult thing. The requirements of modern Courts are apparently more strict than in the earlier practice; and there is something to be said for the liberality of the latter:

1780, *Maskall's Trial*, 21 How. St. Tr. 684: "Do you know anything more of him [the witness Richard Ingram]?" "I have been in several companies where he has been mentioned, and wherever his name was mentioned, he was generally known by the appellation of Lying Dick." To another witness: "What character does he bear?" "There is a diversity of opinions respecting him; some give him a good character, and some a very indifferent one." "Which is the most prevalent of the two?" "I hear that he is a most notorious liar." "Is the opinion more general of his being a liar than otherwise?" "I have heard them that know him a good deal say so."

1884, *Campbell, C. J.*, in *Pickens v. State*, 61 Miss. 566: "General reputation consists in what is generally thought of one by those among whom he resides and with whom he is chiefly conversant. 'Common opinion'; 'that in which there is general concurrence'; 'the prevailing opinion in that circle where one's character is best known'; 'what is generally said by those among whom he associates and by whom he is known'; 'common report among those who have the best opportunity of judging of his habits and integrity';

¹ *Accord*: 1879, *Haley v. State*, 63 Ala. 86; prosecution in rebuttal of a defendant's good character; 1903, *Harrison v. Garrett*, 132 id. 1855, *Pleasant v. State*, 15 Ark. 624, 633 ("rumor and belief," excluded); 1877, *State v. Laxton*, 172, 43 S. E. 594; 1846, *Ford v. Ford*, 7 Humph. 76 N. C. 216 (excluded; here offered by the 101.

'common reputation among his neighbors and acquaintances,'—are so many forms of expression by which an effort has been made to define wherein consists general reputation."

1805, *McSherry, J.*, in *Jackson v. Jackson*, 82 Md. 17, 33 Atl. 317: "A reputation, to be a provable reputation at all, must be a general reputation. It may be either one of two opposites; for instance, either good or bad. It cannot be intermediate,—that is, partly one, and partly the other; for that would not be general, and there would then be no general reputation either way. If it is generally good or generally bad, or, as applicable to the case at bar, if a man and woman are generally reputed to be married, or if the converse is generally asserted, a general reputation, one way or the other, exists; and of a general reputation, and none other, the law allows evidence to be given. But, if it be not general, then, obviously, it does not exist as a fact, and evidence cannot be received to show a partial, limited, or qualified repute. The existence of a diversity of opinion is one of the means by which a witness may know there is a general reputation, but this means of knowledge, apart from the fact that there is or is not a general reputation, and as a totality independent circumstance, is not the thing to be proved."

In applying this principle, a great variety of forms of question are to be found, sanctioned or disapproved, all of them involving efforts, more or less successful, to carry out more definitely the fundamental and unquestioned notion that the reputation must be "general."¹ There is on this subject often an attempt at nicety of phrase which amounts in effect to mere

¹ 1846, *Sorrelle v. Craig*, 9 Ala. 539 ("what is generally said of the person by those among whom he dwells or with whom he is chiefly conversant"); 1848, *Hatjo v. Gooden*, 13 id. 720, 722 ("it is not necessary to know all his neighbors"); 1885, *Jackson v. State*, 78 id. 473 (reputation "in the upper portion of the neighborhood," admitted); 1903, *Vickers v. People*, — Colo. —, 73 Pac. 845 (testimony excluded, where the witness, a non-resident, had talked with only three persons); 1845, *Regnier v. Cabot*, 7 Ill. 40 (the witness knew of the opinion of three persons only; excluded); 1859, *Crabtree v. Kile*, 21 id. 183 (what is "generally said"); 1861, *Crabtree v. Hagenbaugh*, 25 id. 233, 238 (what "a majority of his neighbors said"); 1864, *Fahnestock v. State*, 23 Ind. 231, 238 (character founded on "report of his neighbors," excluded, as not involving the "general opinion of the neighborhood"); 1879, *Meyncke v. State*, 68 id. 404 ("the word 'general' is an essential requisite in an impeaching question of this kind"); 1891, *Coates v. Sulan*, 46 Kan. 341, 26 Pac. 720 (a question as to the "reputation in this community," not inadmissible if properly understood by the witness as involving generalness, though the word "general" was not used); 1869, *Vernon v. Tucker*, 30 Md. 456, 462 (what "several" of the neighbors said, excluded); 1856, *Webber v. Hanke*, 4 Mich. 198 ("what people acquainted with him say," held improper; "what is generally said" is proper); 1878, *Lenox v. Fuller*, 39 id. 271 (apparently approving the preceding case); 1892, *Sanford v. Rowley*, 93 id. 119, 122, 52 N. W. 1119 (numerously signed indorsement of petition for office, excluded); 1859, *Powers v. Presgroves*, 38 Miss. 227, 241 ("what is generally said"); 1885, *French v. Salc*, 63 id. 386, 392, 394 (the testi-

mony is "usually and necessarily indefinite" as to the number of persons; the witness must be able "as a matter of conscience" to give the "common or general opinion"); 1877, *Matthewson v. Burr*, 6 Nebr. 312, 316 (not "what two or three persons only may think or say," but "the general estimation in which he is held by his neighbors and acquaintances"); 1851, *Hersom v. Henderson*, 23 N. H. 498, 506 ("Do the neighbors call him Lying Josh?," excluded); 1843, *State v. O'Neale*, 3 Ired. 83 (inquiries as to "what a majority of neighbors said," and "in what estimation E. was held," excluded; the estimation must be general); 1843, *State v. Parks*, ib. 296 (the witness "had heard a great deal said about his character"; "did not know whether a majority of those he heard speak of it spoke well or ill of it"; "had heard a great many respectable men speak well of L's character, and a great many, equally respectable, speak ill of it"; excluded, as not amounting to a general reputation); 1853, *Freuch v. Millard*, 2 Oh. St. 44 ("reputation" means "general reputation"); 1892, *State v. Turner*, 36 S. C. 534, 539, 15 S. E. 602 (the reputation must be "general," the number of persons included depending largely on circumstances, in the trial Court's discretion); 1851, *Wayne, J.*, in *Gaines v. Relf*, 12 How. 555 (not merely what some say, but the general saying); 1898, *State v. Marks*, 16 Utah 204, 51 Pac. 1089 ("the word 'general' should always be used," and directed to the reputation in the community of residence).

It follows that, on direct examination, the witness cannot be asked to name individuals who have spoken: 1872, *State v. Perkins*, 66 N. C. 127. For allowing this on cross-examination, see *ante*, §§ 988, 1111.

quibbling, because the witness ordinarily will not appreciate the discriminations; such requirements of definition should be avoided as unprofitable.²

§ 1613. **Same: Majority need not have Spoken.** The reputation, as just indicated, must involve the general opinion, not a partial or fragmentary one. Nevertheless that opinion may exist as a general one, entertained by the community as a whole, although no utterance by that general mass of its members, or even by a majority of them, has been made. In other words, a general reputation may by inference be believed to exist, although the utterances actually heard by the witness, and used as the basis of his inference, may be and usually are those of a representative minority only:

1884, *Campbell, C. J.*, in *Pickens v. State*, 61 Miss. 567: "It was not necessary for him [the witness] to have heard a majority, or any given proportion, of that undefined and undefinable circle, designated as the 'neighborhood' or 'community,' say what they thought of G. . . . While a witness should be cautious on this subject, and not be encouraged to testify that he is acquainted with the general reputation of another unless he knows the generally prevalent sentiment of those most conversant with him, he is not to be repressed by telling him he must know what a majority say of him about whom he is called to testify. . . . He may have heard a sufficient number express themselves to be willing to say he knows the general concurrence in one view of a number great enough to be regarded as a fair index to the community. One may know the general reputation of Sargent S. Prentiss as a matchless orator, although he has heard a small proportion of those who felt the thrill of his unrivalled eloquence say what they thought of him."¹

§ 1614. **Same: Never Hearing anything Against the Person.** Upon the same principle, the absence of utterances unfavorable to a person is a sufficient basis for predicating that the general opinion of him is favorable. A witness to good reputation may therefore testify by saying that he has never heard anything said against the person:

1865, *R. v. Rowton*, Leigh & C. 520, 535, 536; *Erle, C. J.*: "The best character is that which is the least talked of"; *Cockburn, C. J.*: "Negative evidence, such as 'I never heard anything against the character of the man,' is the most cogent evidence of a man's good character and reputation, because a man's character is not talked about till there is some fault to be found with it. It is the best evidence of his character that he is not talked about at all."

1854, *Benning, J.*, in *Taylor v. Smith*, 16 Ga. 10: "Certainly the sort of silent respect and consideration by which one is treated and received by those who know him is some index of what they think of him as a man of veracity; and indeed, if he is a person whom they think very highly of, this is about the only index. The character for truth of such a person is never discussed, questioned, 'spoken of.' To discuss, question, or even perhaps to speak of one's reputation for truth, is to admit that two opinions are possible on that point. Suppose the question were, What was the character of Washington among

² 1859, *Bell, J.*, in *Boon v. Wethered*, 23 Tex. 675, 681; 1880, *Stone, J.*, in *Sullivan v. State*, 66 Ala. 50 ("The question of general character or reputation is one of difficult solution to a majority of witnesses. Counsel should be allowed to vary the phraseology, or sever the constituent parts or members of the sentence, so as to place the subject within the comprehension of the witness").

¹ Accord: 1878, *Robinson v. State*, 16 Fla.

835 (not necessary that a majority of the neighbors should have spoken on the subject); 1902, *Cunningham v. Underwood*, 53 C. C. A. 99, 116 Fed. 803, 810. Yet the number of occasions may indicate in a given case that the witness has not sufficient knowledge (*ante*, § 692) of the community's opinion: 1883, *Com. v. Rogers*, 136 Mass. 158 (hearing the character spoken of on two occasions; excluded).

his neighbors for truth? Could the answer be anything but this: 'I never heard it questioned, discussed, spoken of; and yet I know it to have been the most exalted'?"¹

But it is obvious that this form is no sufficient indication for a reputation of *bad* character.² Moreover, so far as the answer "I never heard his character discussed" implies that the witness has not had opportunities for learning what the reputation was, he is not a qualified witness to reputation (on the principle of § 692, *ante*).³

§ 1615. **Reputation must be in Neighborhood of Residence.** That discussion and comparison which contribute to the complete estimate and lead to the general consensus (*ante*, § 1610) must in the beginning obtain its data from the experience of those who have had direct contact with the person in question; and it is these data of personal observation which are indispensable as a foundation of the final reputation. Such experience of observed instances is to be found only among those with whom the person ordinarily associates, — that is, among the members of the community in which he resides and acts:

1887, *Brace, J.*, in *Waddingham v. Huett*, 92 Mo. 533, 5 S. W. 27: "[The witness to reputation] 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, — not by those among or with whom he may have sojourned for a brief period, and who have had neither time nor opportunity to test his conduct, acts, or declarations, or to form a correct estimate of either. A man's character is to be judged by the general tenor and current of his life, and not by a mere episode in it."

Accordingly, it is commonly said that the place or community of which the reputation is predicated must be the "neighborhood" where he has "resided."

¹ *Accord*: 1796, *Leary's Trial*, 26 How. St. Tr. 337, 338; 1848, *Hajjo v. Gooden*, 13 Ala. 720, 722; 1853, *Dave v. State*, 22 id. 23, 37 (disapproving an instruction asking for a knowledge of what "the majority of the neighbors" said or thought; because a majority may not have expressed themselves); 1876, *Childs v. State*, 53 id. 28, 29; 1898, *Hussey v. State*, 87 id. 129, 6 So. 420 (admitting the question whether he had ever heard of the defendant having any other "difficulty" than the one in question); 1888, *Moulton v. State*, 88 id. 121, 6 So. 758; 1902, *People v. Adams*, 137 Cal. 580, 70 Pac. 662; 1854, *Taylor v. Smith*, 16 Ga. 7; 1888, *Flemister v. State*, 81 id. 768, 771, 7 S. E. 642; 1892, *Hodgkins v. State*, 89 id. 761, 15 S. E. 695; 1897, *Powell v. State*, 101 id. 9, 29 S. E. 309; 1882, *State v. Nelson*, 58 Ia. 208, 12 N. W. 253; 1895, *State v. Case*, 96 id. 264, 65 N. W. 149; 1900, *State v. Keenan*, 111 id. 286, 82 N. W. 792; 1891, *Day v. Ross*, 154 Mass. 14, 27 N. E. 676 (compare the citations *infra*); 1878, *Lenox v. Fuller*, 39 Mich. 271; 1895, *Conkey v. Carpenter*, 106 id. 1, 63 N. W. 990; 1876, *State v. Lee*, 22 Minn. 407, 409 (admissible, if the witness has been "acquainted with the accused for a considerable time, under such circumstances that he would be more or less likely to hear what was said about him"); 1886, *Bingham v. Bernard*, 36 id. 114, 116, 30

N. W. 404 (an instruction referring to this as the "very best evidence," held not improper); 1885, *French v. Sale*, 63 Miss. 386, 393; 1878, *State v. Grate*, 68 Mo. 26; 1893, *State v. Brandenburg*, 118 id. 181, 185, 23 S. W. 1080; 1898, *State v. Shafer*, 22 Mont. 17, 55 Pac. 526; 1902, *Matuskevitz v. Hughes*, 26 id. 212, 66 Pac. 939, 68 Pac. 467; 1877, *Matthewson v. Burr*, 6 Nebr. 312, 317; 1880, *State v. Pearce*, 15 Nev. 188, 190; 1900, *State v. Snidell*, 70 N. H. 174, 46 Atl. 1083; 1839, *People v. Davis*, 21 Wend. 315; 1873, *State v. Speight*, 69 N. C. 72, 75, *semble*: 1860, *Gandolfo v. State*, 11 Oh. St. 114, 117; 1850, *Morss v. Palmer*, 15 Pa. 51, 57; 1898, *Milliken v. Long*, 188 id. 411, 41 Atl. 540; 1859, *Boon v. Wethered*, 23 Tex. 675, 681; 1902, *Foerster v. U. S.*, 54 C. C. A. 210, 116 Fed. 860; 1880, *Davis v. Franke*, 33 Gratt. 425; 1870, *Lemons v. State*, 4 W. Va. 755, 760. *Contra*: 1877, *Walker v. Moors*, 122 Mass. 502 (a confused opinion, but apparently excluding such a form of answer); 1867, *Lyman v. Philadelphia*, 56 Pa. 488, 502, *semble*.

² 1884, *Pickens v. State*, 61 Miss. 563, 57, *semble*; 1885, *French v. Sale*, 63 id. 386, 393.

³ In *Com. v. Lawler*, 12 All. 585 (1866), the question, "Have you heard his character called in question?" was excluded merely because the witness seemed to know nothing of the reputation.

The phrasings and definitions of this community and of the time of sojourn vary considerably; but nothing should turn upon precise words; and the general idea may be with sufficient correctness phrased in various forms.¹

§ 1616. **Same: Reputation in a Commercial or other Circle, not the Place of Residence.** In a community where the ordinary person's home is under the same roof as his store or workshop, or where the stores, workshops, offices, and homes are all collected within a small village or town group, and one's working associates are equally the neighbors of one's home, there is but one community for the purpose of forming public opinion, and there is but a single capacity in which the ordinary person can exhibit his character to the community. In other words, he can there have but one reputation. But in the conditions of life to-day, especially in large cities, a man may have one reputation in the suburb of his residence and another in the commercial or industrial circles of his place of work; or he may have one reputation in his place of technical domicile in New York and another in the region of the mines of Michigan or the iron-foundries of Ohio where his investments call him for supervision for long portions of time. There may be distinct circles of persons, each circle having no relation to the other, and yet each having a reputation based on constant and intimate personal observation of the man. There is no reason why the law should not recognize this. The traditional phrase about "neighborhood" reputation was appropriate to the conditions

¹ 1852, *Boswell v. Blackman*, 12 Ga. 593 (reputation in a county, i. e. a district larger than the mere neighborhood, admitted); 1863, *Anrora v. Cobb*, 21 Ind. 510 ("friends and neighbors"); 1877, *Rawles v. State*, 56 id. 441 (limiting it definitely to the neighborhood of residence; not accepting it from "the neighborhood where she is best known"); 1879, *Smock v. Pierson*, 68 id. 405 ("neighborhood where he resides"); 1887, *Hanners v. McClelland*, 74 Ia. 322, 37 N. W. 389 (in a town near by, admitted); 1895, *State v. Brown*, 55 Kan. 766, 42 Pac. 363 (a twenty-four hours' stay in a place, held sufficient to found a reputation for unchastity; "there is no fixed time within which a reputation may be gained; . . . she may have gained considerable notoriety in twenty-four hours"); 1859, *Henderson v. Haynes*, 2 Metc. Ky. 342, 348 ("those among whom he dwells or with whom he is conversant"); 1895, *Combs v. Com.*, 97 Ky. 24, 29 S. W. 734 (in a county where he did not reside, excluded); 1889, *State v. Johnson*, 41 La. An. 574, 7 So. 670 ("general reputation," held improper, without the addition "in the neighborhood in which he lived"); 1859, *Powers v. Presgroves*, 38 Mis. 227, 241 (the reputation must be "where he is best known," "by those among whom he dwells or with whom he is chiefly conversant," but no definite limits to that neighborhood can be set); 1885, *French v. Sala*, 63 id. 386, 392, 394 (the testimony is "usually and necessarily indefinite" as to the dimensions of the neighborhood; the witness must be able to say "as a matter of conscience that he knows the common or general opinion of the community or neighborhood on the sub-

ject"); 1874, *Warlick v. Peterson*, 58 Mo. 408, 416 (must be at place of residence); 1887, *Waddingham v. Hulett*, 92 id. 533, 5 S. W. 27 (reputation at a place where the person visited 3 months, etc., excluded); 1893, *State v. Pettit*, 119 id. 410, 414, 24 S. W. 1014 (reputation where the deceased had lived only 8 or 9 months, held receivable in trial Court's discretion); 1899, *State v. McLaughlin*, 149 id. 19, 50 S. W. 315 (residence for 6 or 8 months, sufficient); 1900, *State v. Cnsenberry*, 157 id. 168, 56 S. W. 737 (reputation where he resided only a few weeks, allowed on the facts); 1860, *Kelley v. Proctor*, 41 N. H. 140, 146 (the question "Are you acquainted with F.'s reputation for truth in the vicinity or neighborhood where he resides?" was urged by counsel as the proper form; Sargent, J.: "No doubt the form of the question as insisted on by the defendant is substantially correct; . . . but a man's neighborhood extends for these purposes as far as he is well known,—as far as people are acquainted with him and his character"; and the question, "Are you acquainted with F.'s reputation for truth?" was held sufficient); 1862, *Griffin v. State*, 14 Oh. St. 63 (excluding a reputation in a town 26 miles from the defendant's home, in a community "not having the means of forming from personal acquaintance an intelligent judgment on the subject"); 1859, *Boon v. Weathered*, 23 Tex. 675, 686 ("in the community where he lives or is best known"); 1896, *State v. Cushing*, 14 Wash. 527, 45 Pac. 145 (reputation in a town a few miles from the witness' home, admitted).

of the time; but it should not be taken as imposing arbitrary limitations not appropriate in other times. *Alia tempora, alii mores*. What the law then and now desired was a trustworthy reputation; if that is to be found among a circle of persons other than the circle of neighbors about a sleeping-place, it should be received. This modern application of the traditional principle was foreshadowed in the following exposition of one of the greatest American judges:

1855, *Lumpkin, J.*, in *Keener v. State*, 35 Ga. 221 (murder in a brothel, by a railway-conductor): "We distinctly repudiate the doctrine that a man may not have different general characters, adapted to different circumstances and localities, — that is, a character for rail-cars and a character for the brothel, a character for the church and one for the street, a character when drunk and a character when sober. . . . A schoolmaster is indicted for an assault and battery upon one of his pupils; he defends himself under his acknowledged right to inflict moderate correction; the charge puts in issue the character of the teacher for violence; and where, pray, would you go to ascertain that character, — among his fellow-men, or in the school-room? There can be but one response to this question. An officer in the army or navy is tried for cruelty to a soldier or sailor; what has his reputation in the community generally to do with the trait of character involved in the issue? It is in the barracks and on board the man-of-war that we look for what we wish to learn."

1903, *Fish, J.*, in *Atlantic & B. R. Co. v. Reynolds*, 117 Ga. 47, 43 S. E. 456: "As the general reputation of a man is usually formed in the neighborhood where he spends most of his time, and most frequently comes in social and business contact with his fellow-men, it is usual to limit the inquiry as to a witness' general character to his general reputation in the neighborhood where he lives; that is, where he has his home. We do not think, however, there is any hard and fast rule which requires this to be done in every possible case. The very reason for so limiting the inquiry generally may be a good reason for allowing more latitude in an exceptional case. The reason for so limiting the inquiry generally, as already indicated, is that the place in which to ascertain a man's true reputation is the place where people generally have had the best opportunities of forming a correct estimate of his character. It is obvious that this may not, in every instance, be the neighborhood where a man's home is situated. . . . We apprehend that there may be cases in which a person has established no general reputation in the immediate neighborhood of his home, but has established such a reputation elsewhere. This may arise from the fact that his home is located in one place and his daily business or work is carried on in another, in which latter place he spends nearly all of his time, and hence is well known to people generally, while he rarely comes in social or business contact with people, outside of his family circle, in the neighborhood of his home."

The judicial rulings on this class of questions show frequently a defiance of common sense. "The rules of evidence," said Lord Ellenborough,¹ "must expand according to the exigencies of society." It is to be hoped that the due expansion will here be found.²

¹ 1812, *Pritt v. Fairclough*, 3 Camp. 305.

² The cases on both sides are as follows: 1864, *Turner's Trial*, 6 How. St. Tr. 563, 607 (robbery; defendant's reputation "upon the Exchange" asked for); 1860, *Mose v. State*, 36 Ala. 211, 229 (a family of eight or ten whites and about fifty blacks; the reputation of a slave therein, admitted, because in such cases "it is a general character and often the only character which the slave has"); 1883, *People v. Mark-*

ham, 64 Cal. 157, 163, 30 Pac. 620 ("general reputation" among the police-officers of a certain town, excluded; reputation must be "amongst his neighbors" or "amongst those who have had opportunities of ascertaining his reputation as generally estimated"); 1901, *Giordano v. Brandywine Granite Co.*, 3 Pennewill Del. 423, 52 Atl. 332 (reputation among fellow-workmen, allowed to be shown by their expressed refusal to work with him because incompetent;

§ 1617. *Time of Reputation*; (1) *Reputation before the Time in Issue*. A reputation to character must ordinarily be thought of as contemporary with the character, *i. e.* as predicating the person, then existing in the community, to possess a certain trait. There is thus no objection, so far as concerns the reputation-element, to using a *prior reputation*, — for example, of Doe, in 1895, for peaceableness as evidential on a charge of murder in 1900; for the reputation in 1895 predicates the trait as then existing, and does not pretend to predicate anything as to 1900; and the real question to be met is a question of relevancy, namely, whether the existence of the trait in 1895 is evidence of its existence in 1900. That it is evidential for that purpose is unquestionable (*ante*, §§ 60, 191, 927). The judicial views thereon have already been considered in dealing with Witness' Character in Impeachment (*ante*, § 928).

§ 1618. *Same*: (2) *Reputation after the Time in Issue*. Where the reputation offered is of a *time subsequent* to the time of the act in issue, the objection is of a different sort, and involves directly the trustworthiness of the reputation-evidence. There is here no difficulty from the point of view of the relevancy of character; a man's trait or disposition a month or a year after a certain date is as evidential of his trait on that date as his nature a month or a year before that date; because character is a more or less permanent quality and we may make inferences from it either forward or backward (*ante*, §§ 60, 921). Assuming, then, that we could ascertain the actual disposition (for example) of Doe one year after the time of a murder charged, there is no objection to using it as a basis for inferring his disposition a year before. But can we assume that it is his real disposition or trait, one year later, which is before us? Is his reputation, as obtaining one year later, then a trustworthy index to his actual character? This question may be answered differently for a party and for a witness.

sensible opinion; *Lore, C. J., diss*); 1903, *Atlantic & B. R. Co. v. Reynolds*, 117 Ga. 47, 43 S. E. 456 (reputation "up and down the W. A. L. Railroad, where he worked," admitted; quoted *supra*); 1890, *Sage v. State*, 127 Ind. 15, 27, 26 N. E. 667 (reputation in H. at a time when the witness had been seven years confined in jail at I., excluded); 1902, *Bonaparte v. Thayer*, 95 Md. 548, 52 Atl. 496 (reputation for veracity "among his business associates," excluded); 1878, *State v. Clifton* (30 La. An. 951 (reputation for honesty in the defendant's boarding-house, excluded); 1876, *Thomas v. People*, 67 N. Y. 224 (reputation in prison, admitted; "there was a large community there, and a man can have a general character there as well as elsewhere"); 1897, *Youngs v. R. Co.*, 154 id. 764, 49 N. E. 1106, 77 Hun 612 (reputation among fellow-employees, not received to show the fact of incompetency); 1898, *Park v. R. Co.*, 155 id. 215, 49 N. E. 674 (*sauc*); 1903, *Lamb v. Littman*, 132 N. C. 978, 44 S. E. 646 (reputation of a boss, for incompetence, among mill hands, admitted; but this was a fellow-servant case); 1877, *Snyder v. Com.*, 85 Pa. 519, 522 (the complaints of the defendant's children about

his cruelty to them, held not equivalent to a reputation); 1897, *Williams v. U. S.*, 168 U. S. 382, 18 Sup. 92 (extortion by a custom-house officer; the defendant's bad reputation "in the Custom House," excluded, because it prevailed only "among the limited number of people employed in a particular public building"; this is not an enlightened ruling; the place where a reputation would be best founded is the place of daily employment); 1900, *State v. Hillberg*, 22 Utah 27, 61 Pac. 215 (reputation "in that precinct," excluded; unsound).

In the following two cases, trial instructions too long to be quoted, dealing with a reputation among criminals, gamblers, etc., were passed upon: 1896, *Smith v. U. S.*, 161 U. S. 85, 16 Sup. 483; *Brown v. U. S.*, 164 id. 221, 17 Sup. 33; the rulings of the majority opinion are possibly correct in theory; but in so far as they departed the well-worded instructions of Mr. J. Parker, one of our greatest American trial judges, they are lamentable quibbles; compare § 21, *ante*.

Distinguish the use of an *employee's reputation* to show the employer's *knowledge of incompetence* (*ante*, § 249).

(a) Where the desired character is that of a *party* — for example, the defendant in a criminal charge, the prosecutrix in a rape charge, or the plaintiff in a statutory action for seduction —, it is obvious that after the charge has become a matter of public discussion, and partisan feeling on either side has had an opportunity to produce an effect, a false reputation is likely to be created,—a reputation based perhaps in part upon rumors about the very act charged or upon the interested utterances of either party. The safeguards of trustworthiness are here lacking:

1863, *Battle, J.*, in *State v. Johnson*, Winston 151: "Upon principle, it ought to be confined to the time when the charge was first made. A different rule will expose the defendant to the great danger of having his character ruined or badly damaged by the arts of a popular or artful prosecutor, stimulated to activity by the hope of thus making his prosecution successful. Evidence of character is of the nature of hearsay; and the general rule in relation to that kind of testimony is that it shall not be received if the hearsay be *post litem motam*."

1892, *Hines, J.*, in *White v. Com.*, 80 Ky. 486: "The only reason for stopping the inquiry at either point [time of discovery or time of arrest] is that the probabilities of innocence derived from previous good character may not be destroyed or embarrassed by the fact that the offence under consideration has been committed. . . . After the discovery that an offence has been committed, a previous good character may be destroyed and a bad one created by discussion of the circumstances connected with the offence, as well before as after the formal charge by legal proceeding 's had.'"

Accordingly, it is generally agreed that a reputation at any time after a charge published, or other controversy begun, is not admissible.¹ But, since the above reasoning is directed against the risk of an unduly hostile reputation, it would seem that a party might properly be allowed to invoke in his favor a good reputation *post litem motam*.²

(2) In the case of a *witness*, the conditions above pointed out do not usually affect his reputation, because his conduct is not the subject of the

¹ 1871, *Brown v. State*, 46 Ala. 175, 184 (of defendant, after the time of the alleged crime, excluded); 1896, *White v. State*, 111 id. 92, 21 So. 330 (defendant's character while in jail, excluded; the time must be at or before the crime charged); 1882, *White v. Com.*, 80 Ky. 485 (bad reputation of a defendant, limited to the time before discovery of the offence charged); 1873, *People v. Brewer*, 27 Mich. 133, 135 (seduction; the woman's reputation *post litem*, excluded); 1861, *State v. Forchner*, 43 N. H. 89, 90 (rape; bad reputation of the prosecutrix for chastity, as formed since the time of the alleged rape, excluded, as "inducing attempts to destroy the character of a prosecutrix in order to defeat the prosecution"); 1900, *State v. Spragne*, 64 N. J. L. 419, 45 Atl. 788 (rape-assault; defendant's bad reputation for violence after the time of arrest, or of commission of the offence — the opinion not clearly distinguishing —, inadmissible; the rule not to apply to the reputation of a witness or of a defendant as witness); 1877, *State v. Laxton*, 76 N. C. 216, 218 (of defendant, after charge made, excluded); 1851, *Cincinnati & F. M. Ins. Co. v. May*, 20 Oh. 224 (of a pilot, confined to the time before the accident

in issue); 1870, *Wroe v. State*, 20 Oh. St. 472 (of defendant, after the time of the offence, excluded); 1893, *State v. Kenvon*, 18 R. I. 217, 223, 26 Atl. 199 (reputation of deceased for quarrelsomeness, since his death, excluded); 1900, *State v. Taylor*, 57 S. C. 483, 35 S. E. 729 (prosecutrix in rape; reputation after the date charged, excluded); 1897, *State v. King*, 9 S. D. 628, 70 N. W. 1046 (seduction; reputation after accusation made, excluded); 1895, *Lea v. State*, 94 Penn. 495, 29 S. W. 900 (of defendant, after charge made, excluded); 1898, *Spurr v. U. S.*, 31 C. C. A. 202, 87 Fed. 701 (defendant's reputation since the time of the act charged, excluded); 1819, *Carter v. Com.*, 2 Va. Cas. 169 (of defendant, after charge made, excluded). *Contra*, but missing the point: 1839, *Com. v. Sackett*, 22 Pick. 396 ("It may be of little weight, but still it will have some bearing, as commonly the descent from virtue to crime is gradual").

For the exclusion of reputation after publication of a defamatory charge, offered to mitigate damages in an action for defamation, see *ante*, § 74.

² *Contra*: 1896, *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046.

controversy. Moreover, although a witness may sometimes be so related to the controversy or to the parties as to have suffered in consequence from partisan feeling, yet the situation hardly requires that as a general rule a limitation to reputation *ante litem motam* should be enforced. Accordingly, the reputation of a witness even up to the time of testifying is generally regarded as admissible.³ Where the witness is also the party, it would seem that the rule applicable to parties should apply.⁴

§ 1619. **Other Principles affecting Reputation, discriminated (Character in Issue, Witness' Knowledge of Reputation, Belief on Oath).** (1) That reputation is distinct from character has already been noted (*ante*, § 1608). Hence, where "character" is *in issue upon the pleadings*, it is important to observe whether by the nature of the case it is the actual character or the reputation that is in issue. If the latter, then reputation is provable as a fact in issue; if the former, then reputation, though not in issue, is admissible under the present exception as evidence of the actual character. The classes of cases involving such questions have already been examined (*ante*, §§ 70-80, 202-212).

(2) The witness who testifies to reputation must, like other witnesses, have had opportunities to acquire personal knowledge of the fact to which he testifies. Hence it is commonly said that he must be a resident of the neighborhood or otherwise so placed as to be acquainted with the reputation; this principle has already been examined (*ante*, § 692).

(3) A witness to reputation may *on cross-examination be tested*, like other witnesses, as to the sources of his knowledge; whether he may be asked what persons he has heard speak unfavorably, or be otherwise so tested, rests on principles already examined (*ante*, §§ 988, 1111).

(4) Whether a witness testifying that he would not believe another upon oath may base that belief upon the other's reputation, is dealt with elsewhere, under the Opinion rule (*post*, § 1980), in treating of personal opinion to character.

³ 1899, *Thrawley v. State*, 153 Ind. 375, 55 N. E. 95 (bad reputation of defendant's wife at time of trial, admissible, even though affected by the charge against defendant); 1878, *Fisher v. Conway*, 21 Kan. 18, 25 (holding that the basing of the reputation upon rumors circulated by enemies, etc., goes merely to the weight of the evidence); 1858, *Mask v. State*, 36 Miss. 77, 89 (testimony to bad reputation admitted, though the witness had never heard it called in question till after the present dispute); 1838, *State v. Howard*, 9 N. H. 486 (although a concerted attempt to injure the witness' reputation was alleged to have been made by the opponent); 1881, *Doliner v. Lintz*, 84 N. Y. 669 (reputation at the time of trial, admissible to show reputation at the time the deposition was taken); 1897, *Smith v. Hine*, 179 Pa. 203, 36 Atl. 222 (that the reputation is founded on partisan opinions goes to weight only); 1900, *Fossett v. State*, 41 Tex. Cr. 400, 55 S. W. 497; 1868, *Stirling v. Stirling*, 41 Vt. 80, 96 (bastardy; complainant's reputation since controversy begun, admitted); 1862,

Amidon v. Hosley, 54 id. 25 (holding, conversely, that a person offering his witness' good character may confine his inquiry to the time before suit begun). *Contra*: 1864, *Reid v. Reid*, 17 N. J. Eq. 101 (opinions obtained by an agent sent to the neighborhood to make inquiries); 1879, *Johnson v. Brown*, 51 Tex. 65, 76 (reputation arising from the very will-contest before the court, excluded). Compare the cases *ante*, § 692, excluding testimony by one sent to a neighborhood to investigate reputation; in part they proceed upon this ground.

In general, a reputation may be stated to have been good up to a certain time, and then bad thereafter: 1858, *Quinsigamond Bank v. Hobbs*, 11 Gray 252, 257.

⁴ 1898, *State v. Marks*, 16 Utah 204, 15 Pac. 1089 (not after time of offence, "or at least," time of arrest; here applied to a defendant as witness). *Contra*: 1889, *Com. v. Honrigan*, 89 Ky. 313, 12 S. W. 550; 1900, *State v. Sprague*, N. J., *supra*, note 1; 1900, *Renfro v. State*, 42 Tex. Cr. 393, 56 S. W. 1013.

§ 1620. **Kind of Character; (1) Chastity; (2) House of Ill-fame; (3) Common Offender.** That species of character of which reputation is strictly and properly a trustworthy evidence is moral character, *i. e.* traits of permanent moral constitution, such as peaceableness, honesty, veracity, and the like, or their opposites. But obviously the line between those personal qualities which are properly provable by reputation and those which are not is a difficult one to draw; it cannot be definitely fixed by way of deduction from principle. The considerations of principle (noted *ante*, § 1610) still leave it arguable in some classes of cases whether reputation is a proper source of proof within the general scope of the principle.

(1) As to *chastity* or its opposite, no doubt has ever arisen, except in a single and peculiar action. In the statutory action or prosecution for seduction of a woman of "previously chaste character," the question first arises whether this "character" is actual character or reputation. Assuming the former view to be taken, then, although actual character is the fact in issue, there is no reason why reputation should not be admissible, as in all other issues, to prove the chaste or unchaste character.¹ But in some jurisdictions the Court's adoption of the view that actual character is the fact in issue has led it erroneously to exclude reputation as evidence of that character.² It may be added that reputation is of course not admissible to prove a specific act of fornication,³ or a condition of pregnancy.⁴

(2) On a charge of *keeping a house of ill-fame* or a *disorderly house*, the same distinction between actual character and reputation serves to solve the difficulty. (a) So far as the offence involves in the issue the *kind of persons resorting to it*, it is possible to maintain that either their reputation or their actual character is the fact in issue; if the former, then those persons' reputation is of course admissible as being in issue;⁵ if the latter, then their reputation is admissible under the present exception as evidence of their personal moral character, and upon this point, naturally, no doubt has ever arisen. (b) So far as the habitual use or "character" of the *house* itself is concerned, the same question again arises, whether the fact in issue is the "fame," *i. e.* reputation of it, or the actual habit and character of it. If we accept the former view (and here much depends on the statutory wording),

¹ 1897, *Carroll v. State*, 74 Miss. 888, 22 So. 295 (where chastity is essential, in a charge of seduction, reputation is evidence of actual chastity).

² 1888, *Hussey v. State*, 88 Ala. 34, 36, 5 So. 484; 1871, *State v. Shean*, 32 Ia. 88, 92 (because actual chastity is required, reputation is excluded, either of unchastity or chastity, its use as hearsay to prove the actual character being ignored; but then, to disprove the commission of acts of lewdness charged, the actual character is declared relevant, and reputation is received to prove it; a paradoxical ruling); 1899, *State v. Heinheimer*, 109 id. 824, 80 N. W. 669 (unchaste repnte, excluded); 1898, *State v. Sumner*, 143 Mo. 220, 45 S. W. 254 (bad repnte excinded, because by statute chastity was im-

material); 1863, *Kenyon v. State*, 26 N. Y. 203, 208 ("It could not have been intended to substitute reputation for character in this its primary and true sense"; but *Balcom, J.*, diss.). *Contra, sensu*: 1893, *State v. Lenihan*, 88 Ia. 870, 873, 58 N. W. 292 (good repnte, admitted in rebuttal); 1892, *State v. Lockerby*, 50 Minn. 363, 52 N. W. 958 (admissible "in corroboration" of the complaining witness).

For this difference of statutes and their interpretation, see more fully *ante*, § 205.

³ 1822, *Treat v. Browning*, 4 Conn. 408, 414 (fornication and the having a bastard child); 1839, *Overstreet v. State*, 3 How. Miss. 328 (charge of fornication).

⁴ 1835, *Boies v. McAllister*, 12 Me. 308.

⁵ The cases are collected *ante*, §§ 78, 204.

then reputation is of course admissible as being in issue.⁶ But if we take the latter view, then, the actual use and character of the house becoming the issue, the question arises whether reputation is admissible under the present exception to prove it. The subject of the reputation is not an individual's moral trait, and therefore is without the ordinary scope of the present exception. Nevertheless, having regard to the circumstances from which such a reputation arises, and the difficulty of obtaining other evidence in the ordinary way from unimpeachable witnesses, it seems unquestionable that reputation should be admitted as trustworthy and necessary evidence.⁷

(3) The offence of being a common thief, or a common gambler, or other common offender, or of keeping a common nuisance, is one which by some Courts, sometimes under statute, has been regarded as provable by reputation;⁸ but perhaps the notion here enters that reputation is a part of the issue. The mode of proving such an offence by specific acts has already been noticed (*ante*, § 203).

Whether the foregoing offences can lawfully be constituted by repute alone is a constitutional question already dealt with (*ante*, § 1354).

§ 1621. Same: (4) Sanity; (5) Temperance; (6) Expert Qualifications; (7) Negligence; (8) Animal's Character. (4) So far as the principle of necessity (*ante*, § 1610) is concerned, there is usually ample available evi-

⁶ The cases are collected *ante*, § 78.

⁷ Admitted: 1901, *Re Fong Yuk*, 8 Br. C. 118, 120 (deportation of a prostitute; reputation of the house in which the woman formerly lived, admissible); 1899, *Demartini v. Anderson*, 127 Cal. 33, 59 Pac. 207 (lease for a house of prostitution; reputation of the house, admitted); 1885, *Illogau v. State*, 78 Ga. 82; Ia. Code 1897, § 4944 (on a charge of keeping a house of ill-fame, the prosecution may introduce "general reputation of such house as so kept" to show its character); 1896, *Egan v. Gordon*, 65 Minn. 505, 88 N. W. 103 (in an action to recover rent); 1895, *State v. Hendricks*, 15 Mont. 194, 39 Pac. 94 (provided there is corroboration by facts of such use); 1838, *State v. McDowell*, Dudley 345, 350 ("In a case in which character is its very gist, I am willing to make that which everybody says the evidence"); Wis. Stats. 1898, § 4561g (in prosecutions for keeping a house of ill-fame, etc., "common or general reputation" is admissible). Excluded: 1878, *Wooster v. State*, 55 Ala. 221; 1903, *Ramsey v. Smith*, — Id. —, 35 So. 325 (sale of a piano to a plaintiff for use in a house of prostitution; reputation not admitted to show the character of the house); 1846, *Caldwell v. State*, 17 Conn. 467, 472; 1900, *Howard v. People*, 27 Colo. 398, 81 Pac. 595 (keeping a house of ill-fame; petition of citizens to city council, inadmissible as constituting reputation); 1898, *Shaffer v. State*, 87 Md. 124, 39 Atl. 313 (keeping a disorderly house; its reputation inadmissible, until St. 1897, c. 522); 1885, *Handy v. State*, 83 Miss. 206; 1864, *State v. Foley*, 45 N. H. 468; 1863, *Konyor v. State*, 28 N. Y. 203, 209 ("The general rule is that hearsay evidence is incompetent to establish any specific fact which is in

its nature susceptible of being proved by the witnesses who speak from their own knowledge"); 1897, *Nelson v. Terr.*, 5 Okl. 512, 49 Pac. 920; 1815, *Com. v. Stewart*, 1 S. & R. 342; 1833, U. S. v. *Jourdain*, 4 Cr. C. C. 338, overruling U. S. v. *Gray*, 1826, 2 Id. 675; 1895, *State v. Plant*, 67 Vt. 454, 32 Atl. 237; 1894, *Barker v. Com.*, 90 Va. 820, 20 S. E. 776.

So, also, excluding reputation of the defendant himself as keeper (compare the cases cited *ante*, § 78, note 3); 1858, *State v. Hand*, 7 Ia. 411; 1833, U. S. v. *Jourdain*, 4 Cr. C. C. 338; U. S. v. *Warner*, *ib.* 342.

It may be noted that in these cases it is not always easy to determine whether the Court proceeds upon the present principle or that of § 78, *ante*.

⁸ 1901, *Kiesel v. Lewis*, 158 Ind. 233, 59 N. E. 478 (disorderly beer-garden as a nuisance; reputation admitted, partly as affecting the depreciation of the value of plaintiff's premises); Ia. Code 1897, § 5003 ("general reputation" of a place, admissible for prosecution to show the character of the place on a charge of keeping an opium resort); 1878, *World v. State*, 50 Md. 49, 54 (reputation admissible under St. 1864, c. 38, to show a defendant to be a "common thief"; and though the reputation must be shown to exist within the statutory period, reputation before that time is relevant to show it); Or. Cr. C. § 1924 (opium offences; "general reputation shall be received in evidence to establish the character of any building as an opium den"); Vt. St. 1894, § 4529 (general reputation admissible to prove a place a liquor- nuisance). *Contra*: 1834, *Com. v. Hopkins*, 2 Dana Ky. 419 (common gambler).

dence of sanity or *insanity* other than reputation. So far as the principle of trustworthiness (*ante*, § 1610) is concerned, although all the conditions that obtain for moral character obtain equally for sanity, yet opinions upon a standard of sanity differ so much that a reputation, without the opportunity to test its ground by cross-examination, would hardly be trustworthy. It is thus generally agreed that reputation is not admissible for this purpose:

1849, *Nisbet, J.*, in *Foster v. Brooks*, 6 Ga. 290: "If reputation of insanity is competent, then reputation of sanity must be also. By this kind of evidence a fool may be proved a wise man, and a philosopher a fool. Public opinion declared Copernicus a fool when he promulgated the planetary system, and Columbus a fool when he announced the sublime idea of a New World. Hazardous in the extreme would it be to the rights of parties under the law, if they were allowed to depend upon the opinion of a neighborhood of the sanity of individuals. Hearsay evidence is excluded because a witness ought to be subjected to cross-examination, that being a test of truth. It ought to appear what were his powers of perception, his opportunities of observation, his attentiveness in observing, the strength of his recollection, and his disposition to speak the truth."¹

The use of a verdict or other *inquisition of lunacy* rests on a different principle (*post*, § 1671).

(5) A person's character or habit as *temperate*, or the reverse, in the use of intoxicating liquor, is sufficiently open to other sources of proof; and reputation is therefore unnecessary.²

(6) The qualifications of an *expert* or professional man, whether as a witness testifying on matters of skill, or as a party charged with lack of skill, ought to be provable by reputation. So far as personal opinion by witnesses is excluded (*post*, § 1984), there remains practically no other mode of proof than the present, except such tests as can be obtained on the stand by cross-examination (*ante*, §§ 938, 992). Moreover, professional (not popular) reputation is usually highly trustworthy. The rulings have generally excluded reputation;³ but the question arises comparatively seldom, partly because

¹ *Accord*: 1882, *People v. Pico*, 62 Cal. 53; 1880, *State v. Hoyt*, 47 Conn. 518, 539 (here for paternal insanity); 1900, *Snell v. U. S.*, 16 D. C. App. 501, 511; 1860, *Choice v. State*, 31 Ga. 424, 470; 1838, *Yeates v. Reed*, 4 Blackf. 463, 466; 1885, *Walker v. State*, 102 Ind. 507, 1 N. E. 856; 1876, *Ashcraft v. De Armond*, 44 La. 233 (rumor in a neighborhood, inadmissible); 1868, *Townsend v. Pepperell*, 99 Mass. 40, 46 (settlement of insane pauper; common speech of the neighborhood as to her insanity, excluded); 1884, *Barker v. Pope*, 91 N. C. 168; 1894, *State v. Coley*, 114 Id. 879, 885, 19 S. E. 705; 1875, *Lancaster Co. Nat'l Bank v. Moore*, 78 Pa. 407, 415; 1881, *Yanke v. State*, 51 Wis. 469, 8 N. W. 276. *Contra*: 1760, *Earl Ferrers' Trial*, 19 How. St. Tr. 932, 937 (confinement in a private asylum, admitted); 1868, *Com. v. Andrews*, Mass., *Davis' Rep.* 134 (murder; insanity of deceased ancestors, held provable by reputation); 1859, *State v. Christinae*, 6 Jones L. 471, 475 (admissible to prove hereditary insanity of other

members of the family, so as to avoid complicated issues as to particular conduct).

² 1893, *Stevens v. R. Co.*, 100 Cal. 534, 570, 35 Pac. 165 (as to intemperance, excluded; the opinion misunderstands the point); 1894, *Cogrove v. Pitman*, 103 Id. 263, 273, 37 Pac. 232, *semble* (reputation not sufficient to prove a habit of intemperance); 1823, *Brindle v. M'Ilvaine*, 10 S. & R. 285 ("causes of physical depravity of the mental faculties are susceptible of a particular description by those who have witnessed them").

³ *Excluded*: 1870, *DePine v. State*, 44 Ala. 39 (witness); 1886, *Holtzman v. Hoy*, 118 Ill. 534, 8 N. E. 632 (negligent treatment by a physician; professional skill held to be in issue, but not provable for defendant by his reputation "in the community and amongst the profession"; the opinion is unsatisfactory, because it ignores the offer of reputation in the profession; no authority cited); 1901, *Clark v. Com.*, 111 Ky. 443, 63 S. W. 740 (abortion; de-

the character of parties in this respect is seldom relevant or in issue (*ante*, § 64), partly because it is usually not profitable by such evidence to discredit skilled witnesses, and partly because of the reluctance of professional men to bear such testimony.

(7) Character as to *negligence* or *care* is provable when it is in issue (*ante*, §§ 80, 208); and is also usable evidentially, under certain conditions, to show the doing or not doing of a specific act (*ante*, § 65). The character thus relevant has always been regarded as properly provable by reputation.⁴ From such a hearsay use of reputation, distinguish its use circumstantially to show *notice*, for example, by an employer, of the employee's character (*ante*, §§ 246-260).

(8) That an *animal's character*, as properly as that of a human being, may be the subject of a trustworthy reputation, for reasons similar to those already noted (*ante*, § 1610), would seem a just conclusion.⁵

E. SUNDRY FACTS.

§ 1623. **Reputation to prove Solvency or Wealth.** When the fact to be proved is the condition of a merchant's pecuniary resources as to *solvency*—that is, the ability practically to pay at maturity an ordinary debt—, considerations analogous to those already noted (*ante*, §§ 1586 and 1610) as making reputation a necessary and a trustworthy source of evidence seem to be here fulfilled. The argument has been well expounded in the following passages:

1845, *Goldthwaite, J.*, in *Lawson v. Orear*, 7 Ala. 786: "Insolvency is rather the conclusion which the law deduces from other facts, than the fact itself, and therefore it is quite probable that a witness would not be permitted to state this conclusion independent of the facts from which it was to be inferred. But in most cases, where the question of insolvency is collaterally involved [here the question was whether a purchase was made with notice of insolvency], it is nothing more than the attempt to show that the particular individual is not in a condition to be trusted as a debtor. In all such cases the common question which suggests itself to every mind is, Why is he not to be so trusted? or, What is his condition as to property or credit or the want of either? . . . From the very nature of things it is scarcely possible that there can be any certain means of acquiring exact information upon such a subject. . . . In all, or in a very large majority of all

defendant's reputation as to skill as a surgeon, excluded; no authorities cited); 1897, *People v. Holmes*, 111 Mich. 364, 69 N. W. 501 (reputation not admissible to show an expert's competence). Compare the cases cited *ante*, §§ 64, 67, 199, 208.

⁴ See the citations in the sections above mentioned, where this is assumed. The only excluding decision seems to be *Baldwin v. R. Co.*, 1855, 4 Gray 333 (character as a careless driver).

⁵ The rulings differ: 1901, *Jones v. Packet Co.*, — *Mass.* —, 31 So. 201 (pedigree of a jack, allowed to be proved by reputation); 1865, *Whittier v. Franklin*, 46 N. H. 23, 27 ("the character of a person for truth, it may well be presumed, cannot be bad without being known to the public; but it may be otherwise in respect

to the vicious propensities of the horse"); 1852, *Heath v. West*, 26 Id. 191, 199 (to the value of a horse, excluded); 1872, *McMillan v. Davis*, 66 N. C. 539 (Roade, J., admitting reputation of foal-getting qualities, value being in issue: "We suppose that with all stock-raisers there are two principal inquiries in selecting a sire: What is his pedigree?, and, Is he a sure foal-getter? Other qualities are judged of by inspection; these cannot be. How are these inquiries to be answered? The most usual and satisfactory, if not the only way, is by reputation").

For the use of a *registry of pedigree* of an animal, see *post*, § 1706. For the admissibility of the animal's *character* itself, see *ante*, §§ 65, 301.

the trading classes, the information of the seller as to the ability of the purchaser to pay is derived from reputation and most generally from no other source whatever. To shut out from the jury the same evidence upon which the entire community acts would present a singular result.¹

1863, *Atwater, J.*, in *Nininger v. Knox*, 8 Minn. 140, 147: "It would seem that the fact of insolvency, from its nature, must usually exclude direct proof, as no one save the person himself could ordinarily safely swear that a man had no property, or insufficient to meet his liabilities, at a given time. . . . The fact of insolvency is of such a nature that the opportunities of the public for forming a correct judgment in the matter must be usually as ample as those existing to form a judgment of character in any other respect, and indeed more so."

In the greater number of jurisdictions, reputation is accordingly admissible to show insolvency or solvency.² Distinguish the circumstantial use of reputation as evidence of *knowledge* by a purchaser of a debtor's insolvency (*ante*, § 253).

It has also been held occasionally that the *wealth* of a party (usually in proving damages for breach of promise of marriage) may be evidenced by reputation;³ but this seems unsound.

§ 1624. **Reputation to prove Partnership.** The use of reputation to prove the existence of an agreement of partnership does not seem justifiable either by the necessity of the case or by the trustworthiness of the evidence; for not only may the testimony of the alleged partners, their admissions, and the written agreement if any, be ordinarily obtained, but the possibilities of a misleading reputation are particularly strong. These considerations have been more than once clearly set forth judicially:

1835, *Waite, J.*, in *Brown v. Crandall*, 11 Conn. 92, 95: "[The rule is that] hearsay evidence is incompetent to establish any specific fact which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge. . . . [If reputation here were admissible,] a person of doubtful credit might cause a report to be circulated that another was in partnership with him, for the very purpose of maintaining his credit. His creditors also might aid in circulating the report for the purpose of furnishing evidence to enable them to collect their debts. There is nothing in the nature of the fact to be proved requiring the admission of such testimony."

1838, *Cowen, J.*, in *Halliday v. McDougall*, 20 Wend. 81, 90 (after quoting the reason-

¹ Citing *Weeks v. Sparke*, *ante*, § 1587.

² *Accord*: 1845, *Lawson v. Orear*, 7 Ala. 788, per Goldthwaite, J.; 1861, *McNeill v. Arnold*, 22 Ark. 482, *semble*; 1871, *Hayes v. Wells*, 34 Md. 518; 1864, *Angell v. Rosenbury*, 12 Mich. 241, 252; 1863, *Nininger v. Knox*, 8 Minn. 140, 147 (quoted *supra*); 1875, *Burr v. Willson*, 22 id. 206, 211; 1893, *West v. Bank*, 54 id. 466, 469, 58 N. W. 54; 1895, *Hahn v. Penney*, 60 id. 487, 62 N. W. 1129; 1900, *Garrett v. Weinberg*, 59 S. C. 162, 37 S. E. 51; 1846, *Hard v. Brown*, 18 Vt. 97 (where the solvency of R. was material in determining the adequacy of his note as "sufficient security" under a contract); 1860, *Noyes v. Brown*, 32 id. 430; 1860, *Bank of Middlebury v. Rutland*, 33 id. 430. *Contra*: 1837, *Ward v. Herndon*, 5 Port. 382, 385 (undecided); here, of a debtor guaranteed by the defendant); 1843, *Branch Bank v. Parker*, 5 Ala.

738; 1858, *Price v. Masange*, 31 id. 701, 708 (fraudulent mortgage); 1876, *Holten v. Board*, 55 Ind. 199; 1903, *Wolfsou v. Allen B. Co.*, 120 Ia. 455, 94 N. W. 910 (financial condition of vendee procured by the plaintiff as commission agent for the defendant); 1903, *Coleman v. Lewis*, 183 Mass. 485, 67 N. E. 603 (but here admitted to corroborate testimony to an indorser's waiver of presentment).

³ *Accord*: 1895, *Stratton v. Dole*, 45 Nebr. 472, 63 N. W. 875; 1864, *Kniffen v. McConnell*, 30 N. Y. 285, 289; in *State v. Cochran*, 1828, 2 Dev. 65, reputation was thus admitted on another issue. *Contra*: 1894, *Bliss v. Johnson*, 162 Mass. 323, 38 N. E. 446 (not received to show lack of means of one claiming to have loaned money); 1902, *Biram v. Johnson*, 87 Minn. 382, 92 N. W. 1.

ing in *Brown v. Crandall*, *supra*): "It may be added that, independent of sinister misrepresentations, there is scarcely a question upon which common reputation is more fallible. A contract of partnership is in nature incapable of being defiled by laymen; and whether an apparent partnership be really so or a contract of some other character is often a most embarrassing legal question with the ablest lawyer. General reputation of the more ordinary contracts, the legal nature and effect of which are understood by men of business in general, would be a much more proper subject of proof by general report; this the law always rejects, and yet I am not aware that there is a necessity for a resort to such proof in the one case more than the other."

Accordingly, it is to-day almost everywhere agreed that reputation is not admissible to prove the existence of a partnership.¹

But in two other ways reputation may here become admissible. (1) By the substantive law of partnership liability, one holding himself out as partner may be charged as such, though no agreement was actually made; and to suffer a reputation of partnership to exist may in law amount to a holding out; thus, the existence of such a reputation may become itself a fact in issue, irrespective of the truth of the matter reputed:

1889, *Earl, J.*, in *Adams v. Morrison*, 113 N. Y. 152, 156, 20 N. E. 829: "When there is a general reputation that two or more persons are copartners, and they know it, and permit other persons to act upon it, and to be induced thereby to give credit to the reputed firm, these facts may be proved and may be sufficient sometimes to estop the reputed members of the firm from denying the copartnership in favor of outside parties."

(2) For the purpose of establishing knowledge by a customer of the dissolution of a partnership, the reputation of its dissolution may be admissible as circumstantial evidence of such knowledge (*ante*, § 255).

§ 1625. Reputation to prove (1) Legal Tradition, (2) Incorporation. (1) So far as the custom and consent of the *legal profession* is of weight in determining the application of a principle of law, it seems to have been recognized that common opinion or reputation in the profession may be taken as evidence of this custom or consent.¹

(2) By statute in many jurisdictions, reputation has been made evidence

¹ 1893, *Knard v. Hill*, 102 Ala. 570, 574, 15 So. 345 (excluded); 1900, *St. Louis & Tenn. R. P. Co. v. McPeters*, 124 id. 451, 27 So. 518; 1853, *Sinclair v. Wood*, 3 Cal. 98, 100 (excluded); 1835, *Brown v. Crandall*, 11 Conn. 92, 95 (inadmissible; quoted *supra*); 1871, *Bowen v. Rutherford*, 60 Ill. 41 (excluded); 1809, *Bryden v. Taylor*, 2 H. & J. 396, 400 (reputation held "not sufficient"); 1835, *Goddard v. Pratt*, 16 Pick. 412, 434 (not admitted to show a dissolution); 1842, *Grafton Bank v. Moore*, 13 N. H. 99 (excluded); 1817, *Whitney v. Sterling*, 14 John. 215 (admitted); 1833, *M'Pherson v. Rathbone*, 11 Wend. 96 (same); 1838, *Halliday v. McDougall*, 20 id. 81, 89; 22 id. 264 (held inadmissible, without other evidence; quoted *supra*); 1842, *Smith v. Griffith*, 3 Hill 333, 336 (inadmissible); 1889, *Adams v. Morrison*, 113 N. Y. 152, 156, 20 N. E. 829 (reputation not admissible in any case to prove the fact); 1850, *Inglebright v. Hammond*, 19 Oh. 343 (ex-

cluded); 1898, *Farmers' Bank v. Saling*, 33 Or. 394, 54 Pac. 190 (excluded); 1824, *Allen v. Rostain*, 11 S. & R. 362, 363, 373 ("not evidence, except in corroboration of a previous testimony"); 1845, *Hicks v. Cram*, 17 Vt. 449, 456 (inadmissible).

² 1761, *Buckinghamshire v. Drury*, 2 Eden Ch. 60, 64 (Lord Hardwicke, L. C.: "The opinion of conveyancers at all times, and their constant course, is of great weight"; here, as to whether an infant is bound by a marriage jointure); 1892, *Venable v. R. Co.*, 112 Mo. 103, 125, 20 S. W. 493 ("common consent and opinion of the profession," considered to show that dower may be barred in eminent domain).

Distinguish the reference to mere contemporaneous usage as an aid to interpretation: 1821, *Packer v. Richardson*, 17 Mass. 122, 144; 1873, *Scanlan v. Childs*, 33 Wis. 663, 666; and cases cited *post*, § 2464.

of the *existence of a corporation* or of certain kinds of incorporation;³ and this is not inconsistent with the general considerations of policy already noted (*ante*, § 1610).

§ 1626. *Reputation to prove Sundry Facts.* Apart from the classes of cases above enumerated, there seem to be none which fulfil the requisite considerations of policy already noted (*ante*, §§ 1586 and 1610), as justifying the resort to reputation; and in the remaining rulings the use of reputation to prove sundry specific acts or conditions has usually been repudiated.¹

³ Ariz. P. C. § 1657 ("general reputation" admissible to prove incorporation, on charge of forgery of bill or note of company); Ark. Stats. 1894, §§ 2906, 2907 (banking company's existence, etc., in criminal cause, provable by "general reputation"); Cal. P. C. 1872, § 1107 (forgery, etc., of bank-bill; incorporation provable by general reputation); Colo. Annot. Stats. 1891, § 1267 ("general reputation," admissible to prove incorporation of bank or company in prosecution for forgery of its bill or note); Ida. Rev. St. 1887, § 7868 (forging, etc., a bill, etc., of incorporated company or bank; "general reputation," admissible to prove incorporation); Ia. Code 1897, § 4870 (general reputation, admissible to prove incorporation of bank, etc., on charge of forging bill, etc.); Kan. Gen. St. 1897, c. 102, § 223 (banking corporation in criminal cause; incorporation provable by reputation); Mo. Rev. St. 1899, § 2634 (in criminal causes, the "existence, constitution, or powers of any bank company or corporation" are provable by "general reputation"); 1860, *State v. Fitzsimmons*, 30 Mo. 237, 239 (statute allowing in criminal cases the existence, etc., of a banking company to be proved by reputation; applied on a trial for selling counterfeit notes); Mont. P. C. 1895, § 2084 (like Cal. P. C. § 1107); § 2086 (so also for any criminal case in proving corporate existence, powers, or constitution); Nev. Gen. St. 1885, § 4645 (on trial for forgery, etc., of bill or note of "incorporated company or

bank," general reputation admissible to prove incorporation); N. D. Rev. C. 1895, § 2216 (like Cal. P. C. § 1107); 1846, *Reed v. State*, 15 Oh. 217, 224 (existence of a foreign banking corporation, in prosecutions for counterfeiting); Okl. Stats. 1893, § 5229 (like Cal. P. C. § 1107); S. D. Stats. 1899, § 8673 (like Cal. P. C. § 1107); Utah Rev. St. 1898, § 4857 (like Cal. P. C. § 1107); § 4859 (like Mont. P. C. § 2086); Wyo. Rev. St. 1887, § 933 (on trial for forgery, etc., of bill or note of incorporated company or bank, incorporation is provable by "general reputation").

¹ 1872, *DeKalh Co. v. Smith*, 47 Ala. 412 (action for personal harm done by disguised assailants; "rumor" admitted to show that the plaintiff had many enemies, in corroboration of the plaintiff); 1888, *Louisville & N. R. Co. v. Hall*, 87 id. 708, 715, 722, 6 So. 277 (that a person had been killed at a low bridge; excluded); 1889, *State v. Evans*, 33 W. Va. 417, 424, 10 S. E. 792 (excluded for showing one man's "influence" over another); 1903, *Louisville & N. T. Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 254 (reputation as to ownership of locomotives causing a nuisance, excluded). Statutes have sometimes interfered: Oh. Rev. St. 1898, § 4427, par. 6 ("The character of the trust or combination alleged [as illegal] may be established by proof of its general reputation as such"); Tex. P. C. 1895, §§ 983, 988 c (character of illegal trust or combination, provable by "its general reputation as such").

END OF VOLUME II.

